2026:DHC:7348-DB

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 26 May 2026
Pronounced on: 2 September 2026

\# **CNR No. DLHC010160052025**

\+ FAO(OS) (COMM) 45/2025

M/S JINDAL ITF LIMITED .....Appellant
Through: Dr. A. M. Singhvi and Mr. Jayant Mehta, Sr. Advs. with Mr. Nilava Bandyopadhyay, Mr. Kumar Shashwat Singh Sawno, Mr. Yash Mittal, Ms. Surabhi Rana and Mr. Om Shelat, Advs.

versus

NTPC LIMITED & ANR. .....Respondents
Through: Mr. Tushar Mehta, SG with Ms. Bani Dixit, Mr. Adarsh Tripathi, Mr. Vikram Singh Baid and Mr. Ajitesh Garg, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

JUDGMENT

% **02.09.2026**

C. HARI SHANKAR, J.

Facilitative Index to the Judgment

A. Facts

1. The Inland Waterways Authority of India[1] develops and regulates inland waterways in the country.

2. On 24 September 2008, a Memorandum of Understanding was executed between the National Thermal Power Corporation[2] and IWAI, to explore a possibility of use of inland waterways to transport coal from the jetty where it was unloaded, to the Farakka Thermal Power Plant[3] of NTPC.

3. On 11 August 2011, a Tripartite Agreement[4] was executed among NTPC, IWAI and Jindal ITF Limited[5]. A draft Coal Transportation Agreement[6] was also incorporated as part of the TPA. The TPA required JITF to build a Coal Unloading System like a jetty, grab, etc. as well as a Material Handling System like conveyor belts. These two systems were referred to, comprehensively, as the Coal Unloading and Material Handling System[7]. The CUMHS was required to be completed in two phases. The first phase spanned a period of 15 months and the second spanned 24 months, reckoned from the date of signing of the TPA, i.e., from 11 August 2011. These phases were to be executed parallelly with each other. Phase I was, therefore, to be completed by 10 November 2012 and Phase II by 10 August 2013.

4. The following clauses of the TPA are of relevance, to the issues

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[1] "IWAI", hereinafter
[2] "NTPC", hereinafter
[3] "FTPP", hereinafter
[4] "TPA", hereinafter
[5] "JITF", hereinafter
[6] "CTA", hereinafter
[7] "CUMHS", hereinafter

in controversy:

1.1 "COD" or "Commercial Operation Date" means Date on which Operator receives the Completion Certificate in relation to the Material Handling System Phase-II in accordance with the terms of the Agreement.

1.4 **Ambiguities within the Agreement**

In case of ambiguities or discrepancies within this Agreement, the following shall apply:

(a) Between two Articles of this Agreement, the provisions of specific Articles relevant to the issue under consideration shall prevail over those in other Articles;

(b) Between the Articles and the Annexures, the Article shall prevail, save and except as expressly provided in the Articles or the Annexures;

(c) Between the dimension scaled form the drawing its specific written dimension, the latter shall prevail; and

(d) Between any value written in numerals and that in words, the latter shall prevail.

(e) Between the provisions of this Agreement and any other documents forming part of this agreement, the former shall apply.

2.2 **Scope of Work**

(b) formulate and implement a detailed plan in accordance with which: (1) the coal would be unloaded and transferred from ocean going vessels (Panamax/ Capesize) to barges at the suitable locations that are identified as being suitable for such unloading from the ocean going vessels to barges by the Operator (such location. being referred to as "Transfer Point"), (2) the mechanism to be used at the Transfer Point for the unloading and transferring the coal from ocean going vessel to barges ("Transshipment Infrastructure"), (3) provide adequate number of barge of suitable specifications to meet movement schedule of designated quantities of imported coal as per the requirement of NTPC, (4) unloading system of adequate capacity and suitable for the Material Handling System specified under Schedule E of Tripartite Agreement ("Unloading Infrastructure") that would be used at the Farakka TPP waterfront for unloading of coal from barges onto the Conveyor

Belt System that would transfer and deliver the coal from the Unloading Infrastructure to the coal stack yard of the Farakka TPP in accordance with the Schedule E of this agreement ("Material Handling System") and (5) such other details necessary to ensure complete logistics plan for the delivery of the coal from the ocean going vessel to the coal stackyard of the Farakka TPP ("collectively hereinafter referred as the Coal Hauling Plan");

(c) construct Material Handling System of Coal Hauling Plan in two phases and, in accordance with Schedule E of this Agreement:

(i) Phase I would include the construction and operation of Conveyor Belt. system comprising Conveyor Belt A, Conveyor Belt B and Conveyor Belt C through junction house JH-1 and JH-2. Operator shall provide and implement the Unloading Infrastructure and Material Handling System Phase-I, that would be in operation for approximately nine (9) months ("Material Handling System-Phase-I Period") for unloading transportation and delivery of minimum 2 MMTPA of coal inside the coal stack yard and thereafter utilized in Coal hauling plan upon completion of Phase-II of Material handling System for unloading, transportation and delivery of 3 MMTPA coal inside the coal stack yard. Operator shall ensure that operation through Phase-I shall commence not later than fifteen (15) months from the date of execution of this Agreement.

(ii) Phase-II would include construction and operation of Conveyor Belt D, Conveyor Belt E Conveyor Belt. F and Conveyor Belt G through Junction houses JH-3, JH-4, JH-5 & JH-6. Operator shall ensure that operation, through this mode shall commence not. later Twenty Four (24) months from the date of execution of this Agreement.

(d) Undertake all measures required to implement the Coal Hauling Plan, pursuant to the terms of this Agreement, which shall include:

(i) Enabling the commencement of unloading, transportation and delivery inside the coal stack yard through Material Handling System as per the schedule below. All time lines shall be counted from the date of execution of Tripartite. Agreement between the selected operator, NTPC and IWAI.

A. Phase I: Within 15 months

B. Phase II: Within 24 months

(ii) arrange, procure and ensure the provision of suitable equipment and/or facilities required for unloading the coal from the ocean going vessels to the barges at the Transfer Point in accordance with the Coal Hauling Plan;

(iii) procure and operate sufficient number of barges to ensure the due unloading from ocean going vessel and transport through IWT mode using NW-1 channel upto Farakka as per the quantity schedule given below:
A. Phase I: 2 MMTPA.
B. Phase II: 3 MMTPA

(iv) design, construct, finance, operate and maintain the Unloading Infrastructure at the land provided by NTPC on the waterfront in or near the Farakka TPP, that would unload coal from the barges and place it on the Material Handling System in accordance with the Coal Hauling Plan. The design and construction of the Unloading Infrastructure will have to ensure that it shall have an operating life equivalent to the operating life of the Material Handling System (developed as per Standards and Specification of Material Handling System provided in Schedule E of this agreement). The Unloading Infrastructure shall be transferred to NTPC at Re 1 (one)/- at the end of the Operation Period in accordance with the terms of the Tripartite Agreement

(v) design, construct, finance, operate and maintain the Material Handling System (both Phase-1 and Phase-II) from the point of unloading at waterfront to coal stack yard of Farakka TPP, in accordance with the Standards and Specification of Material Handling System provided in Schedule E of this agreement, that would enable the movement of coal from Barge unloading point directly to coal stack yard. The coal should not be stacked anywhere outside the coal stack yard of Farakka TPP. The Material Handling System developed in two phases as stipulated in Article 2.2 (c) as per the specification of NTPC and shall be transferred to NTPC, at Re 1 (one)/-, at the end of the Operation Period in accordance with the terms of this agreement.

It is hereby clarified that the Operator shall not use or install any second hand or used items in the Design, construction, operation and maintenance of the Unloading Infrastructure and Material Handling System as provided in this sub-clause 2.2 (d) (iv)& 2.2 (d) (v) above.

2.3 **Operation Period**

The Operation Period of the Coal Hauling Plan shall commence from the COD and shall extend to a period of 7 (seven) years, or till termination of this Agreement in accordance with its terms.

Article 3.1 (c)(ii) Procured all the Applicable Permits/Licenses/Clearances unconditionally or if subject to conditions then all such conditions shall have been satisfied in full and such Applicable Permits/Licenses/Clearances are kept in full force and effect during the construction and operation of the Project.

Article 7.1

7.1 **Obligation**

The obligations of IWAI, NTPC and Operator shall be as under:

(a) Obligation of NTPC

(i) Provide 2 MMTPA of coal during Material Handling System-Phase-I Period to be transported through Inland Waterways Transport (IWT) from Transfer Point to coal stack yard of Farakka Power Plant

(ii) Guarantee minimum quantity of 3 MMT per annum of coal during Operation Period to be transported through Inland Waterways Transport (IWT) from Transfer Point to coal stack yard of Farakka Thermal Power Plant in accordance with terms of this agreement.

(iii) NTPC through their Imported Coal Supplier shall ensure delivery of coal at Transfer Point on Fairly Evenly Spread (FES) basis. NTPC will fumish to Imported Coal Supplier (ICS) a quarterly schedule of quantity with a tentative month wise break up proposed to be delivered at the Power station. ICS and Operator shall coordinate and distribute the quarterly coal supplies in all the months of a quarter.

(iv) To buy back the Unloading Infrastructure and Material Handling System at Re 1/- (one) lumpsum transfer price after expiry of this Agreement due to efflux of time or as per clause. 14.1 (c) due to early termination of this agreement as the case may be.

(v) Facilitate in obtaining the electricity connection at single point at Project Site on chargeable basis for the construction of Project Assets.

(vi) To provide electricity at a single point at Project Site free of cost only during the operation of Project Assets.
(vii) Ensure that Imported Coal Supplier executes the Transport Contract with Operator.

(viii) Include the Transport Contract as specified in Schedule B to this Agreement, in the Main tender Document for Coal Import,

(ix) Approve the Standard Operating Procedures (SOP) for operation and maintenance of Project Facilities.

(b) **Obligation of IWAI**

To provide:

(i) Navigation infrastructure in the form of dredging and maintenance of the navigation channel and provision of night navigation infrastructure as may be needed for smooth operation of barges.
(ii) Least Available Depth (LAD) of 2.5 meters from Haldia upto Farakka
(iii) provide night navigation for 24 hrs operation of barges, markings and other navigational aids DGPS etc
(iv) Maintain and guarantee the above facilities over a period of 7 years
(v) Make available existing IWT facility at Haldia in case of exigency on chargeable basis
(vi) to extend all necessary assistance in the form of sharing information and providing necessary inputs and data to Parties
(vii) monitor the entire process jointly with NTPC wherever required
(viii) traffic management with priority to the traffic with destination for NTPC Power Plant
(ix) issue fortnightly information on the critical parameters of the channel.
(x) in case of navigational distress/emergency such as engine failure or collision with another vessel IWAI to arrange necessary help by diverting its nearest vessel for assistance on chargeable basis

(c) **Obligation of Operator**

(i) Fulfill entire Project Requirements and Scope of

Work as stipulated in Article 2.2;

(ii) ensure coal transportation through IWT for target quantity to NTPC power site in time from midstream unloading point to coal stack yard of Power Plant;

(iii) Transfer the. Unloading Infrastructure and Material Handling System at Re 1/-(Lumpsum Transfer price) to NTPC after expiry of this agreement due to efflux of time or as per clause 14.1 (c) due to early termination of this agreement as the case may be

(iv) Operate and maintain Unloading infrastructure & Material Handling System for the Term of this Agreement;

(v) bear and pay all wharfage, anchorage and any other charges levied by KoPT for Traneshipmant Mechanism at the Transfer Point; KoPT has approved a concessional wharfage charge on coal of Rs. 15 PMT plus service tax and. Nil anchorage charge on mother vessel/ transloader/ daughter vessel/barges for this project for 3 MMTPA of coal for a period of 7 years.

With regard to operation of Transhipment Infrastructure in the area West of Sandheads in the vicinity of Lat. 21°00' to 21° 33' and Long. 87° 10' notified by KoPT as waters under their limits of port, it may be noted that in case the operator has to pay charges in excess of the concessional charges (as detailed in letter attached as Annexure-V of the Addendum issued on 18th Feb 2011) to State Government, Government agencies or any other Port Trust, such additional charges shall be reimbursed to the Operator

(vi) bear and pay all cost, taxes, expenses and charges in connection with or incidental to the performance of the obligations under this Agreement;

(vii) comply with all applicable laws and obtain all applicable permits in all material respects. The Operator shall follow all the applicable rules, regulation, and/or any notification/order of KoPT in relation to operation of transhipper and plying of barges in KoPT waters including but not limited to barges need to have specified speed, comprehensive insurance for wreck removal and third party liability, onboard VHF sets and all vessels should have plying certificate from appropriate authority as per their respective plying area.

(viii) Develop Standard Operating Procedures (SOP) for operation and maintenance of Project Assets in discussion with NTPC;

(ix) take adequate preventive measures to comply with safety and security standards of NTPC as well as local Statutory Authority at own cost and expense.

7.3 **<u>NTPC's Minimum Guaranteed Coal Obligation</u>**

NTPC hereby assures and represents to the Operator that it shall during each year of the Operation Period, utilise the Project for transportation of a minimum quantity of 3MMT per annum of coal (such quantity being referred to as "Minimum Guaranteed Quantity", MGQ), and further that it shall pay the Operator for the transportation of the 90% of Minimum Guaranteed Quantity, if the actual coal quantity made available by NTPC for the Project in a year is less than 90% of Minimum Guaranteed Quantity in accordance with the provisions of this Article. For avoidance of doubt, the provision of Minimum Guaranteed. Quantity shall not be in effect during Material handling System-Phase-I period.

Within three (3) weeks of the end of each period of twelve months of operations of the Project. the Operator shall submit to NTPC a statement ("Annual Statement") providing:

(a) Computation of the total quantity of coal supplied to Farakka TPP using the Project in the preceding twelve month period
(b) "Shortfall Quantity" because of NTPC's default. (Difference between the quantity actually made available by NTPC for Project during the respective 12 month period and 90% of MGQ)
(c) Computation of "Excess Quantity" (Difference between the quantity actually made available by NTPC for Project during the respective 12 month period and MGQ)
(d) Computation of the "MGQ Amount" payable to operator, in case of Shortfall Quantity. It shall be calculated by multiplying the Shortfall Quantity with the 75% of Project Rate applicable on the last day of the period of the Annual Statement in which respective Shortfall quantity is reported.

The Annual Statement would be submitted to NTPC together with the supporting documentation and calculations. The MGQ Amount will be paid to Operator directly by NTPC. The MGQ Amount will be payable on submission of a Bank Guarantee of equivalent value by the Operator in the format to be provided by NTPC. NTPC shall, within a period of thirty (30) days, make payment of the MGQ Amount as specified in the Annual Statement.

Provided however, NTPC is allowed to adjust MGQ Amount already paid / payable in any year under this provision of the agreement against the excess quantity of coal provided above MGQ (3 MMTPA) in any subsequent/earlier years of operations during the tenure of this agreement.

The Excess Quantity shall be adjustable against the shortfall quantity during the tenure of the project. The operator shall refund the MGQ amount, if paid earlier, proportionate to the Excess Quantity OR adjust Excess Quantity accrued earlier with the Shortfall Quantity, as the case may be. For refund purposes, the rates shall be same at which MGQ amount, was paid to the operator. The refund shall be made by the operator to NTPC within 30 days of approval of Annual Statement by NTPC and on receipt of such refund NTPC shall allow the Operator to reduce the value of Bank Guarantee by the amount of refund.

The Bank Guarantee shall be returned by NTPC after the settlement of last Annual Statement at the end of the Term of Agreement.

Provided however, in the event that NTPC raises an objection to the determination of the MGQ Amount as specified in the Annual Statement it shall, within a period of three weeks from the submission of the Annual Statement:

(a) notify the Operator of its dispute to the MGQ Amount,
(b) within a period of one week from such dispute notice, submit a written submission of its dispute to Operator providing the specific grounds and calculations and documents relating to the dispute being raised and
(c) make the payment of the entire MGQ Amount to the Operator, under the condition that if the dispute is resolved in favour of NTPC, then the Operator would refund the said amount together with interest applicable at the then prevailing SBI base rate plus 6.75% (six and three quarters percent).

It is clarified that no dispute raised by NTPC would be valid until NTPC has made the payment of the MGQ Amount pursuant to this sub-clause (c).

It is clarified that if NTPC fails to notify a dispute on the MGQ Amount within three weeks of receipt of the Annual Statement, it shall be deemed to have accepted the same and no disputes thereafter in relation to an Annual Statement would be valid under this Agreement.

<u>Article 8.8</u>

8.8: Delay in Construction Completion and Liquidated Damages therein

Subject to any of the provisions of this Agreement providing for extension of time for performance or excuse from performance, as the case may be, of any of the obligations of the Operator under this agreement, the Operator shall pay to NTPC liquidated damages at the rate of 0.1% (zero point one percent) of the performance Guarantee for every day delay in fulfilling the specified obligations on or before a milestone date. Provided such liquidated damages shall not exceed 5% (five percent) of the normative cost (Rs. 90 crores). In case the aggregate delay exceeds 180 (one Hundred and eighty days) or the aggregate liquidated damages paid and/or payable under this provision exceeds the specified limit of 5% (Five Percent) of the Normative cost (Rs. 90 crores), NTPC shall be entitled to terminate this agreement and consequences of Termination as laid down in Article 13.

ARTICLE 12: EVENTS OF DEFAULT

Event of Default means the Operator Event of Default or NTPC Event of Default or IWAI Event of Default or /and, as the context may admit or require.

12.1 Events of Default

(a) Operator Event of Default

The Operator Event of Default means any of the following events, unless such an event has occurred as a consequence of a Force Majeure Event (referred to as the "Operator Event of Default"):

(i) the Operator's failure to perform or discharge any of its obligation under this Agreement

(ii) the Operator's failure to perform or discharge any of its obligation under any other Transaction Document, which has or is likely to have a Material Adverse Effect on the Project;

(iii) the Operator is deemed to commit a Material Breach of this Agreement including, and not limited to breach of its obligations relating to proper handling of cargo and if such breach is not cured by the Operator within the specified cure period or if not so specified within ninety (90) days of NTPC's notice to the Operator specifying such breach and requiring the Operator to remedy the same;

(iv) the Operator fails to achieve transportation of 90% of Minimum Guaranteed Cargo for reasons not attributable to NTPC/IWAI

(v) any representation made or warranties given by the Operator/Consortium Members/Preferred

Bidder under this Agreement is found to be false or misleading;

(vi) levy of an execution or restraint on the Operator's assets which has or is likely to have Material Adverse Effect on the Project and such execution or restraint remaining in force for a continuous period exceeding sixty (60) days;

(vii) the Operator engages or knowingly allows any of its employees, agents, Subcontractor agent or representative to engage in, in the course of any activity undertaken pursuant to this Agreement, any activity prohibited by law or which constitutes a breach of or an offence under any law, for the time being in force in India;

(viii) the Operator repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by this Agreement;

(ix) the Operator has delayed payment that has fallen due under this Agreement beyond the specified time period or if not so specified beyond ninety (90) days of the due date;

(x) the Operator is adjudged bankrupt or insolvent;

(xi) the Operator does not attend to or abandons the Project for a continuous period of 7 (seven) days;

(xii) As a result of any act or omission of the Operator, any Lender enforces or initiates measures to enforce any Security Interest over any of the assets of the Operator, or the shares of the Operator owned by the Preferred Bidder

(xiii) As a result of any act or omission of the Operator, a. Competent Authority expropriates, confiscates, seizes, nationalizes or compulsorily acquires any of the assets of the Operator or the shares of the Operator owned by the Preferred Bidder;

(xiv) The occurrence of a breach identified as an event of default under any Transaction Documents,;

(b) **NTPC Event of Default**

NTPC Event of Default means any or all of the following events, unless such an event has occurred as a consequence of a Force Majeure Event (referred to as the 'NTPC Event of Default"):

(i) Fails to perform or discharge any of its obligation in accordance with provisions of this agreement unless such failure has occurred as a consequence of any Operator Event of Default or Force Majeure Event;

(ii) fails to perform or discharge any of its obligation under any other contract, which has or is likely to affect the Project/Project Assets, materially;

(iii) fails to fulfill its obligation under Article 7.3 make the payment for the minimum guaranteed coal obligation;

(iv) any representation made or warranties given by NTPC under this Agreement is found to be false or misleading;

(v) any defect in land title, ownership and possession of the Project Site.

(c) **IWAI Event of Default**

IWAI Event of Default means any of the following events, unless such an event has occurred as a consequence of a Force Majeure Event (referred to as the "IWAI Event of Default"):

(i) Fails to perform or discharge any of its obligation as stipulated in Article 7.1 (b) unless such failure has occurred as a consequence of any Operator Event of Default or Force Majeure Event.

12.2 **Rights of Parties**

(a) Upon the occurrence of the Operator Event of Default, NTPC shall without prejudice to any other rights and remedies available to it under this Agreement or law, be entitled to terminate this Agreement.

(b) Upon the occurrence, of NTPC Event of Default, the Operator shall without prejudice to any other rights and remedies available to it under this Agreement, be entitled to terminate this Agreement.

(c) Upon the occurrence of IWAI Event of Default, the Operator shall without prejudice to any other rights and remedies available to it under this Agreement, be entitled to terminate this Agreement.

(d) Provided that before proceeding to terminate this Agreement, the Party entitled to do so shall give due consideration and shall have due regard to the nature of the underlying Event of Default, its implication on the performance of the respective obligations of Parties under this Agreement and the circumstances in which the same has occurred.

12.3 **Consultation Notice**

Either Party exercising its right under Article 12.2, shall issue to the other Party a notice in writing specifying in reasonable detail the underlying Event of Default(s) and proposing consultation amongst the Parties and the I enders to consider possible measures of curing or otherwise dealing with the underlying Event of Default (referred to as the "Consultation Notice").

12.4 **Remedial Process**

Following the issue of Consultation Notice by either Party, within a period not exceeding ninety (90) days or such extended period as they may agree (referred to as the "Remedial Period") the Parties shall, in consultation with the Lenders, endeavor to arrive at an agreement as to the manner of rectifying or remedying the underlying Event of Default.

12.5 **Obligations during Remedial Period**

During the Remedial Period, the Parties shall continue to perform their respective obligations under this Agreement which can be performed, failing which the Party in breach shall compensate the other Party for any loss or damage occasioned or suffered on account of the underlying failure/breach.

12.6 **Revocation of Consultation Notice**

If during the Remedial Period the underlying Event of Default is cured or waived or the Parties agree upon any of the measures set out in Article 12.4, the Consultation Notice shall be withdrawn by the Party who has issued the same.

12.7 **Termination Due to Events of Default**

If before the expiry of the Remedial Period, the underlying Event of Default is neither cured nor waived nor the Parties and the Lenders have agreed upon any of the measures in accordance with Article 12.4, the Party who has issued the

Consultation Notice shall have the right, to terminate this Agreement.

3.2(b) In the event: (a) IWAI/NTPC, do not procure fulfilment of any or all the Conditions Precedent set forth in Articles 3.1 (a) and 3.1(b) within the period specified in respect thereof, and (b) the delay has not occurred as a result of breach of this Agreement by the Operator or due to Force Majeure, "IWAI/NTPC", shall compensate the Operator by suitably extending the COD for the Project and commencement of transportation through Material Handling System Phase-I without any penalty, as applicable.

ARTICLE 13: TERMINATION/EXPIRY OF AGREEMENT

13.1 **Termination Procedure**

NTPC and Operator entitled to terminate this Agreement either on account of a Force Majeure Event or on account of an Event of Default shall do so by issue of a notice in writing (referred to as the "Termination Notice") to the other Party and simultaneously deliver a copy thereof to the Lenders. The Termination Notice shall be for a period of ninety (90) days (referred to as the "Termination Period") and at the expiry of which, this Agreement shall stand terminated.

13.2 **Obligations during Termination Period**

During Termination Period, the Parties shall where applicable to the provisions of Article 13, continue to perform such of their respective obligations under this Agreement which are capable of being performed.

13.3 **Requisition**

Upon issue or receipt, as the case may be, of the Termination Notice, either as a consequence of a Force Majeure Event or as a consequence of an Event of Default, NTPC shall by a notice in writing (referred to as the "Requisition") call upon the Operator to furnish the following information to enable NTPC to estimate the outstanding liabilities/assets of the Operator and/or to finalize the assets to be handed over to/taken over by NTPC:

(a) the progress, stage and manner of implementation of the Unloading Infrastructure and Material Handling System and the details of the assets and liabilities of the Operator;

(b) data or records (to be specified by NTPC) regarding the establishment, operation and maintenance of the Project Assets;

(c) Specifications regarding the Operator's assets comprised in the Project Assets; and

(d) any other information or records (to be specified by NTPC) regarding Operator and the Persons claiming through or under the Operator, its/their business, assets and liabilities;

(e) the particulars of Contractual Arrangements and the details of functioning of the Subcontractors; and

(f) the particulars of the Security Interests supported by Lenders' certificate.

The Operator shall within a period of thirty (30) days of receipt of Requisition furnish the particulars called for by NTPC.

13.4 **Condition Survey**

(a) The Operator agrees that on the service of a Termination Notice or six (6) months prior to the expiry of the Operation Period by efflux of time, it shall conduct or cause to be conducted, by an Expert under NTPC's supervision, a condition survey of the Project Assets to ascertain the condition thereof, verifying compliance with the Operator's obligations under this Agreement and to prepare an inventory of the assets comprised in the Project Assets.. During this period, the designated key personnel of NTPC shall be associated with the operation of Project Assets wherever required (except when the same is impossible due to a Force majeure Event) in order to facilitate smooth takeover of the same by NTPC on the Transfer Date

(b) If, as a result of the condition survey, NTPC shall observe that the Project Site and/or the Project Assets or any part thereof has/have not been operated and maintained in accordance with the requirements thereof under this Agreement (normal wear and tear excepted) the Operator shall, at its cost and expenses, take all necessary steps to put the same in good working conditions before the Transfer Date.

(c) In the event the Operator fails to comply with the provisions of this Agreement; NTPC may itself cause the condition survey and inventory of Project Assets. NTPC shall be compensated by the Operator for any costs incurred in conducting such survey and preparation of inventory as also in putting the Project Assets in good working condition.

13.5 **Consequences of Termination**

Without prejudice to any other consequences or requirements under this Agreement or under any law, the following consequences shall follow upon expiry of the Operation Period by efflux of time or termination of this Agreement due to an Event of Default or a Force Majeure Event:

(a) Transfer of Assets

(i) On the Transfer Date, the Operator shall subject to the provisions of this Agreement:

(A) transfer and deliver, to NTPC or its nominated agency, the Possession of the Project Site along with all built up structures, built up areas a buildings constructed on, over, at or under it and its right, title and interest therein and thereto;

(B) transfer and deliver, to NTPC or its nominated agency, the Project Asset and all its rights, titles and interests therein and execute such deeds and documents, as may be necessary for the purpose and complete all legal or other formalities required in this regard;

(C) hand over to NTPC or its nominated agency all documents including as-built drawings, manuals, designs, documents, information and records relating to the built up structures, built up areas and buildings on, over, at or under the Project Site;

(D) assign, to the extent possible, to NTPC or its nominated agency at the time of transfer all unexpired guarantees and warranties by Subcontractors and suppliers and all insurance policies; and

(E) at its cost transfer to NTPC. or its nominee all such applicable permits which NTPC shall require for owning and operating the Project. Assets which can be legally transferred. Provided if the termination is on account of NTPC's Event of Default the cost of such transfer shall be borne or reimbursed by NTPC

(F) at its cost, remove within 90 (ninety) days from the expiry of this Agreement, from the Project Site any moveable/immoveable assets that are not to be taken over by NTPC under this Agreement

(ii) NTPC and the Operator shall, at least six (6) months prior to the expiry of the Operation Period or upon commencement of Termination Period, as the case may be, take all necessary steps to comply with the aforesaid process of transfer of assets on the Transfer Date, During this period, the designated key personnel of NTPC shall be associated with the operations of the Project in order to facilitate smooth take-over of the same by NTPC on the Transfer Date.

(iii) It is clarified that NTPC or its nominated agency shall not take over the liabilities of the Operator, including without limitation. liabilities relating to labour and personnel related obligations of the Operator and the Persons claiming through or under the Operator. All such labour and employees shall be the responsibility of the Operator/such Persons even after the termination/expiry of the Operation Period and they shall have no claim to any type of employment or compensation from NTPC or its nominated agency.

(iv) On the Transfer Date, Project Assets shall be in healthy / good operating condition, having regard for the nature of the asset, the construction and life of the facilities, structures etc.

(v) If on the Transfer Date, any Person is found to be occupying the Project Site or any part thereof, it shall be lawful for NTPC to secure summary eviction of such Person in accordance with the Applicable Laws.

(b) **Clearances**

The Operator shall, at its cost, transfer to NTPC or its nominated agency, all such Clearances relating to the Project Assets which NTPC may require and which can be legally transferred.

(c) Transfer Costs

(i) The Project Assets shall be transferred to NTPC or its nominated agency, as the case may be, for a sum of Re 1/- (one).

(ii) The Operator shall be responsible for the costs and expenses, including stamp duties, taxes, legal fees and expenses incurred in connection with the transfer of the Project Assets by the Operator to NTPC or its nominated agency.

(d) **Guarantees**

NTPC. shall be entitled to call in, forfeit, encash and appropriate any subsisting Performance Security provided by the Operator, if the termination is on account of an Operator Event of Default.

(e) **Transfer of Risk**

Until the Transfer Date, all risks shall lie with the Operator for loss of or damage to the whole or any part of the Project Assets unless the loss or damage is due to an act or omission of NTPC in contravention of its obligations under this Agreement. On and from the Transfer Date all risks in relation to the Project Assets shall be deemed to have been transferred to and lie with NTPC or its nominated agency.

Article 1.2(b)(xix) - the damages payable by either Party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the Damages") .

Article 14

14.1 Compensation

(a) **Termination due to Force Majeure Event**

(i) No payment shall be paid by any party in case operation stops due to Force majeure.

(ii) The period of operation shall be increased by the same duration for which event. of force Majeure exists.

(b) **Termination due to Operator Event of Default**

If the termination is due to Operator Event of Default, NTPC shall forfeit the Performance security submitted by Operator.

(c) **Termination due to NTPC Default**

In the event this Agreement is terminated due to NTPC Event of Default then NTPC shall buyback the Unloading Infrastructure and Material Handling System at (1) Debt Due plus (2) 1.00% (one hundred percent) Equity.

Provided, however, for the purposes of this

Agreement Debt Due and Equity shall not exceed the value as determined on a normative capital cost of [Rs. 90 crores] that is financed on Debt to Equity ratio of 70:30 and assuming that the repayment over 7 (seven) years period after COD,

(d) **Termination due to IWAI Default**

No payment shall be paid to any parties to this contract in case project terminated due to IWAI Event of Default.

5. Thus, Article 1.1 of the TPA provided that the date of completion of Phase I and Phase II would be treated as the Commercial Operation Date[8] for the purposes of the TPA. Operation of the Coal Hauling System would commence from that date. Article 2.3 provided that the operation period for the Coal Hauling System would be up to seven years from the COD, or up to termination of the TPA. On the expiry of seven years, the infrastructure which was created and owned by JITF would vest in NTPC for a token payment of ₹ 1.

6. In order for the project to take place, NTPC entered into several short term contracts with Imported Coal Suppliers[9] to procure imported coal for transportation to FTTP.

7. The CTAs provided that imported coal would be supplied by the ICSs and the JITF would unload the coal and transport it to the FTTP through the Inland Waterways. The JITF was required to transport coal at the rate of not less than 12000 MT per day.

[8] "COD", hereinafter
[9] "ICS", hereinafter

8. Under Article 2.2(b)(c)(d), JITF undertook to complete Phase I and Phase II of the project within 15 months and 24 months of the execution of the TPA, i.e., by 10 November 2012 and 10 August 2013 respectively. However, Phase I could be completed only by 30 November 2013 and Phase II by 15 June 2015. i.e., with a delay of 385 days and 674 days respectively. The COD was, therefore, extended to 15 June 2015.

9. On 15 November 2016, JITF invoked, against NTPC, the provision for arbitration contained in the TPA by issuing a notice invoking arbitration under Section 21 of the Arbitration and Conciliation Act, 1996[10]. On 17 November 2017, an Arbitral Tribunal[11] was constituted, which came to render the award from which the present proceedings has emanated.

10. Before the learned AT, on 4 March 2017, JITF filed its Statement of Claim[12] claiming damages/compensation from NTPC. Additionally, JITF filed an application under Section 17 of the 1996 Act[13], seeking a direction to NTPC to pay an amount of ₹ 158.50 Crores as compensation for failure to provide the Minimum Guaranteed Quantity[14] of coal for the first year of the operation period, i.e., for the period 15 June 2015 to 14 June 2016.

11. On 9 March 2017, a consultation notice was issued by NTPC to JITF in terms of Article 12 of the TPA. Thereafter on 24 July 2017,

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[10] "the Act of 1996", hereinafter
[11] "the learned AT" hereinafter
[12] "SOC", hereinafter
[13] "the 1st Section 17 application" hereinafter
[14] "MGQ", hereinafter

NTPC issued a termination notice to JITF under Article 13 of the TPA.

12. On 26 May 2017, Statement of Defence[15] and counter claim were filed by the NTPC against the JITF.

13. *Vide* order dated 15 July 2017 passed in the 1st Section 17 application filed by JITF, the Arbitral Tribunal directed NTPC to pay, to JITF, the MGQ amount as claimed by JITF for the first year of the operation period, against providing of an equivalent bank guarantee by JITF. This was followed by two more applications under Section 17[16] by JITF preferred before the Arbitral Tribunal on 4 September 2017. The first application sought a direction to NTPC to deposit damages / compensation for failure to provide the MGQ for the second year of the operation period. The second application sought a stay of the termination notice dated 24 July 2017.

14. The original SOC filed by the JITF claimed

(i) damages towards loss of revenue incurred by JITF, towards the expenses incurred by it on account of deviations in the tender plan worked out to ₹ 4173274285/- for Phase-I and ₹ 67526138/- for Phase-II i.e. a total of approximately ₹424 Crores for both Phases of the project,

(ii) a declaration that the claim for liquidated damages of ₹ 45 Crores claimed by NTPC against JITF was unenforceable in law,

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[15] "SOD" hereinafter

[16] "the 2nd Section 17 application" and "the 3rd Section 17 application" hereinafter

(iii) ₹ 1585005003/- towards the MGQ for the first year of the operation period,

(iv) ₹ 72854082/- towards excess wharfage, and

(v) Interest on the delayed payment by NTPC computed at ₹1,24,76,54070/-.

15. On 5 September 2017 and 16 September 2017, JITF applied under Section 28(3) of the 1996 Act to amend its SOC to claim:

(i) the MGQ for the second year of the operation period of ₹1 97.81 Crores along with additional wharfage, and

(ii) damages of ₹ 1108.93 Crores for the remaining five years of the operation period following the termination of the TPA by NTPC on 24 July 2017.

16. On 11 August 2017, JITF filed yet another application before the Arbitral Tribunal under Section 17 of the 1996 Act[17], seeking stay against invocation of the performance bank guarantee dated 8 August 2014 furnished by JITF in terms of the TPA. This prayer was granted by the Arbitral Tribunal by way of an *ex parte* order dated 12 August 2017. Following this, by a further order dated 20 December 2017, the Arbitral Tribunal stayed the operation of the termination notice dated 24 July 2017 issued by NTPC to JITF. The same order also directed NTPC to pay to JITF ₹ 197.8 Crores as the MGQ for the second year of the operation period, against furnishing by JITF of a bank guarantee of an equivalent amount.

17. NTPC complied with the directions issued by the Arbitral

[17] "the 4th Section 17 application" hereinafter

Tribunal to pay MGQ to JITF for the first and second year of the operation period against furnishing, by JITF, of bank guarantees for equivalent amounts.

18. Ultimately, the claims of JITF against NTPC were divided into Claim Nos.1, 2, 3 and 3A, 4, 5, 5A, 6 and 7.

19. The dispute, both before the learned Single Judge as well as before us, is limited to Claims 1, 3, 3A and 5A of JITF which, therefore, may be tabulated thus:

Claim No.	**Claim**
1	NTPC is responsible and liable for the delays and deviations (from Tender) in Construction Completion of Material Handling System Phase-I and II and JITF is entitled to an amount of ₹ 424,08,00,423 /-.
3 and 3A	NTPC breached its obligation to provide MGQ at Transfer Point for First and Second Years of Operation Period and JITF is entitled to amount of ₹ 158,50,05,003/- towards MGQ amount for First Year Operation Period and ₹ 197,81,13,512/ towards MGQ Amount for Second Year Operation Period.
5A	NTPC's Consultation Notice, Termination Notice and Requisition Notice are illegal, invalid, non-est and of no effect whatsoever

20. The arbitral proceedings culminated in the rendition, by the Arbitral Tribunal, of arbitral award dated 27 January 2019.

21. Aggrieved thereby, NTPC challenged the award by way of OMP (Comm) 204/2019.

22. By judgement dated 30 January 2025, a learned Single Judge has allowed OMP (Comm) 204/2019, and has set aside the arbitral award in its entirety.

23. The present appeal, under Section 37 of the 1996 Act, has been preferred by JITF, against the judgement of the learned Single Judge.

24. We have heard Dr. A. M. Singhvi and Mr. Jayant Mehta, learned Senior Advocates for the appellant and Mr. Tushar Mehta, the learned Solicitor General, for the respondent, at length. Written submissions have also been filed by learned Senior Counsel.

B. Scope of interference under Section 34 and Section 37

25. At the outset, it is necessary to appreciate the scope of judicial review, over the arbitral award, in proceedings under Section 34 and, thereafter, under Section 37 of the 1996 Act, to the extent they are relevant for adjudication of the present appeal.

26. Section 34

26.1 Between themselves, sub-sections (2) and (2A) of Section 34[18]

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[18] (2) An arbitral award may be set aside by the Court only if—

(*a*) the party making the application establishes on the basis of the record of the arbitral tribunal that—

(*i*) a party was under some incapacity; or

(*ii*) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(*iv*) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(*v*) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or envisage setting aside of an arbitral award *only* if

(i) one or other of the parties was under some incapacity, or

(ii) the arbitration agreement was not valid under the law, or

(iii) the applicant was not given notice of appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present his case, or

(iv) the award deals with a dispute which was not falling within the terms of submission to arbitration or decides matters beyond the scope of submission to arbitration, or

(v) the composition of the arbitral tribunal, all the arbitral procedure, was not in accordance with the agreement between the parties, or

(vi) the subject matter of the dispute is not arbitrable, or

(vii) the award is in conflict with the public policy of India, or

(viii) the award is vitiated by patent illegality appearing on its face.

The use of the word "only" makes it abundantly clear that, outside these exigencies, an arbitral award cannot be set aside on any other ground.

(*b*) the Court finds that—

(*i*) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(*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.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

26.2 Explanation 1 to Section 34 (2)(b) explains that an award would be in conflict with the public policy of India *only* if

(i) the award is tainted by fraud, corruption or is in violation of Sections 75 or 81 of the 1996 Act, or

(ii) the award is in contravention with the fundamental policy of Indian law, or

(iii) the award is in conflict with the most basic notions of morality of justice.

26.3 Of all these circumstances envisaged by the statute as justifying setting aside of an arbitral award, the facts of the present case essentially concerned in validity of the award on the ground that it suffers from "patent illegality". Additionally, to an extent, it may also be useful to understand the expression "fundamental policy of Indian law". The grounds on which the impugned judgement of the learned Single Judge sets aside the arbitral award are not relatable to any of the other circumstances contemplated in Section 34.

26.4 Certain decisions of the Supreme Court, which illuminate the aspect of patent illegality and the fundamental policy of Indian law made, to the relevant extent, be noted thus:

(i) ***Associate Builders v. DDA***[19]

> "17. It will be seen that none of the grounds contained in sub-section (2)(*a*) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the

[19] **(2015) 3 SCC 49**

merits of an arbitral award are to be looked into under certain specified circumstances.[20]

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19. When it came to construing the expression "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in ***ONGC Ltd. v. Saw Pipes Ltd.***[21] held:

> "31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that *the concept of public policy connotes some matter which concerns public good and the public interest.* What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, *the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest*. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in ***Renusagar Power Co. Ltd. v. General Electric Co.***[22], it is required to be held that the award could be set aside if it is patently illegal. The result would be— award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
> (b) the interest of India; or
> (c) justice or morality, or
> (d) in addition, if it is patently illegal.
>
> *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 the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.*
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> *****
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> 42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

[20] This statement of the law may not be regarded as binding any more, as, following the decision in **Associated Builders**, Section 34 was amended, with effect from 23 October 2015, by inserting sub-section (2A) therein, which provides for "patent illegality" as a ground to set aside an arbitral award.
[21] **(2003) 5 SCC 705**
[22] **1994 Supp (1) SCC 644**

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 such illegality must go to the root of the matter and cannot be of a trivial nature.* This again is really a contravention of Section 28(1)(*a*) of the Act, which reads as under:

> "28. Rules applicable to substance of dispute.
>
> (1) Where the place of arbitration is situated in India—
>
> (a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) *A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.*

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

> "28. Rules applicable to substance of dispute.—
> (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. *An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.*

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56. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. *It had no business to enter into a pure question of fact to set aside the arbitrator for having applied a formula of 20 months instead of 25 months.* Though this would inure in favour of the appellant, it is clear that the appellant did not file any cross-objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under Claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with Claims 12 and 13. *The formula then applied by the Division Bench was that it would itself do "rough and ready justice". We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator's view and does what it considers to be "justice".* With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that *it is not a first appellate court and cannot interfere with errors of fact*.

(Emphasis supplied)

(ii) ***<u>Ssangyong Engineering & Construction Co. Ltd. v. NHAI</u>***[23]

"19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of "public policy of India" in ***ONGC* v. *Saw Pipes Ltd***[24]and ***ONGC* v. *Western Geco International Ltd.***[25] has been done away with, and a new ground of "patent illegality", with inbuilt exceptions, has been introduced. Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.

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22. However, this Court, in ***Saw Pipes***, added yet another ground, namely, that of "patent illegality" to the three grounds

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[23] **(2019) 15 SCC 131**

[24] **2003) 5 SCC 705**

[25] **2014) 9 SCC 263**

mentioned in ***Renusagar Power Co. Ltd.*** **v.** ***General Electric Co***[26]., in order to set aside an award under Section 34 of the 1996 Act. This ground was added in the following terms: (***Saw Pipes case***)

> "31. … [Patent] 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 the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

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37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, *there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law.* In short, 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.*

38. Secondly, it is also made clear that *reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.*

39. To elucidate, para 42.1 of ***Associate Builders***, 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***, 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.*

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in ***Associate Builders*****,** namely, that *the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).*

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[26] **1994 Supp (1) SCC 644**

41. What is important to note is that *a decision which is perverse, as understood in paras 31 and 32 of* ***Associate Builders****,* 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. Thus, 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 on the ground of patent illegality. Additionally, 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.*"

(Emphasis supplied)

(iii) ***MMTC Ltd. v. Vedanta Ltd***[27]

"11. As far as Section 34 is concerned, the position is well-settled by now that *the Court does not sit in appeal over the arbitral award* and may interfere on merits on the limited ground provided under Section 34(2)(*b*)(*ii*) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally*, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and* ***Associated Provincial Picture Houses v. Wednesbury Corpn***[28]*., reasonableness*. Furthermore, *"patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.*

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(*b*)(*ii*), but *such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible*

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[27] (2019) 4 SCC 163

[28] (1948) 1 KB 223 (CA)

view based on facts. (See ***Associate Builders***). Also see ***ONGC Ltd.*** **v.** ***Saw Pipes Ltd.***; ***Hindustan Zinc Ltd.*** **v.** ***Friends Coal Carbonisation***[29]; and ***McDermott International Inc.*** **v.** ***Burn Standard Co. Ltd***[30].

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, *the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision.* Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

(iv) ***PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust***[31]

"40. It will thus appear to be a more than settled legal position, that in an application under Section 34, *the court is not expected to act as an appellate court and reappreciate the evidence.* The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". *A judicial intervention on account of interfering on the merits of the award would not be permissible.* However, *the principles of natural justice as contained in Sections 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award.* 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". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. *An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.*

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[29] **(2006) 4 SCC 445**
[30] **(2006) 11 SCC 181**
[31] **(2023) 15 SCC 781**

41. *A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, 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 on the ground of patent illegality.*

42. To understand the test of perversity, it will also be appropriate to refer to paras 31 and 32 from the judgment of this Court in ***Associate Builders***, which read thus:

> "31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:
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> (i) a finding is based on no evidence, or
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> (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,
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> such decision would necessarily be perverse.
>
> 32. A good working test of perversity is contained in two judgments. In ***Excise and Taxation Officer-cum-Assessing Authority* v. *Gopi Nath & Sons***[32], it was held:
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> > '7. … It is, no doubt, true that *if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.'*
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> > In ***Kuldeep Singh* v. *Commr. of Police***[33] , it was held:
> >
> > '10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. *If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may*

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[32] **1992 Supp (2) SCC 312**
[33] **(1999) 2 SCC 10**

be, the conclusions would not be treated as perverse and the findings would not be interfered with.' "

(Emphasis supplied)

(v) ***Delhi Metro Rail Corporation v. Delhi Airport Metro Express (P) Ltd***[34]

"34. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by "patent illegality" appearing on the face of the award.

35. In ***Associate Builders***, a two-Judge Bench of this Court held that *although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it.* This Court held with reference to Sections 28(1)(*a*) and 28(3), that *the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:*

(i) based on no evidence;

(ii) based on irrelevant material; or

(iii) ignores vital evidence.

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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.* [***Patel Engg. Ltd.* v. *North Eastern Electric Power Corpn. Ltd***[35]]. *A "finding" based on no evidence at all or an award which ignores vital evidence in*

[34] **(2024) 6 SCC 357**
[35] **(2020) 7 SCC 167**

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 his jurisdiction or violating a fundamental principle of natural justice."

(Emphasis supplied)

(vi) ***<u>OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd</u>***[36]

"55. In the light of aforesaid discussion, reverting back to the instant matter, on a plain and grammatical construction of clauses (*ii*) and (*iii*) of Explanation 1 to Section 34(2)(*b*) of the 1996 Act it cannot be said that *the imposition of an exorbitant interest in the background of contemporary commercial practices, would be against the fundamental policy of Indian law*, or against the basic notions of morality or justice. It is well-settled that *fundamental policy of Indian law does not refer to violation of any statute but fundamental principles on which Indian law is founded. Any difference or controversy as to rate of interest clearly falls outside the scope of challenge on the ground of conflict with the public policy of India unless it is evident that the rate of interest awarded is so perverse and so unreasonable so as to shock the conscience of the Court sans which no interference is warranted in the award, whereby interest is awarded by the arbitrator.*

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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74. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does

[36] **(2025) 2 SCC 417**

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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79. On the requirement of recording reasons in an arbitral award and consequences of lack of, or inadequate, reasons in an arbitral award, this Court in *Dyna Technologies* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1, paras 27-43] held : (SCC p. 14, paras 34-35)

> "34. *The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.*
>
> 35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are : proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. *If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the court comes to a conclusion that there were gaps in the*

reasoning for the conclusions reached by the Tribunal, the court needs to have regard to the document submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards."

80. We find ourselves in agreement with the view taken in ***Dyna Technologies (P) Ltd.*** **v.** ***Crompton Greaves Ltd***[37]., as extracted above. Therefore, in our view, *for the purposes of addressing an application to set aside an arbitral award on the ground of improper or inadequate reasons, or lack of reasons, awards can broadly be placed in three categories:*

> *(1) where no reasons are recorded, or the reasons recorded are unintelligible;*
>
> *(2) where reasons are improper, that is, they reveal a flaw in the decision-making process; and*
>
> *(3) where reasons appear inadequate.*

81. *Awards falling in Category (1) are vulnerable as they would be in conflict with the provisions of Section 31(3) of the 1996 Act. Therefore, such awards are liable to be set aside under Section 34, unless:*

> *(a) the parties have agreed that no reasons are to be given, or*
>
> *(b) the award is an arbitral award on agreed terms under Section 30.*

82. *Awards falling in Category (2) are amenable to a challenge on ground of impropriety or perversity, strictly in accordance with the grounds set out in Section 34 of the 1996 Act.*

83. *Awards falling in Category (3) require to be dealt with care. In a challenge to such award, before taking a decision the Court must take into consideration the nature of the issues arising between the parties in the arbitral proceedings and the degree of reasoning required to address them. The Court must thereafter carefully peruse the award, and the documents referred to therein. If reasons are intelligible and adequate on a fair reading of the award and, in appropriate cases, implicit in the documents referred*

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[37] **(2019) 20 SCC 1**

to therein, the award is not to be set aside for inadequacy of reasons. However, if gaps are such that they render the reasoning in support of the award unintelligible, or lacking, the Court exercising power under Section 34 may set aside the award.

84. *An Arbitral Tribunal must decide in accordance with the terms of the contract. In a case where an Arbitral Tribunal passes an award against the terms of the contract, the award would be patently illegal. However, an Arbitral Tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not intefere* [See : ***SAIL* v. *Gupta Brother Steel Tubes Ltd***[38]., ***Pure Helium India (P) Ltd.* v. *ONGC***[39]; ***McDermott International Inc.* v. *Burn Standard Co. Ltd***[40]; ***MMTC Ltd.* v. *Vedanta Ltd***[41]]. But *where, on a full reading of the contract, the view of the Arbitral Tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference* [***South East Asia Marine Engg. & Constructions Ltd.* v. *Oil India Ltd***[42]**]**.

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168. We have given due consideration to the above submission. In our view, a distinction would have to be drawn between an arbitral award where reasons are either lacking/unintelligible or perverse and an arbitral award where reasons are there but appear inadequate or insufficient [See paras 79 to 83 of this judgment.] . *In a case where reasons appear insufficient or inadequate, if, on a careful reading of the entire award, coupled with documents recited/relied therein, the underlying reason, factual or legal, that forms the basis of the award, is discernible/intelligible, and the same exhibits no perversity, the Court need not set aside the award while exercising powers under Section 34 or Section 37 of the 1996 Act, rather it may explain the existence of that underlying reason while dealing with a challenge laid to the award.* In doing so, the Court does not supplant the reasons of the Arbitral Tribunal but only explains it for a better and clearer understanding of the award."

(Emphasis supplied)

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[38] **(2009) 10 SCC 63**
[39] **(2003) 8 SCC 593**
[40] **(2006) 11 SCC 181**
[41] **(2019) 4 SCC 163**
[42] **(2020) 5 SCC 164**

(vii) ***<u>Prakash Atlanta (JV) v. National Highways Authority of India</u>***[43]

"24. In ***Associate Builders***, this Court noted that the expression 'public policy of India' in Section 34(2)(b)(ii) of the Arbitration Act was given a wider meaning in ***ONGC Ltd.* v. *Saw Pipes Ltd.*** It was held therein that the concept of public policy connotes some matter which concerns public good and public interest. *It was observed that what is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time but an arbitral award which, on the face of it, is patently in violation of statutory provisions, cannot be said to be in public interest.* It was further observed that such an award is likely to adversely affect the administration of justice. This Court, therefore, held that, in addition to the narrower meaning given to the term 'public policy' by a 3-Judge Bench of this Court in ***Renusagar***, an arbitral award can be set aside if it is patently illegal. The result was that an arbitral award could be set aside if it was contrary to the fundamental policy of Indian law; or the interest of India; or justice or morality; or if it is patently illegal. *It was observed that illegality must go to the root of the matter but, if the illegality is of trivial nature, it cannot be held that the award is against public policy. It was further held that if the award is so unfair and unreasonable that it shocks the conscience of the Court, it would be opposed to public policy.*

25. Thereafter, in ***ONGC* v. *Western Geco International Ltd.***[44], 3-Judge Bench of this Court added three other distinct and fundamental juristic principles which must be understood as part and parcel of the fundamental policy of Indian law. The first is the principle that *in every determination that affects the rights of a citizen or leads to civil consequences, whether by a Court or other authority, such Court or authority is bound to adopt what is, in legal parlance, called 'judicial approach'*. The second principle is that *a Court and so also a quasi-judicial authority, while determining rights and obligations of parties before it, must do so in accordance with the principles of natural justice. It was observed that, in addition to audi alteram partem, the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances as non-application of mind is a defect that is fatal to any adjudication. It was, therefore, held that the requirement that an adjudicating authority must apply its mind is so deeply embedded in our jurisprudence that it can be described as the fundamental policy of Indian law*. The last principle is *that a decision which is perverse or so irrational that no reasonable person would have arrived at the same cannot be sustained.*

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43 **2026 SCC OnLine SC 98**
44 **(2014) 9 SCC 263**

Decisions that fall short of the standards of reasonableness were, therefore, held liable to challenge in a Court of law and even in statutory processes wherever the same were available."

(Emphasis supplied)

26.5 <u>The cumulative takeaway</u>

The principles that cumulatively emerge from the above decisions, regarding conflict with the fundamental policy of Indian law, and patent illegality, as grounds to set aside an arbitral award, maybe enumerated as under:

(i) The concept of public policy connotes some matter which concerns public good and public interest.

(ii) An award which, on the face of it, its patent plea in violation of statutory provisions, is not in public interest, as it is likely to adversely affect the administration of justice.

(iii) Illegality, as a ground to set aside an arbitral award, must go to the root of the matter. Illegality, if trivial, would not result in an arbitral award becoming contrary to public policy.

(iv) An arbitral award can be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such an award is opposed to public policy.

(v) A contravention of the 1996 Act itself would be rendered as a patent illegality as, for example, a case in which no reasons are provided for the award, as required by Section 31(3). An

(vi) arbitral award can also be set aside if the reasons recorded are unintelligible, improper, i.e. revealing of law in the decision-making process, or inadequate. However, while exercising this power, the law declared in paras 81 to 83 of ***OPG Power Generation***, extracted *supra*, have to be borne in mind.

(vii) An arbitral award is required to decide the controversy in accordance with the terms of the contract. Ergo, an award which is contrary to the terms of the contract is vitiated by patent illegality.

(viii) However, if the Arbitral Tribunal construes the term of the contract in a reasonable manner, no ground to set aside the award would exist. Construction of the terms of the contract is primarily the realm of the arbitrator. The manner of construction of the terms of the contract would constitute a basis to set it aside only if it is such as no fair-minded or reasonable person would undertake.

(ix) Equally, if an arbitrator wanders outside the contract and deals with matters which are not allotted to him, it amounts to an error of jurisdiction, which can constitute a basis to set aside the arbitral award.

(x) "Patent illegality" has, however, to appear on the face of the award, and must go to the root of the matter. It does not include mere erroneous application of the law.

(xi) Contravention of a statute, not linked with public policy or public interest, cannot constitute a legitimate basis to set aside an arbitral award.

(xii) A Section 34 court cannot enter into a pure question of fact to set aside an arbitral award. It cannot reappreciate evidence.

(xiii) An arbitral award cannot be set aside to ensure "rough and ready justice". "Justice", as a ground to set aside an arbitral award, would require the award to be contrary to public policy, in that it must shock the conscience of the court. The Court cannot set aside an arbitral award on the ground that it feels that it is unjust in the facts of the particular case as, by doing so, the Court is substituting its view for the view of the arbitrator, which is impermissible.

(xiv) A Section 34 Court is not an appellate court. It cannot interfere with errors of fact, unless they exhibit perversity.

(xv) Perversity is found to exist where a finding is based on no evidence at all, or ignores vital evidence, or so outrageously defies logic has to suffer from the vice of irrationality. A finding based on documents taken behind the back of a party would also qualify as a decision based on no evidence and, therefore, perverse.

(xvi) The requirement of compliance with the "fundamental policy of Indian law" would include compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and exhibiting Wednesbury reasonableness.

(xvii) “Patent illegality” includes contravention of the substantive law of India, contravention of the 1996 Act and contravention of the terms of the contract.

(xviii) If the view adopted by the arbitral tribunal is possible on the facts, no case for interference is made out.

(xix) Failure to comply with the principles of natural justice renders the arbitral award liable to be set aside both on the ground of being contrary to the fundamental policy of Indian law as well as vitiated by patent illegality.

(xx) Awarding exorbitant interest would be against the fundamental policy of Indian law. The rate of interest must be so perverse and so unreasonable as to shock the conscience of the Court.

(xxi) Disregarding orders of superior courts in India, or their binding effect, would render the arbitral award contrary to the fundamental policy of Indian law.

(xxii) An arbitral tribunal is also required to adopt a judicial approach, which requires, in turn, application of mind to the facts and circumstances of the case. Non-application of mind is fatal to an arbitral award.

26.6 We proceed, therefore, to examine, keeping in mind the above principles, whether the learned Single Judge was, in the present case, justified in setting aside the arbitral award.

C. Findings of the learned Arbitral Tribunal, decision of the learned Single Judge, rival contentions and analysis thereof

27. To avoid prolixity and repetition, we propose to deal with the controversy claim-wise, alluding, sequentially, to the findings of the learned AT, the judgment of the learned Single Judge, the rival submissions thereon by learned Counsel before us, and our findings thereon.

C.I Re. Claim No.1 – "NTPC is responsible and liable for the delays and deviations (from Tender) in Construction Completion of Material Handling System Phase-I and II and JITF is entitled to an amount of Rs. 424,08,00,423 /-".

28. Discussions and findings by the learned AT

28.1 The learned Arbitral Tribunal notes, in para 81 of its Award, that Claim No. 1 consisted of two parts. The first part was for ₹ 417,32,74,285/- and the second was for ₹ 6,75,26,138/-. The claim of ₹ 417,32,74,285/- was on account of shortfall of supply of coal by NTPC during Phase-1 of the TPA and the second part of the claim for ₹ 6,75,26,138/- was for the costs and expenses incurred by JITF owing to deviation in the plan, also attributable to the delay on the part of the NTPC.

28.2 The learned Arbitral Tribunal has examined the aspect of delay on the part of NTPC, under the various heads of delay asserted by JITF in its SOC. The learned Arbitral Tribunal has upheld the claim of JITF regarding NTPC being responsible for the delay under all the heads except delay on account of post bid changes in lay out, delay in removal of surplus earth and delay in removal of abandoned RCC structures in the path of conveyor belt E.

28.3 On the second aspect of Claim 1, for ₹ 417,32,74,285/- towards shortfall in supply of coal vis-à-vis the obligation of NTPC as envisaged in Article 7.1(a)(i) of the TPA, the learned Arbitral Tribunal has ruled as under:

> "83. It is JITF's case that JITF's Transhipper was ready and available at Transfer Point from 20.02.2013. It was the obligation of NTPC as per Article 7.1(a)(i) of the TPA to provide 2 MMTPA of coal during the period commencing from 19.02.2013 (the date on which JITF could have completed the construction of Phase I if there was no delay on the part of NTPC) to 14.06.2015 (the date till declaration of COD by NTPC). The Tribunal is of the view that as per the provisions of TPA, it is an obligation of NTPC to provide 2 MMTPA of coal during Material Handling System-Phase-I Period. The Article 3.2(b) provides for compensation for delays committed by NTPC by extending suitably the period of COD. In an ideal situation, JITF would be entitled to compensation by suitably extending the period of COD, however, in the present case, due to illegal termination (as explained below), the said option is not available. Therefore, the Tribunal is required to rely on to the provisions of the Contract Act, 1872, which provides for compensation in cases of breach. As NTPC due to its own act has breached the terms of the Contract, NTPC is liable to restore the damages suffered by JITF for the wrongs committed by NTPC. By applying the provisions of the Contract Act, this Tribunal is of the view that JITF is entitled to the Claim of ₹ 417,32,74,285/-.

29. <u>The impugned judgment of the learned Single Judge</u>

29.1 The learned Single Judge has, in the impugned judgment, set aside the decision of the learned Arbitral Tribunal with respect to Claim 1, though the impugned judgment does not differ with the arbitral award with respect to its findings regarding the various heads of delay and the responsibility of NTPC in that regard. The basic considerations on which the learned Single Judge has chosen to set aside the award of the learned Arbitral Tribunal are to be found in the following paragraphs from the impugned judgment:

> "119. In regard to the first part of the claim No.1, the finding of the learned AT would indicate that the learned AT has granted the claim in totality as asked for by the respondent/claimant. It is shockingly surprising to see that though the learned AT notes that Article 3.2 (b) provides for compensation for delays committed by the NTPC by extending suitably the period of COD in an ideal situation and JITF would be entitled to compensation by suitably extending the period of COD, however, on account of illegal termination, the said option is not available. This finding of the learned AT certainly amounts to the patent illegality and amounts to perversity which shocks the conscience of the Court. It can also be noted that the learned AT simply relied on the chart furnished shed by the respondent/claimant and did not discharge its obligation of adjudicating the claim. Non-adjudication of the claim amounts to the award being totally non-speaking and has opened itself to the challenge by the petitioner.
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> *****
>
> 122. Reliance can also be placed upon ***Union of India v. Chadalwada Gopala Krishna Murthy and Anr.***[45]**.** There is also substance in the argument raised by the Learned Solicitor General that the learned AT took the figure of ₹ 417,32,47,285/- claimed by the respondent/claimant as a correct figure of damages without adjudication. It was submitted that the learned AT awarded the claim even though no coal was transported i.e. the coal was allegedly not provided by NTPC.
>
> *****
>
> 124. It is an admitted fact that the learned AT awarded this claim taking into account the obligations of the NTPC as per Article 7.1 (a) (i) of the TPA to provide the 2 MMTPA of Coal during the

[45] **(2010) 14 SCC 633**

period commencing from 19.02.2013 (the date of which JITF could have completed the construction of Phase -I, if there was no delay on the part of the NTPC) to 14.06.2015 (the date till declaration of COD by the NTPC). It was noted that since it was an obligation of NTPC to provide 2 MMTPA of coal during the material handling system and therefore placing reliance upon the provisions of Contract Act, 1872 held NTPC is liable to restore the damages suffered by the JITF for the wrongs committed by NTPC. Admittedly, the award claim has been granted for the activity which has not taken place and no operational expenses or running costs were incurred, which outrightly shocks the conscience of the Court and makes the finding patently illegal.

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126. It is pertinent to mention here that the finding of the learned Arbitral Tribunal is in violation of Article 3.2 (b) of TPA which provides for only an extension of COD in case of any delay in the construction period of Phase -I. Thus, the finding of the learned Arbitral Tribunal is the re-writing of the award. In part II of the claim whereby the claim in the sum of Rs. 18,32,21,995/- has been awarded out of the claim of Rs.6,75,26,138/-. It has been submitted that out of a total delay of 674 days, the delay of 251days has not been attributed to the NTPC and therefore the damages of delay could not have been granted to the respondent/claimant. Para-84 of the impugned award which reads as under:

> "84. Similarly, in view of the discussions above, JITF is also entitled to a sum of Rs1,83,22,995/- (out of total claim of Rs.6,75,26,138/-) on account of costs and expenses incurred by JITF towards certain works. The evidence lead by JITF has also been cogent to support its claim, which was not contradicted by NTPC and therefore, in view of the available evidence and findings of the Tribunal, JITF is entitled to a sum of Rs.1,83,22,995/-."

127. A perusal of this also makes it clear that the learned Arbitral Tribunal has failed to show any basis for the quantifications of damages. It is also pertinent to mention here that the work of Phase-I and Phase-II was to be executed simultaneously and therefore, the delay would certainly overlap. This finding is certainly correct to the terms of the contract. Thus, the Court finds that the award of claim-I falls into the category of patent illegality, and shocks the conscience of the Court and is liable to be set aside."

29.2 From these paragraphs, it becomes clear that, in setting aside the award of the learned Arbitral Tribunal, the learned Single Judge has proceeded on the following considerations:

(i) The learned AT awarded compensation to JITF, even though Article 3.2(b) of the TPA envisaged payment of compensation only by extending the COD. As such, the direction to pay compensation/damages on account of the delay of NTPC was contrary to Article 3.2(b) of the TPA.

(ii) Compensation had been awarded though no coal was transported by JITF, as the very basis of awarding compensation was that there was short supply of coal by NTPC. The claim had, therefore, been granted for an activity which had not taken place and for which no costs had been incurred by JITF. This was shocking to the judicial conscience.

(iii) The figure of ₹ 4173274285/- had been accepted without any discussion. The table submitted by JITF had merely been made the basis of awarding the claim, without any examination of whether the figures in the table were acceptable. Thus, there was no basis for computation of the claim, as awarded, forthcoming from the arbitral award.

30 Analysis

30.1 We are unable, with respect, to subscribe to the view expressed by the learned Single Judge with respect to the award of the learned

Arbitral Tribunal on Claim 1, especially given the circumscribed nature of our jurisdiction under Section 37 of the 1996 Act. In setting aside the award of the learned Arbitral Tribunal, we are of the considered opinion that the learned Single Judge has transgressed the boundaries of Section 34.

30.2 In so far as Article 3.2(b) is concerned, the learned Arbitral Tribunal, in para 83 of the award, notes the fact that the said clause envisages compensation, to JITF, owing to short supply of coal by NTPC, only by extension of the COD. Nonetheless, observes the learned Arbitral Tribunal, it was impossible to operate this clause, as NTPC had terminated the TPA on 24 July 2017. At the same time, JITF could not be denied its entitlement to compensation for the delays on the part of the NTPC, especially as the fact of such delays and of NTPC being responsible in that regard were not in dispute.

30.3 In adjudicating Claim 1, therefore, the learned Arbitral Tribunal proceeded on the basis of Section 73[46] of the Contract Act,1872 and not strictly on the basis of Article 3.2(b). The learned Single Judge has not held – as, indeed, he could not possibly have – that the Arbitral Tribunal was foreclosed from awarding compensation under Section 73 of the Contract Act. With respect to the power of the Arbitral

[46] **73. Compensation for loss or damage caused by breach of contract.—**When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.— When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Tribunal to award compensation under Section 73, even in a case where compensation was, otherwise, not payable under the contract between the parties, one may refer to ***SAIL v. Gupta Brother Steel Tubes Ltd.***[47], in which it was held:

> "24. There is no impediment nor we know of any obstacle for the parties to a contract to make provision of liquidated damages for specific breaches only leaving other types of breaches to be dealt with as unliquidated damages. We are not aware of any principle that once the provision of liquidated damages has been made in the contract, in the event of breach by one of the parties, such clause has to be read covering all types of breaches although parties may not have intended and provided for compensation in express terms for all types of breaches."

30.4 The learned Single Judge was, therefore, not correct in his finding that, in awarding compensation under Claim 1, the learned Arbitral Tribunal had breached Article 3.2(b) of the TPA.

30.5 The learned Single Judge further observes that the learned Arbitral Tribunal could not have awarded a claim for an activity which had not taken place and in respect of which no cost had been incurred by JITF.

30.6 This finding, again, is, with respect, not sustainable.

30.7 Article 3.2(b) itself entitled JITF to compensation in the event of short supply of coal by NTPC. It is no argument, therefore, to state that as JITF could not have transported coal which had not been supplied, it would not be entitled to compensation.

[47] **2009 (10) SCC 63**

30.8 Besides, compensation has been worked out on the basis of the amount of coal which NTPC was *required to supply* during Phase-1, between 19 February 2013 to 14 June 2015, which was the declared COD date. The award was, therefore, eminently in sync with Section 73 of the Contract Act.

30.9 The third ground on which the learned Single Judge has chosen to set aside the award of the learned Arbitral Tribunal with respect to Claim 1 is that there was no discussion, in the arbitral award, of whether the figure of ₹ 417,32,74,285/-, as claimed by JITF was, or was not, justified. The learned Single Judge observes that the learned Arbitral Tribunal merely adopted this figure as contained in the table filed by JITF before it, without ascertaining the correctness of the computation. Indeed, this, we may note, was the main plank of the submissions of the learned Solicitor General, as advanced before us. The learned Solicitor General was at pains to submit that, irrespective of whether JITF was, or was not, entitled to damages, it was the fundamental duty of the learned Arbitral Tribunal to compute the damages which could be awarded. This exercise, submits the learned Solicitor General, was wanting in the present instance. The figure of ₹ 417,32,7,4285/-, as claimed by JITF, was baldly accepted by the learned Arbitral Tribunal, without any inquiry or investigation.

30.10 In arriving at this finding, we are of the opinion that the learned Single Judge has omitted to note the position which emerges from the evidence led in the case. The Table along with Notes 1 and 2 thereunder, to which learned Single Judge alludes, read thus:

"Loss of Revenue due to delay from 19 Feb 2013 to 14 June 2015

Date	Estimated Quantity (MT)	Actual Coal Offered (MT)	Shortfall Quantity (MT)	Rate (₹/MT)	Total Revenue (In ₹)
19-Feb-13	59524		59524	1,051.47	62,587,310
31-Mar-13	166667		166667	1,054.70	175,783,752
30-Apr-13	166667		166667	1,062.13	177,021,620
31-May-13	166667		166667	1,068.60	178,100,186
30-Jun-13	166667		166667	1,072.20	178,700,520
31-Jul-13	166667		166667	1,075.87	179,311,029
31-Aug-13	166667		166667	1,079.41	179,901,188
30-Sep-13	166667		166667	1,083.01	180,501,522
31-Oct-13	166667		166667	1,086.49	181,081,505
30-Nov-13	166667	123762	42905	1,157.19	49,648,851
31-Dec-13	166667		166667	1,163.88	193,980,000
31-Jan-14	166667		166667	1,162.03	193,671,667
18-Feb-14	107143		107143	1,102,23	118,096,591
19-Feb-14	59524	68124	8600	1,102.23	(9,479,430)
31-Mar-14	166667	73100	93567	1,163.95	108,907,857
30-Apr-14	166667		166667	1,146.15	191,025,000
31-May-14	166667		166667	1,119.76	186,627,448
30-Jun-14	166667		166667	1,123.37	187,227,782
31-Jul-14	166667		166667	1,127.46	187,909,517
31-Aug-14	166667		166667	1,131.00	188,499,675
30-Sep-14	166667	78709	87958	1,134.60	99,796,774
31-Oct-14	166667	72500	94167	1,131.73	106,571,242
30-Nov-14	166667	141454	25213	1,095.89	27,630,309
31-Dec-14	166667		166667	1,090.58	181,763,333
31-Jan-15	166667	77000	89667	1,077.88	96,649,907
18-Feb-15	107143		107143	1,053.83	112,910,357
29-Feb-15	59524		59524	1,053.83	62,727,976
31-Mar-15	166667	77000	89667	1,073.98	95,300,207
30-Apr-15	166667	63950	102717	1,071.17	110,027,012
31-May-15	166667		166667	1,070.38	178,396,667
14-Jun-15	77778	67230	10548	1,080.50	11,396,911

Total	**4637302**	**842829**	**3794473**		**4,173,274,285**

Note:

1. Rates are based on HSD prices for Kolkata as appearing in IOCL website.
Copy of relevant page enclosed.

2. Rates are based on Actual Invoices of respective months except for the months Feb'13-Feb'14, May'14, June'14, July'14, Aug'14, Sep'14, June'15 for which rates have been calculated based on Fuel Price for Kolkata appearing on IOCL website.
Copy of relevant page enclosed."

The above table constituted Annexure C-75 to the amended statement of claim tendered by JITF before the learned Arbitral Tribunal.

30.11 Had this table been accepted as it stood, without any basis for the figures contained therein, we might have found substance in the views of the learned Single Judge.

30.12 That, however, is not the case.

30.13 The figure of 166667 MT per month, in the second column of the table, is worked out by dividing the contractual obligation of NTPC, emanating from Article 7.1(a)(i) of the TPA, to supply a minimum of 2 MMTPA coal during Phase I of the project, with 12, being the number of months in a year. When the figure of 2 MMTPA is divided by 12 months, it works out, rounded off, to 166667 MT per month. Where only a part of the month is involved, the table filed by JITF proportionately works out the coal which was required to be supplied by NTPC during that part of the month.

30.14 Inasmuch as the obligation of NTPC, as emanating from Article 7.1(a)(i) of the TPA, cannot possibly be disputed, the figures in the second column of the afore-extracted table are equally beyond dispute.

30.15 The shortfall in quantify has been worked out by subtracting, from the quantity of coal which was required to be supplied per month, the actual quantity supplied by NTPC. The actual quantity supplied by NTPC is also not in dispute, so that the figure of shortfall cannot, equally, be disputed.

30.16 In working out the payment to which JITF would have been entitled, had NTPC supplied coal as per its contractual obligation under Article 7.1(a)(i), the table filed by JITF relies on the rate of coal based on actual invoices for the respective months, except for a few months for which the rates have been calculated based on the fuel price for Kolkata appearing on the IOCL website, a copy of which was also enclosed. The basis for adopting these rates is also noted in Note 2 below the table. The manner in which JITF had worked out the shortfall in revenue suffered by it as a consequence of the failure, on the part of NTPC to supply the contracted quantity of coal is, therefore, wholly scientific, and in accordance with Section 73 of the Contract Act.

30.17 Besides, the above table, and the figures contained therein also stand proved in evidence. Paragraph 49 of the affidavit in evidence tendered by CW1, Mr. Shishir Chandra Gupta, read thus:

> "49. However, as per the records maintained by the Claimant, the Respondent provided only 842829 MT of coal to the Claimant. I say that therefore the Claimant is entitled to damages towards loss of revenue in sum of Rs.417,32,74,285/- (Rupees Four Hundred Seventeen Crore Thirty Two Lakh and Seventy Four Thousand and Two Hundred and Eighty Five) calculated on the basis of the balance of the quantity not provided by the Respondent from 19 February 2013 until 14 June 2015, being 3794473 MT x the applicable Project Rate, for the relevant period. I rely on details of calculation of Rs. 417,32,74,285/- (Rupees Four Hundred Seventeen Crore Thirty Two Lakh and Seventy Four Thousand and Two Hundred and Eighty Five) being loss of revenue until 14 June 2015 (Annexure C-75 at Page No. 1503, Volume-V of Amended Statement of Claim). I say that the calculation stated above has been computed by me along with the finance team of the Claimant and the same is correct."

30.18 Thus, CW1, in his affidavit in evidence, proved the tabular statement filed with the statement, and also deposed that the calculation had been computed by him along with the finance team of JITF. The basis of the figures in the table are forthcoming even from the Notes below the table as well as from the mandate of Article 7.1(a)(i) of the TPA. CW1 was never cross examined on the above assertion contained in para 49 of his affidavit in evidence. The contents of the said paragraph have, therefore, to be taken as admitted.

30.19 Even otherwise, no evidence was led by NTPC to dispute the basis on which the aforenoted tabular statement had been submitted by JITF. Inasmuch as the figures contained in the statement were either based on the contractual obligation of NTPC as envisaged by Article 7.1 (a)(i) of the TPA, or on the actual quantity of coal supplied by NTPC and the rates emanating from the invoices for the respective months and other acceptable evidence, there is no basis to discredit the total figure of ₹ 417,32,74,285/-, as worked out in the table.

30.20 Though para 83 of the arbitral award may not refer, in detail, to the above material, we find that, in earlier paragraphs of the award, the learned Arbitral Tribunal has distilled the evidence led before it by the various witnesses and their cross examination, to the extent relevant. The mere fact that there was no repetition of these facts in para 83 of the award cannot result in a conclusion that the learned Arbitral Tribunal has, without any application of mind, accepted the figure of ₹ 417,32,74,285/- as computed by JITF.

30.21 We, therefore, are unable to agree with the learned Single Judge on the third ground on which he has chosen to set aside the arbitral award with respect to Claim 1, either, i.e., that, in awarding the claim for ₹ 417,32,74,285/-, the learned Arbitral Tribunal has merely accepted the figure cited by JITF, without undertaking any independent computational exercise.

30.22 Resultantly, we find the decision of the learned Arbitral Tribunal with respect to Claim 1 to be unexceptionable, and are unable to sustain the decision of the learned Single Judge to reverse the award to that extent.

30.23 The decision of the learned Arbitral Tribunal on Claim 1 is, therefore, upheld.

C.II Re. Claim Nos.3 and 3A - "NTPC breached its obligation to provide MGQ at Transfer Point for First and Second Years of Operation Period and JITF is entitled to amount of ₹ 158,50,05,003/- towards MGQ amount for First Year Operation Period and ₹ 197,81,13,512/ towards MGQ Amount for Second Year Operation

<u>Period."</u>

31 <u>Rival Submissions before the learned Arbitral Tribunal</u>

31.1 These claims, as raised by JITF, were based on Article 7.3 of the TPA. Under the said Article,

(i) the difference in the quantity of coal made available by NTPC during any year of the operation period and 90% of the MGQ represented a shortfall of coal as provided by NTPC,

(ii) within three weeks of the end of each period of 12 months in the operating period, JITF was required to submit, to NTPC, the Annual Statement, disclosing the total quantity of coal supplied to FTTP by JITF and the shortfall of supply of coal by NTPC,

(iii) the amount payable to JITF would be the shortfall quantity multiplied by 75% of the project rate,

(iv) on supply of the Annual Statement by JITF, the MGQ amount was to be paid directly by NTPC to JITF,

(v) NTPC was obliged to make payment of the MGQ amount as specified in the Annual Statement within 30 days of submission of the Annual Statement,

(vi) NTPC was allowed to dispute the determination of the MGQ amount and shortfall as specified in the Annual Statement within three weeks of submission of the Annual Statement by JITF, by notifying the dispute and submitting written submissions in support thereof,

(vii) NTPC was nonetheless, required to pay, to JITF, the claimed MGQ amount in the Annual Statement, subject to JITF refunding the amount with interest if the dispute was ultimately resolved in favour of NTPC,

(viii) no dispute raised by NTPC in respect of the Annual Statement would be valid till the MGQ amount was paid by it, and

(ix) failure, on the part of the NTPC, to notify the dispute within three weeks of the receipt of the Annual Statement would be regarded as deemed acceptance of the Annual Statement by NTPC, and no dispute raised by NTPC in relation to the Annual Statement thereafter would be valid.

31.2 Admittedly, within the stipulated period of three weeks of the expiry of the first year of the operating period, JITF had, on 23 June 2016, furnished the Annual Statement to NTPC, as required by Article 7.3. JITF submitted that, during the first year of the operating period, NTPC had made available only 0.746 MMT of coal at the transfer point, which fell short of the guaranteed supply of 90% envisaged in Article 7.3 by 1.9534 MMT. JITF, therefore, claimed its entitlement to receive, against this shortfall, an amount of ₹ 158,50,05,003/-, the calculation of which was provided in Annexure C-83 to the SOC. NTPC was, therefore, bound to make payment of the said MGQ amount on or before 23 June 2016. Though JITF repeatedly wrote to NTPC, expressing its willingness to provide an equivalent bank guarantee as required by Article 7.3, NTPC did not pay the MGQ amount. JITF submitted that, as NTPC had not disputed the computation of the MGQ and the shortfall in the Annual Statement furnished by JITF within a year thereof, it was deemed to have been accepted and no dispute raised by NTPC in respect of the Annual

Statement thereafter was valid.

31.3 NTPC submitted, in response, that Article 7.3 would not apply where the shortfall in supply of coal by NTPC was not due to any default on its part. The cause of shortfall was, therefore, relevant. NTPC submitted that the shortfall was attributable to JITF, and not to NTPC. It was submitted that JITF was aware that the MOEFCC[48] had revised the minimum quantity of coal which could be imported to 1.5 MMTPA. While calculating the shortfall of coal supplied in the Annual Statement, JITF had failed to account for this directive from the MOEFCC. With the issuance of the said directive, the MGQ under Article 7.3 stood revised from 3 MMTPA to 1.5 MMTPA. The shortfall, if any, had, therefore, to be reckoned vis-à-vis 90% of 1.5 MMTPA and not 90% of 3 MMTPA.

31.4 It was further submitted that JITF had never been able to achieve the parameter level as envisaged in the TPA and that, therefore, owing to factors for which NTPC was not responsible, JITF was unable to accept the allocated amount of coal made available by NTPC. NTPC further submitted that it was always ready and willing to provide more than the revised MGQ of 1.5 MMTPA and had, therefore, entered into contracts with ICSs for supply of 1.55 MMTPA of coal during the period 15 June 2015 to 14 June 2016. Based on these submissions, NTPC disputed JITF's contention that there was any shortfall in supply of coal by NTPC within the meaning of Article 7.3 of the TPA during the first year of the Operation Period from 15 June 2015 to 14 June 2016.

[48] Ministry of Environment, Forest and Climate Change

31.5 Even while recording the submissions, the learned Arbitral Tribunal has, in para 93 of the arbitral award, noted the fact that it was undisputed that the quantity of coal which was actually transported by JITF to FTTP during the first year of the operating period between 15 June 2015 and 14 June 2016 as only 0.775 MMT.

31.6 The directive by the MOEFCC, reducing the permissible quantity of coal which could be imported in an year to 1.5 MMT was cited, by NTPC, as a *force majeure* event. JITF contested this claim. It was submitted that the reduction in the quantity of coal, which could be imported, as permitted by MOEFCC to 1.5 MMTPA was only owning to failure, on the part of NTPC, to obtain the necessary environmental clearance. The responsibility of obtaining environmental clearance, it was submitted was the responsibility of NTPC and not of JITF. NTPC was required to obtain the requisite environmental clearance even before it commenced the project.

31.7 JITF submitted that, even though NTPC had defaulted in making available to JITF, the MGQ of coal during the first year of the operating period, JITF transported, to the FTTP, the entire quantity of 0.775 MMT which had been made available by NTPC.

31.8 It was further submitted by JITF that NTPC never had any intention of complying with the statutory requirement of providing, to JITF, the MGQ of 3 MMTPA of coal. It was pointed out that NTPC had never imported 3 MMT of coal in any calendar year. The figures disclosed by NTPC for the period 27 February 2013 to 16 November

2016 indicated that the total quantity of coal allocated for transportation through inland waterways was only 3.115 MMT over all these years. During the first year of the Operating Period, even as per the documents submitted by NTPC, tenders had been floated for obtaining only 0.21 MMT coal. In the next year post COD, NTPC did not issue any tender for importing coal. This indicated that the policy of importing coal and transporting the imported coal through inland waterways had not found favour with NTPC, which had decided, therefore, to drastically reduce the quantity of coal imported. Though this resulted in considerable savings to NTPC, it amounted to a breach of NTPC's obligations under Article 7.3 of the TPA.

31.9 JITF further contended that the MGQ had never been changed by the parties. There was no reduction of the MGQ of 3 MMTPA as envisaged by Article 7.3 of the TPA.

31.10 It was further submitted by JITF that the responsibility of obtaining environmental clearance was not of JITF but of NTPC. The environmental clearance was not for transportation of the coal or relatable to the TPA, but was for setting up of the original Thermal Power Project. Environmental clearance had originally been granted by the MOEFCC to NTPC on 7 February 2007. Consequent to the decision to commence procuring of imported coal and transport the imported coal from inland waterways to the FTPP, the environmental clearance originally granted on 7 February 2007 was required to be modified after assessing the environmental impact of transport of the imported coal through inland waterways. For this, NTPC had to approach the MOEFCC for obtaining the necessary environmental clearance. Having failed to do so, NTPC was in default. JITF submitted that instead of accepting this fact, NTPC started insisting that JITF obtain the environmental clearance.

31.11 The reason for not being granted environmental clearance for 3 MMTPA was because NTPC had failed to conduct the necessary studies to the satisfaction of the MOEFCC. The default was, therefore, on NTPC's part and NTPC could not, therefore, plead *force majeure*.

31.12 Expanding on this submission, JITF pointed out that NTPC had, on 3 October 2006, submitted a proposal for grant of environmental clearance in terms of Environmental Impact Assessment Notification[49] dated 14 September 2006 for setting up of 500 MW TTP. Coal, for the purposes of the FTPP, was to be obtained from mines at a distance of about 80 km by road. Environmental clearance was granted, in respect to the said application, by the MOEFCC, on 7 February 2007, valid for a period of five years. Para 6 of the communication of the MOEFCC granting environmental clearance clearly stated that if there was any deviation or alteration in the project from that which was submitted to the MOEFCC for clearance, NTPC was required to make a fresh reference to the MOEFCC to assess adequacy of the conditions imposed, and incorporate additional environmental protection measures required, if any. The project conceived under the TPA, executed on 11 August 2011, was for carriage of blended coal through inland waterways and not through rail or road. The aspect of environmental impact of the said project had, therefore, to be considered afresh. A fresh reference to the MOEFCC by NTPC was,

[49] "EIA Notification", hereinafter

therefore, necessary.

31.13 The environmental clearance obtained by NTPC had, therefore, nothing to do with the project envisaged under the TPA, as the proponent of the project environmental clearance had necessarily to be obtained by NTPC, as per amendment dated 6 April 2011 to the EIA Notification dated 14 September 2006. A fresh application for obtaining environmental clearance was also required as per para 6 of the earlier environmental clearance granted *vide* letter dated 7 February 2007. In as much as environmental clearance was being granted for the entire TPA and not merely the project envisaged under the TPA, the responsibility of obtaining environmental clearance was wholly of NTPC and not of JITF.

32 Analysis by learned Arbitral Tribunal

32.1 The learned Arbitral Tribunal found substance in JITF's contention that, as there was a change of the policy with respect to the manner in which coal was to be procured and transported, with a decision having been taken to procure imported blended coal and convey it to the TPP through Inland Waterways, it was NTPC's responsibility, even before issuing the tender for the present project, to obtain environmental clearance from the MOEFCC, as this amounted to a deviation from the earlier manner of procurement of coal for which environmental clearance had been granted on 7 February 2007. NTPC ultimately applied to the MOEFCC, seeking permission to use blended coal and transport the blended coal to the FTPP through NW-1 on 22 May 2012. The application referred to the earlier environmental clearance granted by the MOEFCC on 7 February 2007. This application was considered by the reconstituted Expert Appraisal Committee[50] on EIA for thermal power and coal mining projects, regarding the requirement or possibility of amending the environmental clearance already granted. The minutes of the meeting of the reconstituted EAC had been placed on record by JITF as Annexure C-12 to the SOC. The EAC came to the conclusion that the likely impact on fisheries was an issue which required to be examined. Accordingly, the EAC directed the initiation of a study to examine a disaster management strategy including fire and oil spill impact on marine life, ecology etc,. and submission of the study report so that further consideration for continuing transportation of imported coal through Inland Waterways could be examined. NTPC was, however, not able to produce the necessary study report within the time granted by the EAC. It applied, therefore, for extension of time on 31 July 2014. One year's extension was granted, which also came to an end on 30 July 2015. As there was no requisite report even by that date, the EAC, in its meeting dated 26 June 2015, recommended for continuation of the permission for transportation of imported blended coal through Inland Waterways upto a maximum of 1.5 MMTPA for a period of one year till 30 July 2016, subject to NTPC submitting the present findings of the study after a period of six months.

32.2 These facts, held the learned Arbitral Tribunal, made it clear that the environmental clearance obtained by NTPC was for the TPP and that, therefore, NTPC ought to have obtained modified environmental clearance for using imported blended coal and

[50] "EAC", hereinafter

transportation thereof through Inland Waterways before commencement of execution of the project envisaged by the TPA. As NTPC could not carry out the requisite study within the time granted by the EAC, the EAC allowed importation and usage and transport only of a reduced quality of coal. Thus, therefore, held the learned Arbitral Tribunal, as the default was on the part of NTPC, it could not constitute either a change in law or a *force majeure* event. JITF was not concerned or involved in this exercise, as the environmental clearance related to the entire Thermal Power Plant and not to the project envisaged by the TPA.

32.3 The learned Arbitral Tribunal also noted that there had been in fact no change in Article 7.3 of the TPA. The MGQ envisaged by the said Article remained the same, i.e., 3 MMTPA. No alternation was effected thereto.

32.4 The learned Arbitral Tribunal next adverted to Article 7.1(a)(ii) of the TPA. It was noticed that this clause obligated NTPC, through its ICS, to ensue delivery of coal at the transfer point on Fairly Even Spread[51] basis and also to furnish, to the ICS, a quarterly schedule of quantity with a tentative month wise breakup proposed to be delivered at the TPP. The learned Arbitral Tribunal found substance in JITF's contention that NTPC had not only failed to ensure delivery of the MGQ at the transfer point, but had also failed to furnish the ICS a quarterly schedule of quantity with tentative month wise breakup of the quantity of imported coal proposed to be delivered at the power

[51] "FES", hereinafter

station. The learned Arbitral Tribunal further observed that, even in the arbitral proceedings, no such quarterly schedule of quantity, required to be prepared by NTPC and disclosed to the ICS, was produced.

32.5 The learned Arbitral Tribunal found no substance in NTPC's repeated emphasis on the fact that it had entered into arrangements with the ICS for supply of coal. The learned Arbitral Tribunal held that there was no evidence to indicate that 3 MMTPA of coal, as required by Article 7.3, was ever delivered to NTPC at the transfer point. Documentary evidence placed on record by JITF indicated that NTPC had not even instructed the ICS to supply the requisite quantity of coal to meet the MGQ requirement. The evidence which had been produced on record by NTPC also established that the quantity of coal in respect of which NTPC had contracted with the ICS was far less than the MGQ. In the first year of operation post COD, NTPC had supplied only 0.746 MMT coal, with a shortfall of 1.9534 MMT. The entire quantity of coal made available by NTPC had been transported by JITF to the FTPP through NW-1.

32.6 The learned Arbitral Tribunal also found substance in JITF's emphasis on the fact that, during the entire period from 2013 to 2017, only 3.115 MMT of coal had been procured.

32.7 It was further observed by the learned Arbitral Tribunal that the additional documents filed with the counter claim of NTPC contained the various Notifications of Award[52] of contract for purpose of imported coal by NTPC. The figures in these NOAs tallied with the figures in the table prepared by JITF. The last NOA dated 13 August 2015 issued by NTPC was in respect of a tender issued in February 2015. Post COD, NTPC did not issue any tender for import of coal.

32.8 The learned Arbitral Tribunal noted that RW-3 Amber Kumar, in his cross examination, had been specifically called upon to disclose any document which proved that NTPC had procured 3 MMT of coal in any year for transportation through Inland Waterways. RW-3 relied on the tender awarded in August 2015 which was for a quantity of 2.25 MMT. This document, too, noted the learned Arbitral Tribunal, indicated that the award of tender was not just for transportation to FTPP through Inland Waterways but also covered five other power stations of NTPC. For the FTPP, the quantity allocated for transportation was a mere 0.21 MMT.

32.9 Thus, there was no evidence to indicate that (i) NTPC had made requisite efforts for obtaining the environmental clearance for transportation of imported blended coal through the Inland Waterways before commencement of execution of the project under the TPA or (ii) it had actually made available the MGQ of 3 MMTPA during any year.

32.10 The learned Arbitral Tribunal thereafter proceeded to examine the entitlement of JITF, as a consequence of these defaults by the

[52] "NOA", hereinafter

NTPC. It was noted, in the arbitral award, that JITF had made substantial investments in the CUMHS. The payment mechanism under the TPA and the CTA was such that JITF would obtain return on the investments through payments made for transportation of the coal made available at the transfer point by NTPC. In view of the incorporation of the MGQ in Article 7.3 of the TPA, it was inferable that, at the time of envisaging the project, the operator was to recover the costs of infrastructure and other operational expenses, along with a reasonable profit, over a period of seven years, during each of which year it was entitled to be supplied the MGQ of 3 MMTPA of imported coal. This requirement of providing, to JITF, the MGQ of 3 MMTPA every year, as contained in Article 7.3 of the TPA, was not subject to any condition precedent, save fixing of the COD. Inasmuch as the entire scheme of the project was based on this guarantee and the draft TPA was drafted by NTPC/IWAI with no ambiguity in the clause, the learned Arbitral Tribunal held that it was binding on NTPC.

32.11 The learned Arbitral Tribunal noted that, during the first year of the operation period, from 15 June 2015 to 14 June 2016, NTPC made available only 0.746 MMT and, during the second year of the operation period from 15 June 2016 to 14 June 2017, NTPC made available only 0.2 MMT of imported coal for transportation by JITF. JITF ensured that the entire quantity of coal made available was transported by it through NW-1 to the FTPP. The shortfall quantity for the first year of the operation period was 1.9534 MMT and for the second year of the operation period was 2.408 MMT. The contractual entitlement of JITF, when tallied against the MGQ amount was, therefore, ₹ 158,50,05,003/- for the first year of the operation period and ₹ 197,81,13,512/- for the second year.

32.12 Following this analysis, the learned Arbitral Tribunal holds thus, in paras 128 to 131 of the arbitral award:

> "128. NTPC during the entire Arbitration proceedings, failed to show any evidence that it has actually placed order for imported coals for a particular year to be transported through inland waterways for its Farakka plant for 3 MMT. Despite repeated questions from the Tribunal, NTPC has not come up with any clear answer. The documents filed by NTPC like contract for supply of coal (from 2013 to 2017, NTPC entered into contracts for only 3.115 MMT of imported coal through waterways) also does not reflect that at any given year during the operation period, it has placed orders for supply of 3 MMT imported coal. In Minutes of Meeting dated 13.10.2016 between IWAI, NTPC and JITF, the NTPC admitted that it did not give 3 MMTPA to JITF.
>
> 129. However, as per TPA, it was the obligation of NTPC to provide the coal at the transfer point and which admittedly, NTPC has failed to do. Admittedly, JITF delivered the entire quantity of coal i.e. 0.746 MMT that was made available to it at Transfer Point in the First Year Operation Period.
>
> 130. Further, from the documents filed by NTPC, it is clear that the total allocation for waterways for this project (i.e. from October 2013 to June 2017) was 2.33 MMT.
>
> 131. The main trigger point for Article 7.3, i.e., the failure of NTPC to provide coal at the transfer point, is satisfied in the present case, as it has failed to show any evidence that it actually provided coal to the tune of 3 MMT per annum at the transfer point and in absence of any evidence in that regard, Article 7.3 triggers and JITF is eligible to get the MGQ amount."

32.13 The learned Arbitral Tribunal, thereafter, proceeds to examine JITF's claim for payment of the guaranteed MGQ amount for the second year of the operation period. On reasoning which is broadly similar to that adopted by the learned Arbitral Tribunal in respect of the first year, JITF's claim for the second year was also found to be justified. The learned Arbitral Tribunal observed, in the arbitral award, that

(i) NTPC had never disputed the annual statement or computation, therein, of the MGQ amount or the shortfall of coal supply, as provided by JITF for the second year of the operation period and had, thereby, waived its right to raise any dispute regarding the MGQ amount or the shortfall in making available the MGQ during the second year,

(ii) admittedly, the entire quantity of imported coal of 0.292 MMT provided by NTPC was delivered by JITF to the FTPP during the second year,

(iii) the fact that NTPC was neither ready nor willing to provide JITF the MGQ of coal for the second year of the operation period was apparent from the fact that

(a) the last tender issued by NTPC for obtaining imported coal was in February 2015, before the commencement of the second operation period, and

(b) NTPC's own Annual Statement for the year 2016-2017 expressly stated that, during the said year, NTPC had imported 1.09 MMT of coal and had, by thus reducing coal imports by 85%, saved ₹ 8000 crores,

(iv) Article 7.1(a)(iii) of the TPA obligated NTPC to provide imported coal at the transfer point on FES basis,

(v) MOEFCC had, on 3 February 2017, granted extension of permission to import coal up to 31 Mach 2018 and had also allowed import of coal up to 3 MMTPA, from the permissible limit of 1.5 MMTPA for the first year of the operation period,

(vi) despite this NTPC, failed to provide, even during the second year of the operation period, the guaranteed MGQ of 3 MMTPA as per Article 7.3,

(vii) though the reconstituted EAC had granted extension to NTPC for transportation of coal up to 30 July 2016 with a direction to NTPC to submit findings of the study as ordered by it, NTPC made an application for extension of environmental clearance only five days prior to the expiry of the existing environmental clearance on 25 July 2016,

(viii) in such circumstances, NTPC could not seek to benefit by its own wrong and plead *force majeure* owing to non availability of environmental clearance beyond 30 July 2016,

(ix) thus, all circumstances envisaged in Article 7.3 of the TPA, as would justify JITF's claim for payment of the MGQ amount stood satisfied,

(x) the only pre condition for triggering of JITF's entitlement to the MGQ amount under Article 7.3 was providing of the COD by NTPC, and it was not in dispute that the COD had been achieved on 15 June 2015 as duly certified by NTPC, and

(xi) inasmuch as the entitlement of JITF to the MGQ amount was dependent only on achieving of COD, and the COD of 15 June 2015 had been certified by NTPC itself, JITF was *ipso facto* entitle to be paid the entire MGQ amount for the period of seven years from the date of the COD.

32.14 The learned Arbitral Tribunal further observed that, during the proceedings, a query had been posed to NTPC, by the learned Arbitral Tribunal, as to how JITF would be recompensed if the guaranteed MGQ of coal was not provided by NTPC, to which NTPC responded that it would pay the MGQ amount as per Article 7.3 of the TPA. In that view of the matter, NTPC could not dispute the entitlement of JITF to be paid the MGQ amount in terms of Article 7.3 of the TPA, especially as, on its own showing and on the basis of documents on record, it was clear that NTPC had stopped importing coal from the 2016-2017 financial year.

32.15 Following the above reasoning, the learned Arbitral Tribunal, in para 151 of its arbitral award, awarded, to JITF, the claim of ₹ 158,50,05,003/- towards the MGQ amount for the first year of operation period and ₹ 197,81,13,512/- towards the MGQ amount for the second year of the operation period.

33 The Impugned Judgment

33.1 From paras 128 to 132, the impugned judgment merely sets out the discussion and conclusion of the learned Arbitral Tribunal on Claims 3 and 3A. Thereafter, in para 133, the learned Single Judge has observed that the learned Arbitral Tribunal has "taken a literal and strict interpretation of Article 7.3 and has simply awarded the amount on the basis of the shortfall quantity". In para 134, the learned Single Judge proceeds to observe that even if, *arguendo*, it were to be presumed that NTPC did not obtain environmental clearance in time, "the fact of the matter" was that the importable quantity of coal was reduced from 3 MMT to 1.5 MMT with effect from 30 July 2015.

33.2 Thereafter, after referring to the judgment of the Supreme Court in ***Nabha Power Ltd. v. Punjab State Power Corporation Ltd***[53], the learned Single Judge identifies what, according to him were the issues involved in respect of Claims 3 and 3A thus, in para 136:

> "The core question in the present case is whether the damages that have been awarded by the learned Tribunal by inserting Clause 7.3, at all the faces, be it pre-COD or post-termination, fulfils the test of "business efficacy". Secondly, whether the view of the Tribunal of calculating the MGQ at the rate of 2 MMTPA or 3 MMTPA, even after its reduction by the EC to 1.5 MMTPA passes the test of reasonableness."

33.3 Thereafter, in para 137, the learned Single Judge observes and holds as under:

> "137. It is also necessary to refer to Section 28, sub-section 3 of the A&C Act, which also mandates that the learned Arbitrator shall take into account the terms of the contract and trade usages applicable to the transaction. It is correct that the Courts are required to keep their hands off and follow the policy of minimum judicial intervention, but at the same time, the awards should be such that it should not prick the conscience of the Court. It is also to be seen that when the quantity of coal had been reduced, the "Doctrine of impossibility or doctrine of frustration" of performing the contract would come into play. The NTPC had argued consistently that they had contractual arguments close to 4 MMT of coal, out of which, 1.5 MMT was reserved solely for Farakka TPP which was more than the quantity permitted by the EC for the First Year Operation Period. It has also been argued that Clauses D and E of the bid document dated 09.02.2015 confers flexibility and empowers NTPC to make revisions in the quantity allocated not only from one mode of transportation to another but also from one Station to another, depending upon the requirement. It has consistently been pleaded that as per Clause 7.1, the coal was to be provided on a fairly evenly spread basis and NTPC was to furnish ICS, a quarterly schedule of quantity with a tentative month-wise break up proposed to be delivered at the Power station. It was the responsibility of the international coal supplier and the JITF to coordinate and distribute the quarterly coal supplies in all the months of the quarter. The learned AT has attributed the entire default to NTPC. Arguments raised by learned SG that the respondent never adhered to the time schedule of unloading and

[53] **(2018) 11 SCC 508**

transportation of 1200 MT per day within 5 days, and their average unloading weight was 8300 MT per day and the minimum and maximum time taken for coal transportation was 34 days and 163 days as against 5 days, cannot be just brushed aside."

33.4 The learned Single Judge then refers to the affidavit in evidence of CW1 Shishir Chandra Gupta regarding delays which were not attributable to NTPC, and agrees with the submission of the learned Solicitor General that these admissions were not taken into account by the learned Arbitral Tribunal.

33.5 The impugned judgment then proceeds, in para 140 to 142, to hold as under:

> "140. It is pertinent to mention that learned AT irrespective of the directions of MoEF has calculated the shortfall, taking into account 3 MMT. It is quite surprising how the NTPC could have violated the directions given by authority and opened itself to various kinds of prosecutions and adverse consequences. The perseverance of the environment is the duty of one and all and violation of the same cannot be allowed to be carried out at any cost. It becomes the statutory obligation of everybody to comply with the directions relating to the environment. Thus, the finding of the learned Arbitral Tribunal in calculating the MGQ taking into account 3 MGQ on the face of it, is perverse. In regard to the responsibility of getting the EC, the learned AT has proceeded on the premises that NTPC being the project proponent, was required to take the EC. However, in this regard, it is necessary to refer to the following provisions of the TPA:-
>
> > "Article 3.1C (ii) puts an obligation on the operator to procure all applicable permits/licenses/clearances, unconditionally, or if subject to conditions, then all such conditions must have been satisfied in full and such applicable permits/licenses/clearances are kept in full force and effect during the construction and operation of the project."
>
> It is also necessary to refer to clause 7.1C (vii) which puts an obligation on the operator to comply with all applicable laws and obtain all applicable permits in all material respects.

141. It is also pertinent to mention here as borne out from the record that NTPC, vide letter dated 25.02.2014, invited the attention of the respondent to the condition precedent of the operator which is in response to the letter of the respondent dated 20.02.2014, whereby, a request was made for reimbursement of fee against studies awarded by JITF on CIFRI for environmental clearance of Farakka IWT Project. NTPC, inviting the attention on the provisions of TPA and clause 3.1C of the TPA reiterated that all the clearances required for the project are to be taken by the operator. It is also pertinent to mention here the letter dated 30.04.2014, which was also related to the operational delays on the part of the respondent. The perusal of the record indicates that consent to operate the project dated 16.09.2016 was taken by the respondent and the responsibility of NTPC was limited to facilitating the clearance. The Court considers that after reduction by MoEF in the First Year Operation Period from 3 MMTPA to 1.5 MMTPA, has to be taken into account. It is a basic principle that what is prohibited by law cannot be directed to be enforced in any manner.

142. The learned AT has also allowed the claim of the JITF towards reimbursement of Rs.42,93,914/- on account of the fee paid to CIFRI on the ground that NTPC is required to obtain prior EC for the use of blended coal and for transportation of coal from Sandheads to Farakka TPP through NW-1. It was also noted that on account of the delay on the part of NTPC to undertake the study, JITF engaged CIFRI on behalf of NTPC, in the interest of the Project for conducting the required study and informed NTPC vide its letter dated 20.02.2014 that the subject study report had been issued to CIFRI on behalf of NTPC to avoid delay. Learned AT rejected the contention of NTPC that in an internal meeting of NTPC, IWAI and JITF, it was decided that JITF would conduct the study and also did not agree to discharge NTPC of its obligations as IWAI had agreed to pay JITF the cost of CIFRI. The discussion made hereinabove makes it clear that it was not the responsibility of the petitioner to take EC clearance. It has to be understood that initial EC was taken by NTPC for main Project. However, subsequently, TPA was executed for the project, and the terms of the TPA specifically provides it to be the responsibility of JITF. Therefore, on the face of it, the NTPC cannot be held liable for this."

34 Analysis

34.1 We feel, with respect, that the findings of the learned Arbitral

Tribunal with respect to Claims 3 and 3A were practically impregnable to challenge. The learned Arbitral Tribunal has, essentially, held that as there was a failure on the part of NTPC, to make available to JITF, during the first and second years of the operation period following the COD, the MGQ of imported coal, and as the plea of change in law and *force majeure* was unsustainable, the inexorable consequence in law was that JITF was entitled to be paid on the basis of MGQ rates envisaged in Article 7.3 of the TPA. It is difficult to understand how this finding could invite interference, much less under Section 34 of the 1996 Act. By no stretch of imagination, into our mind, can it be said that the observations and the findings of the learned Arbitral Tribunal suffered from patent illegality, as the learned Single Judge has chosen to hold.

34.2 There is no dispute about the fact that NTPC did not make available, to JITF, during the first and second years of the operation period, the MGQ of coal as required by Article 7.3.

34.3 The plea of NTPC that, by virtue of the reduction in the permissible quantity of imported coal, which could be transported by inland waterways, by the MOEF, to 1.5 MMTPA, Article 7.3 of the TPA automatically stood modified, had merely to be urged to merit rejection. The law does not recognize any such modification of terms of a contract entered into between the parties of their own volition. Any modification of the TPA could only be by consent of the parties. The learned Arbitral Tribunal correctly noted that Article 7.3 of the TPA remained unchanged throughout its life. The MGQ of 3 MMTPA, specifically stipulated therein, was never changed, much less altered to 1.5 MMTPA or any other figure.

34.4 The result is that *the impugned judgment, in fact, is contrary to the terms of the contract*. Though Article 7.3 of the TPA always held, and continued to hold, that NTPC was required to provide an MGQ of 3 MMTPA imported coal during all 7 years following the COD, i.e. during the entire operation period, the learned Single Judge, in the impugned judgment, modified this figure of 3 MMTPA to 1.5 MMTPA. This amounts to re-writing the contract. Re-writing of a contract is by itself a fatal flaw in any arbitral award. *In the present case, in fact the position is that, while the learned Arbitral Tribunal applied Article 7.3 as it stood, the learned Single Judge has modified Article 7.3 by substituting the figure of 3 MMTPA contained in the said clause to 1.5 MMTPA following the communication dated 30 July 2015 of the MOEFCC. Even on this sole ground, we are of the opinion that the impugned judgment of the learned Single Judge cannot sustain.*

34.5 The plea of *force majeure* and change in law as advanced by NTPC, were rightly rejected by the learned Arbitral Tribunal. *Force majeure* was urged by NTPC on the ground that the MOEFCC had, by its communication dated 30 July 2015, reduced the quantity of importable blended coal from 3 MMTPA and granted environmental clearance for importation of blended coal only to the extent of 1.5 MMTPA. This, could not, however, constitute *force majeure*, as the decision to allow importation and transport by inland waterways of only 1.5 MMTPA imported coal was entirely attributable to defaults on the part of the NTPC. NTPC failed to provide the necessary study report to the reconstituted EAC, regarding the possible adverse effects on marine, ecology and life, in the event of spillage and other such mishaps during carriage of the coal by the waterways. The learned Arbitral Tribunal held that a party cannot plead *force majeure* on the basis of circumstances which have arisen owing to its own defaults.

34.6 The impugned judgment does not, however, advert to this aspect at all.

34.7 In fact, in para 136, the impugned judgment has noted one of the "core questions" arising for considerations as "whether the damages that have been awarded by the learned Arbitral Tribunal by inserting Article 7.3 at all the faces, be it pre-COD or post termination fulfils the test of business efficacy. To our mind, no such issue really arose for consideration in so far as Claims 3 and 3A were concerned. The simple issue for consideration was whether the learned Arbitral Tribunal was correct in directing payment, by NTPC to JITF, of the amount to which JITF would have been entitled during the first and second years of the operation period, had NTPC adhered to its contractual obligation to provide 3 MMTPA imported coal for transportation in each of these years. Considerations of business efficacy could find no place in such a deliberation which was entirely based on the express wordings of Article 7.3 of the TPA.

34.8 The second issue arising for consideration, as per the learned Single Judge in para 136 of the impugned judgment, too, to our mind, does not really arise. The learned Single Judge has identified the second issue as being "whether the view of the learned Arbitral

Tribunal of calculating the MGQ at the rate of 2 MMTPA or 3 MMTPA, *even after its reduction by the EC to 1.5 MMTPA* passes the test of reasonableness". No such issue arose for consideration, either, to our mind, as the MGQ of 3 MMTPA, stipulated in Article 7.3 of the TPA, was never altered. The EC could not have altered the terms of the TPA executed among NTPC, JITF and IWAI. The learned Single Judge has, therefore, to our mind, misdirected himself by presuming that there was a reduction of the stipulated MGQ of 3 MMTPA, specified in Article 7.3 of the TPA, to 1.5 MMTPA. No such modification took place in any point of time.

34.9 Thus, the impugned judgment proceeds by failing, at the very outset, to identify the actual issue in controversy.

34.10 Once there was failure, on the part of NTPC, in making available the statutory MGQ of imported coal during the first and second years of the operation period, and NTPC could not avail the defence of *force majeure* or change in law, the only sequitur in law would be that NTPC would be liable to pay, to JITF, the MGQ amount worked out in terms of the Article 7.3 of the TPA. The working of this amount had specifically been provided by JITF along with its SOC, and the computation thereof has never been disputed in any point of time. In any event, the computation was based on the terms of Article 7.3 of the TPA themselves, and was not, therefore, open to question.

34.11 The learned Single Judge has also, to our mind, erred in importing the principle of impossibility or frustration of contract.

Frustration of contract cannot be pleaded by a party who is itself responsible for the circumstances in which, according to the party, it was rendered impossible to execute the contract.

34.12 The reliance, by the learned Single Judge, on the affidavit in evidence of CW1 Shishir Chandra Gupta is also, to our mind, misguided. Paras 69 and 165 of the said affidavit, on which the learned Single Judge places reliance, and which stand reproduced in para 138 of the impugned judgment, read thus:

> "69. I say that the bottlenecks being faced by the Claimant were in the knowledge of the Respondent. I say that the Respondent stated that after having gone through the problem of less frequency of barge movement, the Respondent identified the following difficulties, apart from other issues, namely (i) inadequate night navigation lights and markers for night navigation; (ii) frequently changing channel depth, and with shifting of channels, the same are not marked; and (iii) Vessels keep waiting at Farakka and Kolkata due to shortage of pilots of IWAI; (iv) Bridge Pillars are not marked and lighted which is dangerous for night navigation. I say that the Respondent asked IWAI to initiate required action to increase the barge operation for more coal intake at Farakka. I refer to Respondent's letter dated 16 January 2014 which is exhibited herein as Exhibit CW-1/25.
>
> 165. I state that the Claimant vide a separate letter dated 20 January 2016 (Annexure C-39of the Amended Rejoinder to the Statement of Defence) addressed to IWAI and marked copy to the Respondent, highlighted the alarming level of decrease in the water availability which was 1.5-1.7 meters in the Farakka jetty area and 2 to 2.3 meters in Chain age 333, 388, and 529. The Claimant also informed that 9 of its barges which were carrying parcel load of just 1,250 MT were stuck in the channel at that time due to the sudden drop of 30 cms. of water level in 24 hours. I state that the Claimant requested IWAI to take immediate measures to increase the navigational depth in the channel enabling the Claimant to comply with the cargo requirements due to the reason that the barge movements were on hold as a result of the shortage in water levels, which consequently caused pile up of cargo at Transfer Point and an OGV waiting to be unloaded at anchorage with 70,000 MT, the Claimant vide the said letter also highlighted that

> the decrease in water levels was resulting into delays in unloading of cargo and deviation from import schedule as agreed between the Claimant, the Respondent, and the ICS, which was not attributable to the Claimant."

Following the extracts of the above paras from the deposition of CW1, the learned Single Judge observes, towards the beginning of para 139 of the impugned judgment, that the learned Solicitor General had rightly stated that these admissions were not taken into account by the learned Arbitral Tribunal.

34.13 To our mind, the "admissions" contained in the afore-extracted paras from the affidavit in evidence of CW1 do not in any way answer the issue of short supply of imported coal by NTPC to JITF during the first two years of the operation period, following the COD. As such, we do not see how these passages from the affidavit in evidence of CW1 would militate against the award rendered by the learned Arbitral Tribunal in respect of Claims 3 and 3A of JITF.

34.14 We are also unable to agree with the observations and findings of the learned Single Judge that the obligation of NTPC to provide the MGQ of imported coal to JITF, as envisaged by Article 7.3 of the TPA, stood reduced from 3 MMTPA to 1.5 MMTPA. The learned Arbitral Tribunal has correctly held that this reduction took place only because of the failure on the part of NTPC to obtain environmental clearance which, in turn, was attributable to its own defaults. The learned Single Judge has not, at any point of the impugned judgment, dealt with the learned Arbitral Tribunal's finding that NTPC, as the project proponent, was required to obtain environmental clearance. The learned Arbitral Tribunal has correctly relied, in this context, on amendment dated 6 April 2011 to the EIA notification dated 14 September 2006. For ready reference, the relevant clauses of the notification and the amendment may be reproduced as under:

14th September, 2006

EIA Notification

S.O. 1533 Whereas, a draft notification under sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986 for imposing certain restrictions and prohibitions on new projects or activities, or on the expansion or modernization of existing projects or activities based on their potential environmental impacts as indicated in the Schedule to the notification, being undertaken in any part of India1, unless prior environmental clearance has been accorded in accordance with the objectives of National Environment Policy as approved by the Union Cabinet on 18th May, 2006 and the procedure specified in the notification, by the Central Government or the State or Union territory Level Environment Impact Assessment Authority (SEIAA), to be constituted by the Central Government in consultation with the State Government or the Union territory Administration concerned under sub-section(3) of section 3[54] of the Environment (Protection) Act, 1986 for the purpose of this notification, was published in the Gazette of India, Extraordinary, Part II, section 3, sub-section (ii) vide number S.O. 1324 (E) dated the 15th September ,2005 inviting objections and suggestions from all persons likely to be affected thereby within a period of sixty days from the date on which copies of Gazette containing the said notification were made available to the public;

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Now, therefore, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of section 3 of the Environment (Protection) Act, 1986, read with clause (d) of sub-rule (3) of rule 5 of the Environment (Protection) Rules, 1986 and in supersession of the notification number S.O. 60 (E) dated the 27th January, 1994, except in respect of things done or omitted to be done before such supersession, the Central Government hereby directs that *on and from the date of its publication the required*

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[54] **3. Power of Central Government to take measures to protect and improve environment.—**

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(3) The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under Section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the powers or perform those functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.

construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to this notification entailing capacity addition with change in process and or technology shall be undertaken in any part of India only after the prior environmental clearance from the Central Government or as the case may be, by the State Level Environment Impact Assessment Authority, duly constituted by the Central Government under sub-section (3) of section 3 of the said Act, in accordance with the procedure specified hereinafter in this notification.

(Emphasis supplied)

2. Requirements of prior Environmental Clearance (EC):- The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:

(i) All new projects or activities listed in the Schedule to this notification;

(ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;

(iii) Any change in product - mix in an existing manufacturing unit included in Schedule beyond the specified range.

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6. Application for Prior Environmental Clearance (EC):- An application seeking prior environmental clearance in all cases shall be made in the prescribed Form 1 annexed herewith and Supplementary Form 1A, if applicable, as given in Appendix II, after the identification of prospective site(s) for the project and/or activities to which the application relates, before commencing any construction activity, or preparation of land, at the site by the applicant. The applicant shall furnish, along with the application, a copy of the pre-feasibility project report except that, in case of construction projects or activities (item 8 of the Schedule) in addition to Form 1 and the Supplementary Form 1A, a copy of the

conceptual plan shall be provided, instead of the pre-feasibility report.

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9. Validity of Environmental Clearance (EC): The "Validity of Environmental Clearance" is meant the period from which a prior environmental clearance is granted by the regulatory authority, or may be presumed by the applicant to have been granted under sub paragraph (iv) of paragraph 7 above, to the start of production operations by the project or activity, or completion of all construction operations in case of construction projects (item 8 of the Schedule), to which the application for prior environmental clearance refers. The prior environmental clearance granted for a project or activity shall be valid for a period of ten years in the case of River Valley projects (item 1(c) of the Schedule), project life as estimated by Expert Appraisal Committee or State Level Expert Appraisal Committee subject to a maximum of thirty years for mining projects and five years in the case of all other projects and activities. However, in the case of Area Development projects and Townships [item 8(b)], the validity period shall be limited only to such activities as may be the responsibility of the applicant as a developer. This period of validity may be extended by the regulatory authority concerned by a maximum period of five years provided an application is made to the regulatory authority by the applicant within the validity period, together with an updated Form 1, and Supplementary Form 1A, for Construction projects or activities (item 8 of the Schedule). In this regard the regulatory authority may also consult the Expert Appraisal Committee or State Level Expert Appraisal Committee as the case may be.

MINISTRY OF ENVIRONMENT AND FORESTS NOTIFICATION

New Delhi, the 4th April, 2011

S.O. 695(E).— Whereas by notification of the Government of India in the Ministry of Environment and Forests vide number S.O. 1533(E), dated the 14th September, 2006 issued under sub-section (1) and clause (v) of sub-section (2) of section (3) of the Environment (Protection) Act, 1986 read with clause (d) of sub-rule (3) of rule 5 of the Environment (Protection) Rules, 1986, the Central Government directed that on or from the dates of its publication, the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to the said notification entailing the capacity addition with change in process and or technology shall be undertaken in any part of India only after prior environmental clearance from the Central Government or as the case may be, by the State level Environment Impact Assessment Authority, duly constituted by the Central Government under sub-section (3) of section 3 of the said Act in accordance with the procedure specified therein;

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Now therefore, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of section 3 of the said Environment (Protection) Act, read with clause (d) of sub-rule (3) of rule 5 of the said Environment (Protection) Rules, the Central Government hereby makes the following amendments in the said Notification, namely:-

In the said notification, -

(I) In para 6, for the existing words "An application seeking prior environmental clearance in all cases shall be made", the following words shall be substituted, namely:-

> "An application seeking prior environmental clearance in all cases *shall be made by the project proponent*".
>
> (Emphasis supplied)

34.15 Moreover, as has been correctly noted by the learned Arbitral Tribunal, the environmental clearance was for operation of the entire TPP. The clearance had originally been obtained for 3 MMTPA when coal was being sourced from the quarry located 80 km away. The sourcing of this coal was obviously not by sea, but was by road. While granting environmental clearance for procuring the said coal, the MOEFCC had itself stated that if, at a later point, there was any deviation, NTPC would be required to apply afresh so that the environmental impact of such deviation could be assessed and any further safeguards, if required, could be put in place before granting environmental clearance. It was, therefore, incumbent on NTPC to reapply for environmental clearance once it had decided to use imported coal, transported through Inland Waterways, to the FTPP. The environmental impact of such transportation had necessary to be examined afresh. It was for this reason that the EAC directed NTPC to conduct a study and furnish the report to the EAC. NTPC, despite taking an extension in that regard, could not comply with the request. It was in these circumstances that clearance was granted only for transportation of 1.5 MMTPA of imported coal through Inland Waterways. As such, it could not be said that JITF was remiss, at any point of time, in obtaining environmental clearance.

34.16 The learned Arbitral Tribunal also correctly noted that, even after the EAC had enhanced the quantity of imported coal which could be transported from 1.5 MMTPA to 3 MMTPA by communication dated 3 February 2017, NTPC nonetheless did not provide the MGQ of imported coal to JITF for transportation, nor make any efforts to obtain such quantity. No further tenders were entered into, and no contracts with any ICSs were established for sourcing the MGQ of coal. These factors, along with the annual statement of NTPC which itself indicated that, during the year 2016-2017, NTPC had drastically reduced its procurement of imported coal by substituting it with domestic coal, thereby entailing a saving of over ₹ 8000/- crores, correctly convinced the learned Arbitral Tribunal that NTPC had no intention whatsoever to honour its obligation under Article 7.3 of the TPA.

34.17 For these reasons, we are unable to sustain the findings of the learned Single Judge with respect to the decision of the learned Arbitral Tribunal apropos Claim 3 and 3A of JITF.

34.18 The discussion and findings of the learned Arbitral Tribunal, to our mind, are completely impervious to challenge within the limited scope of Section 34 of the 1996 Act. They reflect not only a plausible, but also a correct appreciation of the law and facts. We are unable to appreciate the findings of the learned Single Judge that the decision of the learned Arbitral Tribunal was liable to be interfered with.

35 We, therefore, sustain the arbitral award, insofar as it allows Claims 3 and 3A of the JITF.

C.III Re. Claim 5A - NTPC's Consultation Notice, Termination Notice and Requisition Notice are illegal, invalid, non-est and of no effect whatsoever

36 Findings of the learned Arbitral Tribunal

36.1 The learned Arbitral Tribunal noted that, in Claim 5A, JITF was challenging the validity of the consultation notice, the termination notice and the requisition notice issued by NTPC and was claiming, as a consequence of illegal termination, damages of ₹ 1108,93,05,000/-.

36.2 JITF's contentions before the learned Arbitral Tribunal, in this regard, were as under:

(i) Re. consultation notice

(a) The consultation notice dated 9 March 2017 was issued by NTPC for matters which were *sub judice* and pending adjudication before the learned Arbitral Tribunal.

(b) JITF replied to the consultation notice on 16 March 2017. NTPC, in its response dated 13 April 2017, required JITF to provide confirmation with respect to only two aspects, i.e. (i) the acceptance of the next Ocean Going Vessel[55] by JITF and (ii) extension of the CTA beyond 31 January 2017. JITF had already accepted the nomination of MV Vishwa Preeti as the next OGV on 6 April 2017. However, MV Vishwa Preeti was diverted by the ICS and could not, therefore, be commissioned. By its letters dated 12 April 2017 and 14 April 2017, addressed to NTPC, JITF accepted the nomination of the next OGV as well. Following this, on 15 April 2017, MV Mary Gorgias was nominated by the ICS. The vessel arrived on 18 May 2017. Prior thereto, on 14 April 2017, JITF had agreed to extension of the CTA as well. This fact was once again intimated by JITF to NTPC on 26 April 2017, in which communication it was stated that JITF had given consent for extension of the CTA and had also accepted nomination of the next OGV. As a result, the aspects noted by NTPC in its communication dated 13 April 2017 stood addressed. The consultation notice thereby was effectively revoked and withdrawn. NTPC did not dispute or rebut the contents of this communication dated 26 April 2017 from JITF.

(c) The fact that the basis of the consultation notice

[55] "OGC", hereinafter

issued by NTPC to JITF no longer survived was further manifest from communication dated 3 May 2017 from NTPC to IWAI, in which it was specifically stated that, as the OGV had been nominated and accepted by JITF, and 5.5 LMT coal was yet to be delivered, there was no requirement for any further meeting between NTPC and JITF. The letter specifically stated that NTPC was looking forward to early resumption of operations by JITF.

(d) As a result, the consultation notice initially issued by NTPC to JITF and followed by communication dated 13 April 2017 stood worked out.

(ii) Re. termination notice

(a) Despite the satisfaction of the consultation notice issued by it, NTPC proceeded to issue the termination notice on 24 July 2017.

(b) The termination notice alleged events of default by JITF in excess of the events of default stated in the consultation notice.

(c) The termination notice was a mere facade, as, even prior to its issuance, NTPC had written to IWAI on 17 May 2017 that it had stopped further procurement of imported coal and was substituting imported coal with domestic coal, which had resulted in considerable financial benefit to NTPC of over ₹ 8000 crores. This indicated that NTPC had no intention to perform its obligations under the TPA and that it had terminated the TPA merely so as to escape its performance.

(d) The termination of the TPA was also a knee jerk reaction to the order dated 15 July 2017 of the learned Arbitral Tribunal on JITF's Section 17 application, by which the learned Arbitral Tribunal had directed NTPC to pay, to JITF, the MGQ for the first operation period of ₹ 158.50 Crores.

(e) The fact that NTPC had no intention of continuing to obtain imported coal, thereby rendering it impossible for JITF to transport any such coal, was further manifest from the Annual Report of NTPC for the year 2016-2017, which clearly stated that, during the year 2016-2017, NTPC had imported 1.09 MMT of coal, thereby reducing its coal import by 85%. The Chairman of NTPC also wrote to IWAI on 17 May 2017, stating that NTPC had stopped procuring imported coal and had substituted imported coal with domestic coal.

(f) In these circumstances, it was contended that the termination notice dated 24 July 2017 issued by the NTPC was illegal.

(iii) <u>Re. JITF's obligations</u>

Apropos its own obligations, JITF pointed out that Article 4.1(a)(v) of the TPA required JITF to make all reasonable efforts to deliver the coal unloaded from the OGV within 5 days of unloading. There was no mandate in the TPA or in the CTA requiring delivery of the coal to be made within 5 days, as alleged by NTPC. In the circumstances, ICS had, in its email dated 26 September 2016, of which a copy was also marked to NTPC, accepted 15 days as reasonable time for transport of the coal by JITF.

(iv) Re. Unlawful termination

(a) JITF contended that, owing to the illegal termination of the TPA by NTPC, JITF was left with no coal to transport. There was no way in which it could, therefore, recoup the expenses and investments incurred by it in setting up all the facilities in terms of the TPA. On the other hand, JITF was contractually bound to hand over all the assets to NTPC for a token price of ₹ 1.

(b) In these circumstances, JITF was entitled to damages from NTPC.

(c) JITF contended that the damages had to be decided on the basis of Article 7.3 of the TPA, which represented mutually agreed genuinely pre-estimated damages in case of non-supply of coal. This Clause would also apply in the event of illegal termination of the TPA by NTPC, resulting in default of the obligation to supply the MGQ for the remaining period of the TPA, and inability of JITF to comply with its contractual obligations. NTPC was, therefore, liable to pay, to JITF, the MGQ for the balance term of the TPA, which was worked at ₹ 1108,93,05,000/-, in the alternative to specific enforcement of the TPA.

36.3 After recording the above facts and contentions, the learned Arbitral Tribunal observed that, on facts, it was apparent that the termination of the TPA by NTPC was *mala fide* and not attributable to any default on the part of JITF. NTPC had clearly no intent to continue with the TPA or perform its obligation, under Article 7.3, to provide the MGQ of coal as, at the relevant time, NTPC was relying on domestic coal, which was cheaper than imported coal. That NTPC had no intention of performing its obligations was further manifest by the fact that, even after the termination notice dated 24 July 2017 was stayed by the learned Arbitral Tribunal by order dated 20 December 2017, no step was taken by NTPC to transfer the coal to JITF through the Inland Waterways. In these circumstances, the termination of the TPA by NTPC had to be regarded as *mala fide* and bad in law.

36.4 Inasmuch as NTPC was unwilling to perform its obligations under the TPA, there was a clear irretrievable breach of the TPA by NTPC. This resulted in impossibility of performance of the TPA by JITF.

36.5 As specific performance of the TPA could not be ensured or directed, JITF was entitled to recover damages for the loss suffered by it as a consequence of the illegal termination of the TPA by NTPC.

36.6 The TPA itself contained a genuine pre-estimate of the loss which would be suffered by NTPC in the event of illegal termination, in the form of the guaranteed MGQ. Article 7.3 permitted for a reduction of 32.5% from the MGQ while computing the damages payable to JITF. The scheme of the project was that the operator could recover the expenses and operational costs incurred by it, along with a reasonable profit, through the amounts which were payable to it for transportation of the MGQ of coal by NTPC for 7 years. The MGQ had, therefore, to be treated as representing a genuine pre-estimate of the loss and expense which would be suffered by the operator/contractor, i.e., JITF, as envisaged by Section 74[56] of the Contract Act.

36.7 JITF had constructed the CUMHS out of its own funds and had also invested huge amounts in undertaking the project. It had, therefore, a legitimate expectation that it would be able to operate the system for 7 years so as to recover the costs of the investment and

[56] **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 party complaining of 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.
Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
Exception.—When any person enters into any bail-bond, recognisance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.
Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

earn a reasonable profit. However, owing to the illegal termination of the TPA by NTPC on 24 July 2017, JITF was left with no coal to transport, even while being contractually bound to hand over the assets to NTPC for a token payment of ₹ 1. In these circumstances, Article 7.3 of the TPA was legitimately invocable as representing the genuine pre-estimate of the damages to which JITF would be entitled.

36.8 That NTPC was in complete breach of its obligations under the TPA was also manifest from the fact that, even after the termination of the TPA was stayed by the learned Arbitral Tribunal, NTPC took no step to provide coal to JITF for transportation. Instead, immediately after the second year of the operation period of the TPA, NTPC, of its own, chose not to utilise the project facility for providing the MGQ of coal to JITF, in clear breach of its obligation under Article 7.3 of the TPA. Thus, there was a conscious decision by NTPC not to utilise the MGQ for the remaining period of the TPA.

36.9 In these circumstances, JITF had been reasonable in seeking only the amount to which it was entitled had the TPA continued to remain in effect for the full period of 7 years, as envisaged by Article 7.3 of the TPA, less the discount provided in the said clause.

36.10 Following this reasoning, therefore, the learned Arbitral Tribunal awarded, to JITF, against Claim 5A, the amount claimed of ₹ 1108,93,05,000/-.

37 <u>Impugned judgment of the learned Single Judge</u>

37.1 The learned Single Judge notes, in the impugned judgment, that admittedly there were no operations by JITF for five years after the first two years of the operation period following the COD.

37.2 The learned Single Judge, thereafter, adverts to Sections 73 and 74 of the Contract Act. The learned Single Judge holds, quite correctly, that Section 73 of the Contract Act envisaged damages only on proof of actual loss suffered by the claimant and would not apply to a case of pre-estimated or pre-fixed damages. Inasmuch as the damages awarded by the learned Arbitral Tribunal were not based on actual loss or damage suffered by JITF, Section 73 of the Contract Act would not apply.

37.3 The learned Single Judge thereafter proceeds to advert to Section 74 of the Contract Act. Section 74 of the Contract Act envisages payment of pre-estimated or pre-fixed damages. The learned Single Judge notes, in para 150 of the impugned judgment, that a claimant to damages under Section 74 was not required to prove loss, as Section 74 entitled the plaintiff seeking damages to reasonable damages not in excess of the amount mentioned in the contract.

37.4 The learned Single Judge, thereafter, refers to the judgments of the Supreme Court in ***Fateh Chand v. Balkishan Das***[57], ***Maula Bux v. Union of India***[58], and ***ONGC v. Saw Pipes Ltd.***[59]. Having referred to these decisions, the learned Single Judge proceeds in paras 155 to 157 of the impugned judgment, to reason thus:

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[57] **AIR 1963 SC 1405**
[58] **(1969) 2 SCC 554**
[59] **(2003) 5 SCC 705**

"155. The Court, at the outset, considers that the award of damages by the learned Arbitrator for the five years of contract in which, in fact, no activity has taken place, taking recourse to Clause 7.3 is totally illegal and perverse. If the contract had been terminated rightly or wrongly, Clause 7.3 ceases to exist. In that case, the provisions in Article 14 of the TPA would come into play. It is also an admitted fact that the respondent had not led any evidence for ascertainment of the damages. Therefore, it is a case where apparently, the learned Arbitral Tribunal has travelled much beyond the contractual terms. The Court has no doubt in its mind that the MGQ would remain in currency only during the actual operation of the contract and it comes to an end with the termination of the contract. The view taken by the learned Tribunal by taking Clause 7.3 for the purpose of liquidated damages and that too, "pre-estimated genuine amount of damages" is surely beyond the terms of the contract and is perverse. The Court has no doubt in mind that learned AT has wrongly invoked Clause 7.3 to assess damages pursuant to termination. It is not the case that the contract did not provide consequences of "Termination". In this regard, reference can be made Article 14.1(c), which specifically provides for "compensation" in the event of "termination due to NTPC default". If the argument of respondent is accepted, it would lead to conclusion that NTPC had no right to terminate the contract.

156. In regard to the termination of notice, there is a substance in the argument of learned SG that there were "events of default" which were "underlying in nature". Thus, there were certain defects which were central, fundamental and went to the root of the matter, and included capability of the operator to transport the coal.

157. The attention has been invited during the course of the arguments by the learned SG to the various letters dated 09.03.2017, 13.04.2017, 03.05.2017 and 29.05.2017. It was submitted that these letters/evidences were not taken into account by the learned Arbitral Tribunal which makes the award unsustainable. There is a substance in the argument of learned SG that though, the single instance of default was rectified by the respondent, the overall delay and default were never rectified, which justified the action of NTPC in terminating the contract. Learned AT has invoked Clause 7.3 even post termination of the contract by NTPC, which is also hit by Clause 1.4 of the TPA. Clause 1.4 of the TPA reads as under:

"1.4 Ambiguities within the Agreement

In case of ambiguities or discrepancies within this Agreement, the following shall apply:

> (a) Between two Articles of this Agreement, the provisions of specific Articles relevant to the issue under consideration shall prevail over those in other Articles;
>
> (b) Between the Articles and the Annexures, the Article shall prevail, save and except as expressly provided in the Articles or the Annexures;
>
> (c) Between the dimension scaled from the drawing and its specific written dimension, the latter shall prevail; and
>
> (d) Between any value written in numerals and that in words, the latter shall prevail.
>
> (e) Between the provisions of this Agreement and any other documents forming part of this agreement, the former shall prevail."

37.5 Thus, the reasoning of the learned Single Judge as contained in paras 155 to 157 of the impugned judgment is that

(i) award of damages for a period of five years of the contract in which no activity took place, by recourse to Article 7.3 of the TPA was illegal and perverse,

(ii) once the TPA was terminated, whether legally or illegally, Article 7.3 would cease to exist,

(iii) JITF did not lead any evidence on the basis of which actual damages suffered by it could be ascertained,

(iv) the requirement of MGQ would apply only during the life of the contract and came to an end on termination of the contract,

(v) adoption of Article 7.3 for awarding liquidated damages, treating the MGQ envisaged in the said clause as genuine pre-estimated damages was in excess of the terms of the contract and was *ex facie* perverse,

(vi) the TPA, in fact, provided for the consequence of termination in the form of Article 14.1(c) which, in fact, would be the Article which would apply if it were to be presumed that the termination of the TPA by NTPC was illegal,

(vii) acceptance of JITF's argument would imply that NTPC had no right to terminate the TPA,

(viii) in so far as the finding regarding illegality of the termination itself was concerned, there was substance in the contention of the learned SG that there were events of default which were underlying in nature and that there were certain defects which were central, fundamental and went to the root of the matter, including the capability of JITF to transport coal,

(ix) the learned SG had also correctly pointed out that the letters dated 9 March 2017, 13 April 2017, 3 May 2017 and 29 May 2017 had not been taken into account by the learned Arbitral Tribunal, rendering the award unreasonable,

(x) as the overall default and delay had never been rectified by JITF, the termination of the TPA by NTPC was valid, and

(xi) the invocation of Article 7.3 of the TPA even after its termination by the learned Arbitral Tribunal was violative of Article 1.4 of the TPA, as per which the appropriate clause which would apply, even where the termination of the TPA by NTPC to be regarded as illegal, be Article 14.1(c).

38 Analysis

38.1 In our considered opinion, the learned Single Judge has fundamentally erred in conflating the aspects of compensation in the case of a valid termination of a contract with compensation following illegal breach. If the termination of the contract is illegal, that by itself constitutes a breach of the contract, as held by the Supreme Court in ***Dwarka Das v. State of Madhya Pradesh***[60] and ***J.G. Engineers Pvt. Ltd. v. Union of India***[61].

38.2 The decisions on which the learned Single Judge places reliance namely ***Fateh Chand, Maula Bux*** and ***ONGC***, in fact, militate against the findings in the impugned judgment. We may refer to these decisions, briefly, as under.

38.3 ***Fateh Chand***

38.3.1 The relevant paragraphs from the decision in ***Fateh Chand***, as relied upon by the learned Single Judge, may be reproduced thus:

> "8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjusted in the light of Section 74 of the Indian Contract Act, which in its material part provides:
>
> > "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 party complaining of 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."
>
> 9. The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. *Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages*

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60 **(1999) 3 SCC 500**
61 **(2011) 5 SCC 758**

and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. *The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.*

15. *Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty*. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party

who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. *Such compensation has to be ascertained having regard to the conditions existing on the date of the breach*."

(Emphasis supplied)

38.3.2 It is clear that ***Fateh Chand*** is an authority for the law which emerges from Section 74 of the Contract Act, which permits award of damages on pre-estimated/pre-fixed basis. The following principles emerge from the afore-extracted passages from ***Fateh Chand***:

(i) The fixation of genuinely pre-estimated damages by mutual agreement is regarded as a stipulation naming liquidated damages and is binding upon the parties to the contract.

(ii) As against this, a stipulation for damages *in terrorem* is in the nature of penalty and is, therefore, unenforceable in law.

(iii) Section 74, if it applies, does not require a party to prove actual damage or breach.

(iv) Damages cannot be granted under Section 74 if no legal injury has resulted as a consequence of the breach of contract

(v) Section 74 requires the party guilty of breach of contract to make good the loss or damage to the opposite party, which naturally arose in the usual course of things, or which the parties knew, when they entered into the contract, as likely to result from the breach.

(vi) Section 74, therefore, declared the law as to the liability upon breach of contract where compensation by agreement was pre-determined, as against a stipulation by way of penalty.

(vii) The amount of compensation to be awarded under Section 74 in the form of damages had, however, to be determined by the Court with regard to the conditions applicable on the date of breach.

38.4 ***Maula Bux***

38.4.1 The impugned judgment relies on the following passage from ***Maula Bux***:

> "It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression 'whether or not actual damage or loss is proved to have been caused thereby' is intended to cover different classes of contracts which come before the courts. In case of breach of some contracts it may be impossible for the court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."

38.4.2 In ***Maula Bux***, the Supreme Court held that where the Court is unable to assess compensation, the sum named by the parties, if regarded as genuinely pre-estimated damages, may be taken into consideration as reasonable compensation.

38.5 *ONGC*

38.5.1 The passages from ***ONGC***, cited by the learned Single Judge, read thus:

> 64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in ***Fateh Chand case*** wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, *inter alia* (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him…
>
> *****
>
> 67. …In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach

of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.

68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

38.5.2 From ***ONGC***, the following principles emerge:

(i) If the compensation is by way of penalty, a party would be entitled only to reasonable compensation.

(ii) However, if the compensation in the agreement is in the form of a genuine pre-estimate of the loss suffered by the party as a consequence of breach, which the parties knew as likely to result from breach, there was no question of the party suffering as a result of the breach being required to prove loss. The party was not required, in such a case, to lead any evidence of the actual loss suffered by it.

38.5.3 Applying these principles, the Supreme Court held, in ***ONGC***, that no evidence had been led by the ONGC to show that the compensation sought by Saw Pipes was unreasonable or by way of penalty.

38.6 Once these principles are understood, several clear errors emanate from the reasoning contained in paras 155 and 156 of the impugned judgment.

38.7 The learned Single Judge has held that the termination of the TPA by NTPC, *whether it was legal or illegal*, would result in Article 7.3 of the TPA ceasing to exist. This is a clearly unsustainable finding. If the termination is illegal, it results in breach of contract by NPTC. In the case of breach of contract, JITF becomes entitled to compensation. Award of such compensation in terms of the genuine pre-estimated damages envisaged by the contract was, therefore, totally legal.

38.8 The learned Single Judge further observes that the liability of NTPC to make available, to JITF, the MGQ of coal, in terms of

Article 7.3 of the TPA, survived only during the currency of the TPA and came to an end with the termination of the TPA. To the extent that the liability of NPTC to make the MGQ of coal available to JITF would exist only so long as the TPA remained in force, the observation of the learned Single Judge is correct. However, that is not the issue which arises for consideration. The learned Arbitral Tribunal has treated the MGQ, which would have been payable, had the TPA not been illegally terminated by NTPC and had the TPA subsisted in force for seven years, as constituting a legitimate basis to assess the reasonable compensation to which JITF would be entitled in terms of Section 74 of the Contract Act, treating the MGQ payable in that event as a genuine pre-estimate of damages. There is nothing illegal in this decision of the learned Arbitral Tribunal.

38.9 The third and perhaps most significant error in the reasoning of the learned Single Judge is in his reliance on Article 14.1(c) of the TPA. The learned Single Judge holds that, even if the termination of the TPA was illegal, the compensation to which JITF would be entitled, would have to be reckoned on the basis of Article 14.1(c).

38.10 JITF has correctly pointed out that Article 14.1(c) can have no application at all, as it applies only where there is termination of the contract by NTPC's default. There was no termination of the contract by JITF in the present case on the ground of default by NTPC; ergo, Article 14.1(c) would not apply.

38.11 In fact, there is no provision in the TPA providing for any specified damages in the case of breach of contract by its wrongful termination by NTPC. In such a case, therefore, the Tribunal was justified in working out the reasonable compensation to which JITF would be entitled on the basis of the guaranteed MGQ, as envisaged by Article 7.3 of the TPA, had NTPC not illegally terminated the TPA, and had the TPA subsisted and continued to remain in force for a period of seven years after the COD. The decision of the learned Arbitral Tribunal to treat the guaranteed MGQ, as envisaged by Article 7.3 of the TPA as a genuine pre-estimate of the damages to which the JITF would be entitled is, therefore, entirely in sync with Section 74 of the Contract Act.

38.12 The learned Single Judge further observes that acceptance of JITF's argument would mean that NTPC would have no right to terminate the TPA. This, again, with respect, is a factually and legally unsustainable finding. NTPC had every right to terminate the TPA in the case of an event of default by JITF. The right of NTPC to terminate the TPA would not, however, entitle NTPC to *illegally* terminate the TPA. In the case of breach of contract by JITF, NTPC had the right to terminate the TPA in terms of Article 14.1, in which case the said clause would apply. We are, however, in the present case concerned with illegal termination of the TPA by NTPC.

38.13 In so far as the finding of the learned Arbitral Tribunal to the effect that the termination of the TPA by NTPC was illegal is concerned, there is hardly any traversal in the impugned judgment of the learned Single Judge thereto. All that is said, is contained in paras 156 of the impugned judgment which is already reproduced in para 31.4 *supra*. With respect, the observations in the said paragraphs are totally vague. There is no evidence of any incapability on the part of the JITF to transport coal and fulfil its obligations under the TPA, as has been observed in the said paragraphs of the impugned judgment. The judgment does not, in any way, address the findings of the learned Arbitral Tribunal on the basis of which it was held that the termination of the TPA by NTPC was illegal.

38.14 The findings and reasoning of the learned Single Judge also ignore the fact that the termination of the TPA by NTPC had been stayed by the learned Arbitral Tribunal by order dated 20 December 2017. The stay order continued to remain in effect till the expiry of seven years from the COD. Thus, there was effectively no operative termination of the TPA till expiry of the contractual term. Despite this, there was no further effort by NTPC to satisfy its obligations under the TPA to provide the MGQ of coal to JITF for it to transport the coal to the FTTP. The various communications, to which allusion has already been made hereinbefore, on the other hand, make it absolutely clear that NPTC had, in order to bolster its own finances and save what, according to it, was in the region of ₹ 8,000 crores, taken an informed decision to discontinue procurement of imported coal and instead used domestic coal.

38.15 NTPC cannot, therefore, seek to contend that it had any intention of continuing to perform its obligation of making the MGQ of coal available to JITF for transportation. In that view of the matter, there can obviously be no question of laying any default at the door of JITF in failing to comply with its contractual obligations to transport the coal. In such circumstances, Article 7.3, which specifically referred to the MGQ and the amount which had to be paid against transportation of the MGQ, became directly applicable.

38.16 Before concluding our discussion on Claim 5A of JITF, it is necessary to reiterate the limits of Section 34 of the 1996 Act, which emanate from the decisions already cited earlier in this judgment. Apart from the fact that reasoning of the learned Single Judge is, in our respectful opinion, legally flawed, we are also constrained to observe that the learned Single Judge has effectively re-adjudicated Claim 5A and has sat in appeal over the decision of the learned Arbitral Tribunal. Apart from everything else, we do not find that the judgment of the learned Arbitral Tribunal, in so far as it adjudicated Claim 5A in favour of JITF, suffered from any such patent illegality as would justify interference within the scope of Section 34 of the 1996 Act.

38.17 *Holistically viewed, in fact, the decision of the Tribunal is eminently fair and just, and we are entirely unable to appreciate the decision of the learned Single Judge to interfere therewith. Huge amounts had been invested by JITF in the project, as required by the TPA. Article 7.3 of the TPA required NTPC to guarantee, for transport by JITF, the MGQ of coal for a total period of seven years. This was the sole basis on which NTPC could recoup the amounts invested by it in the project. Even for the first two years of the operating period of seven years, there was considerable shortfall in the supply of coal by NTPC, much below the contracted MGQ. Thereafter, NTPC, apparently in order to minimize its financial outlay and earn handsome profits, decided to discontinue use of imported* *coal and switched to domestic coal. The consequence of such a decision on JITF, and on the TPA itself, was blissfully ignored. When JITF, becoming aware of this, moved the learned Arbitral Tribunal, and obtained an order directing NTPC to disgorge the MGQ for the first year of the operating period to JITF, NTPC promptly decided to terminate the contract. The result was cataclysmic to JITF, as it resulted not only in JITF losing all rights to payment for the remaining five years of the contract whereby it could recoup the expenses incurred by it, but also made JITF liable to return the assets, in which it had entirely invested, to NTPC for a token ₹ 1. In these circumstances, JITF was entitled, by virtue of Section 74 of the Contract Act, to be compensated. In working out the reasonable compensation to which JITF would be entitled, the learned Tribunal has relied on the MGQ – which was guaranteed – as per Article 7.3 of the TPA, for the remaining five years of its life. This being an amount pre-estimated in the TPA itself, and not being conditional on any factor except the declaration of the COD by NTPC, no fault whatsoever can be found with the decision of the learned Arbitral Tribunal to treat it as a genuine pre-estimate of damages. There is, therefore, no justification whatsoever to interfere with the decision of the learned Arbitral Tribunal in this regard.*

38.18 We, therefore, are constrained to hold that the decision of the learned Single Judge to interfere with the findings and decision of the learned Arbitral Tribunal with respect to claim 5A of JITF is not sustainable in law. The findings of the learned Arbitral Tribunal are, therefore, affirmed.

C.IV Re. remaining Claims

39. The impugned judgment of the learned Single Judge has set aside the entire arbitral award, without any discussion or finding regarding the decision on the remaining claims of JITF. As such, the impugned judgment, to the extent it has set aside the award qua the claims other than Claims 1, 3, 3A and 5A is clearly unsustainable.

40. The arbitral award, qua the remaining claims, has, therefore, to be upheld, and the decision of the learned Single Judge to the contrary reversed, on this sole ground.

D. Conclusion

41. In view of the above discussion, we are unable to sustain the impugned judgment of the learned Single Judge.

42. The impugned judgment of the learned Single Judge is, therefore, set aside, and the arbitral award dated 27 January 2019 upheld in its entirety.

43. The appeal stands allowed accordingly, with no further orders as to costs.

C. HARI SHANKAR, J.

OM PRAKASH SHUKLA, J.

1. I had the privilege of diving through an erudite and thoughtful draft judgment rendered by my esteemed brother **C. Hari Shankar, J**.

2. However, for the reasons that would follow, I find myself unable to subscribe with the opinion expressed by my respected brother regarding Claim No. 1, 3, 3A and 5A. Therefore, I am constrained to pen down my dissenting view through this opinion.

3. The learned Single Judge in my opinion has addressed all the issues before him appropriately and the impugned judgment does not warrant this court's interference under Section 37 of the Act.

4. Since, the dispute before us is primarily limited to Claim No. 1, 3, 3A and 5A, I would limit my dissent to findings pertaining to above claims and would state in a brief manner why I disagree with the findings of my esteemed brother.

5. Additionally, as the relevant facts, Impugned award, impugned judgment and submissions made before us have been flawlessly explained and stated in the opinion of my brother. I would avoid burdening my opinion with the same to avoid unnecessary prolixity.

6. Starting from the dispute pertaining to Claim No.1, the learned arbitral tribunal has awarded Rs.424,08,00,423 crore to JITF on the ground that, since compensation of COD under Article 3.2(b) was not available, JITF would be entitled to compensation under the Indian

Contract Act, 1872[62].

7. Briefly put, according to learned arbitral tribunal, Article 3.2(b) provided for compensation for delay caused by NTPC through extension of COD. However, the operation of the said clause could not be invoked, as admittedly NTPC had terminated the TPA on 24.06.2017. In these circumstances, according to learned Arbitral Tribunal, JITF could not be denied compensation for the delays on the part of the NTPC, as it was not disputed that delays were attributable to NTPC.

8. The learned Arbitral Tribunal had also agreed that the only form of compensation to JITF was to extend COD. However, as the TPA got terminated and the delay was attributable to NTPC, the learned arbitral tribunal granted monetary compensation of 424,08,00,423 crore to JITF.

9. Hari Shankar, J has upheld the findings of the learned Arbitral Tribunal and held that the learned single Judge erred in holding that the learned Arbitral Tribunal had breached Article 3.2(b) of the TPA. He observes that the arbitral tribunal has the power under Section 73 of ICA to award compensation, even in a case where compensation was otherwise not payable under the contract.

10. Without commenting on, as to whether an arbitral tribunal reserves the power under Section 73 of the ICA to award compensation, even in a case where compensation was otherwise not

[62] "ICA" hereinafter

payable under the contract. I would like to express, for Claim No.1, here the case was not that the compensation has not been stipulated or provided anywhere at all in the contract or could not had been granted under section 73 of the ICA, but the issue is the form of compensation and the contractual character of the period for which the monetary claim was calculated.

11. Article 3.2(b) of the TPA uses the expression "shall" and **"**compensate." It does not merely regulate an extension procedure. It identifies the very form of compensation agreed by the parties i.e. "*shall compensate … by suitably extending COD*."

12. The arbitral tribunal has itself recorded that in an ideal situation, the compensation was in form of extending COD.

13. It is clear that compensation was expressly provided in the contractual mechanism between the parties. However, in my opinion, because the contractual remedy could not have been implemented, the arbitral tribunal should not have replaced it with another remedy using Section 73 of the ICA.

14. It is undisputed that an arbitral tribunal may interpret the contract and apply remedies supplied by substantive law. However, it cannot rewrite the commercial bargain agreed between the parties nor it can create a substantive contractual entitlement which the parties never agreed to. The Tribunal cannot penetrate in the virgin area for which the parties exercised certain extent of autonomy.

15. The law on this aspect is settled that an arbitral Tribunal is a creature of the contract itself and it has no inherent power to grant an equitable relief comparable to a civil court. The arbitral tribunal cannot ignore an express contractual stipulation or grant relief because such relief appears to be fair or equitable. At the cost of repetition, an arbitral tribunal is a creature of contract itself and it must act in accordance with it.

16. The Primary function of the arbitral Tribunal is to enforce the promises which the parties themselves made and maintain the sanctity of the contract and the arbitral tribunal has no power apart from what the parties have conferred upon him.

17. The fact that the remedy chosen by the parties later becomes practically unavailable does not necessarily authorise the arbitrator to invent a different contractual consequence.

18. The Hon'ble Supreme Court in ***SEPCO Electric Power Construction Corporation v. GMR Kamalanga Energy Ltd***[63]., held as follows on jurisdiction of the Arbitral Tribunal:

> "91. Numerous precedents laid down by this Court have often emphasised that an arbitrator lacks the power to deviate from or to reinterpret the terms of the contract while making an award. The awards must be within the parameters of the agreement entered between the parties.
>
> 92. This Court in ***Saw Pipes*** (supra) has reiterated that any deviation from the mandate of Section 28 Sub-Section 3 of the 1996 Act is a valid ground for lambasting an arbitral award. Commenting on the duty of the arbitrators, this Court observed as follows:

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[63] **2025 INSC 1171**

"73. It is to be reiterated that it is the primary duty of the arbitrators to enforce a promise which the parties have made and to uphold the sanctity of the contract which forms the basis of the civilized society and also the jurisdiction of the arbitrators. Hence, this part of the award passed by the Arbitral Tribunal granting interest on the amount deducted by the appellant from the bills payable to the respondent is against the terms of the contract and is, therefore, violative of Section 28(3) of the Act."

93. To substantiate that the contract is paramount to the working, scope, and interpretation for the purpose of an award by the arbitrator, a reference may be made to another 3-Judge Bench decision in ***South East Asia Marine Engineering and Constructions Limited v. Oil India Limited.*** Therein, while rejecting the challenge to setting aside of the arbitral award, this Court made the following observations:

"28. In this context, the interpretation of Clause 23 of the contract by the Arbitral Tribunal, to provide a wide interpretation cannot be accepted, as the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. In the case at hand, this basic rule was ignored by the Tribunal while interpreting the clause.

29. The contract was entered into between the parties in furtherance of a tender issued by the respondent herein. After considering the tender bids, the appellant issued a letter of intent. In furtherance of the letter of intent, the contract (Contract No. CCO/FC/0040/95) was for drilling oil wells and auxiliary operations. It is important to note that the contract price was payable to the "contractor" for full and proper performance of its contractual obligations. Further, Clauses 14.7 and 14.11 of the contract state that the rates, terms and conditions were to be in force until the completion or abandonment of the last well being drilled.

30. From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while

bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion.

31. The interpretation of the Arbitral Tribunal to expand the meaning of Clause 23 to include change in rate of HSD is not a possible interpretation of this contract, as the appellant did not introduce any evidence which proves the same."

94. Further clarification of this proposition is brought about through observations of this Court in a further decision by 3-Judge Bench in Union of India and Others v. Bharat Enterprise61 wherein it was underlined that the existence and powers of an arbitrator are a creature of the agreement between the parties, and it is the terms of the contract which serves as a fundamental basis for the procedure to be adopted by the arbitral tribunal. Therefore, the concerned arbitrator is restricted to the terms of the contract thereof and cannot go outside its scope or what is, per se, specified. In words of the Bench, "*A disregard of the specific provisions of the contract would incur wrath of the Award being imperilled. This position cannot be in the region of dispute*."

95. In order to achieve an enhanced understanding apropos the scope of the powers and jurisdiction of an arbitrator, a reference may also be made to a decision of this Court in ***Associated Engineering*** (supra), which was determined vis-à-vis Section 30 of the Arbitration Act, 1940 wherein, it was observed that:

"24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill and Boyd's Commercial Arbitration, 2nd edn., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, 4th edn., para 622). A deliberate departure from contract amounts to not only manifest disregard of his

authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

26. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be explain liable to be set aside. As stated by Lord Parmoor :[***Attorney-General for Manitoba v. Kelly***[64]:

> "It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties."

Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator is, it is open to the court to see what dispute was submitted to him. If that is not clear from the award, it is open to the court to have recourse to outside sources. The court can look at the affidavits and pleadings of parties; the court can look at the agreement itself. ***Bunge & Co. v. Dewar and Webb***[65].

27. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award".

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[64] **(1922) 1 AC 268, 276**
[65] **(1921) 8 Ll L Rep 436**

19. In ***PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O.C. Port Trust***[66], The Hon'ble Supreme court held that an arbitral tribunal is not a court of law and cannot exercise powers *ex debito justitiae* unless the parties have agreed to bestow such power to the Tribunal. Its jurisdiction is confined to the four corners of the agreement and it can pass only such orders as fall within the subject matter of the reference. The relevant paras capturing the above findings are reproduced below:

> 84. After referring to various international treaties on arbitration and judgments of other jurisdictions, this Court in ***Ssangyong Engineering and Construction Company Limited*** (supra), observed thus:
>
> > "76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula 76 under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can

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[66] **(2021) 18 SCC 716**

never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

[emphasis supplied]

85. As such, as held by this Court in ***Ssangyong Engineering and Construction Company*** Limited (supra), the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. **This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, rewriting a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category**.

86. We may **gainfully** refer to the following observations of this Court in ***Bharat Coking Coal Ltd. v. Annapurna Construction***[67].

"22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. **He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."**

87. **It has been held that the role of the Arbitrator is to arbitrate within** the **terms of the contract. He has no power apart from what the parties have given him under the contract.**

[67] **(2003) 8 SCC 154**

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<u>If he has travelled beyond the contract, he would be acting without jurisdiction</u>.

88. It will also be apposite to refer to the following observations of this Court in the case of ***Army Welfare Housing Organization v. Sumangal Services (P) Ltd***[68].

> "43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. **<u>Its functions are not judicial functions. It cannot exercise its power ex debitojustitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject matter of reference</u>**."

89. <u>It has been held that an Arbitral Tribunal is not a Court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers *ex debito justitiae.* It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject matter of reference.</u>

20. Thus, it is clear that where an award imposes a unilateral addition, alteration, or obligation not contemplated by the agreement, the tribunal acts beyond its jurisdiction. Such rewriting of the contract amounts to a breach of fundamental principles of justice and may justify interference.

21. Having understood the jurisdiction of the arbitral tribunals, even if it was impossible to operate Article 3.2 (b), the learned arbitral tribunal erred in granting monetary compensation to JITF.

22. To my mind, the language and the expressions of the Article 3.2(b), is clear that this clause defines not merely an entitlement to additional time but the manner in which NTPC must "compensate"

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[68] (2004) 9 SCC 619

JITF.

23. According to me, the clause is crystal clear about what the parties had already agreed as to what would happen if NTPC caused delay.

24. Therefore, I with utmost respect, disagree with the finding of my learned brother that learned arbitral tribunal in this matter could award monetary compensation which was otherwise not payable under the contract.

25. The expression "*shall compensate … by suitably extending COD.*" used in Article 3.2(b) cannot be read to defeat it's plain meaning i.e., to keep the compensation non-monetary in nature.

26. Having once agreed that the compensation shall not be payable in monetary terms, the learned arbitral tribunal could not have awarded compensation by terms which were never agreed between the parties.

27. According to me the problem in awarding such an amount is twofold. The first being that the contractual character of the period for which the monetary claim was calculated. Article 7.1(a)(i), of the contract required NTPC to provide 2 MMTPA of coal during the "Material Handling System-Phase-I Period".

28. Article 2.2(c)(i) describes Phase-I as a defined construction and operating stage, with the Phase-I system intended to be in operation for approximately nine months and thereafter utilised in the coal hauling plan following completion of Phase-II.

29. The contract therefore does not state that the 2 MMTPA obligation commences on a hypothetical date calculated retrospectively by assuming an alternative construction history. It links the obligation to the contractual Phase-I period. According to me, this distinction matters because Article 3.2(b) separately provides the agreed consequence of specified delay attributable to NTPC in the nature of a suitable extension of COD and commencement of transportation through Phase-I, without penalty. Unfortunately, although the tribunal itself recognised this provision, but went on to conclude that because termination had subsequently occurred, the contractual extension mechanism was no longer available and it could therefore resort to general damages under the provisions of Contract Act.

30. In my view, that conclusion impermissibly shifts the contractual starting point. The impossibility of granting the contractual remedy at a later stage cannot enlarge the substantive monetary obligation that existed during an earlier, contractually defined period. An agreed extension-of-COD mechanism does not become a monetary entitlement merely because subsequent events render extension impracticable. According to me, the tribunal had incorrectly identified the breach and the contractual period to which it related and apparently it seems the claim was calculated on a hypothetical commencement date rather than on the actual contractual Phase-I Period.

31. The, second problem, is that even if it has to be accepted that compensation could be granted using Section 73 of the ICA, the learned arbitral tribunal does not get a free hand in awarding amount of compensation what it considers fair. In my opinion, compensation awarded was not apparently compensation for specifically proved additional expenditure actually incurred. Instead, it was calculated on coal that was never actually handled, and according to me, using a project rate methodology that included costs of operating activities which never took place.

32. In this regard, I agree with the submissions made by learned Solicitor general that damages were granted to JITF not only without adjudication, but also without considering that the "project rate" at which damages were computed as per the JITF's chart, comprised of operational cost and running expenses.

33. Undoubtedly, operational costs such as fuel prices for running the entire system, running barges, running transhippers, cranes, expenses with respect to employees, etc were also included and awarded by the learned arbitral tribunal.

34. According to me, if the JITF's case was that there was no movement of coal, such operational cost and running expenses could not have been added in the total damages.

35. The learned Solicitor General is correct in submitting that there can be no question of claiming hypothetical loss of profit while also including operational costs that were never incurred.

36. Clearly, even assuming *arguendo* that Section 73 was capable of operating notwithstanding the contractual mechanism of extension of time, the learned Arbitral Tribunal could not mechanically monetise the unavailable extension without ascertaining loss.

37. It was independently required to identify the breach giving rise to damages and establish a nexus between that breach and the alleged pecuniary loss and determine the quantum on the basis of evidence.

38. Section 73 compensates proved loss caused by breach. However, in the present case, the table submitted by JITF has been admitted as it is and there is no independent examination conducted by the learned arbitral tribunal.

39. Thus, according to me, the findings of learned single judge, on claim No.1, deserve no interference as the Learned Single Judge was justified in concluding that Claim No. 1 suffered from patent illegality in its legal foundation. The error was not the selection of one arithmetic formula over another but it was the substitution of a hypothetical period for the contractual period and the consequent creation of a liability which the contract, read as a whole, did not impose in that form.

40. The next issue which arises for my consideration is pertaining to <u>Claim Nos.3 and 3A.</u>

41. As per this claim, NTPC was required to make a minimum quantity of coal available to JITF. For the first operational year, the contractual benchmark was effectively 90% of 3 MMT per annum. But only about 0.746 MMT was made available to JITF during the first operational year.

42. On that basis, JITF claimed the MGQ shortfall amount.

43. The learned Single Judge noted that entire award proceeded on the basis that obtaining environmental clearance was NTPC's responsibility and that the reduction of permissible coal quantity from 3 MMT to 1.5 MMT did not reduce NTPC's MGQ liability.

44. However, in para 140 to 142, the learned single judge records the following:-

> "140. It is pertinent to mention that learned AT irrespective of the directions of MoEF has calculated the shortfall, taking into account 3 MMT. It is quite surprising how the NTPC could have violated the directions given by authority and opened itself to various kinds of prosecutions and adverse consequences. The perseverance of the environment is the duty of one and all and violation of the same cannot be allowed to be carried out at any cost. It becomes the statutory obligation of everybody to comply with the directions relating to the environment. Thus, the finding of the learned Arbitral Tribunal in calculating the MGQ taking into account 3 MGQ on the face of it, is perverse. In regard to the responsibility of getting the EC, the learned AT has proceeded on the premises that NTPC being the project proponent, was required to take the EC. However, in this regard, it is necessary to refer to the following provisions of the TPA:-
>
>> "Article 3.1C (ii) puts an obligation on the operator to procure all applicable permits/licenses/clearances, unconditionally, or if subject to conditions, then all such conditions must have been satisfied in full and such applicable permits/licenses/clearances are kept in full force

and effect during the construction and operation of the project."

It is also necessary to refer to clause 7.1C (vii) which puts an obligation on the operator to comply with all applicable laws and obtain all applicable permits in all material respects.

141. It is also pertinent to mention here as borne out from the record that NTPC, vide letter dated 25.02.2014, invited the attention of the respondent to the condition precedent of the operator which is in response to the letter of the respondent dated 20.02.2014, whereby, are quest was made for reimbursement of fee against studies awarded by JITF on CIFRI for environmental clearance of Farakka IWT Project. NTPC, inviting the attention on the provisions of TPA and clause 3.1C of the TPA reiterated that all the clearances required for the project are to be taken by the operator. It is also pertinent to mention here the letter dated 30.04.2014, which was also related to the operational delays on the part of the respondent. The perusal of the record indicates that consent to operate the project dated 16.09.2016 was taken by the respondent and the responsibility of NTPC was limited to facilitating the clearance. The Court considers that after reduction by MoEF in the First Year Operation Period from 3 MMTPA to 1.5 MMTPA, has to be taken into account. It is a basic principle that what is prohibited by law cannot be directed to be enforced in any manner.

142. The learned AT has also allowed the claim of the JITF towards reimbursement of Rs.42,93,914/- on account of the fee paid to CIFRI on the ground that NTPC is required to obtain prior EC for the use of blended coal and for transportation of coal from Sand heads to Farakka TPP through NW-1. It was also noted that on account of the delay on the part of NTPC to undertake the study, JITF engaged CIFRI on behalf of NTPC, in the interest of the Project for conducting the required study and informed NTPC vide its letter dated 20.02.2014 that the subject study report had been issued to CIFRI on behalf of NTPC to avoid delay. Learned AT rejected the contention of NTPC that in an internal meeting of NTPC, IWAI and JITF, it was decided that JITF would conduct the study and also did not agree to discharge NTPC of its obligations as IWAI had agreed to pay JITF the cost of CIFRI. The discussion made hereinabove makes it clear that it was not the responsibility of the petitioner to take EC clearance. It has to be understood that initial EC was taken by NTPC for main Project. However, subsequently, TPA was executed for the project, and the terms of the TPA specifically provides it to be the responsibility of JITF. Therefore, on the face of it, the NTPC cannot be held liable for this."

45. I agree with the findings of the learned Single Judge for the reasons that shall follow.

46. Before expressing my difference, I feel it would be appropriate to reproduce Article 3.1(c) and Article 7.1 (c) (vii) of the TPA.

> 3.1 (c) Conditions Precedent of Operator
>
> The Conditions Precedent required to be satisfied by the Operator shall be deemed to have been(filled when the Operator shall have:
>
> (i) Furnished the Performance Guarantee as stipulated in Article 4;
>
> (ii) procured all the Applicable Permits/ Licenses/ Clearances unconditionally or if subject to conditions then all such conditions shall have been satisfied in full and such Applicable Permits/ Licenses/ Clearances are kept in full force and effect during the construction and operation of the Project;
>
> (iii) The Operator shall, within 45 (Forty five) clays of the Compliance Date, prepare and submit the Construction Documents to NTPC and IWAI.
>
> (iv) make all applications at its cost and procure the clearances, and all other necessary Applicable Permits that are required for commencing of the Project.
>
> Provided that upon request in writing by the Operator, IWAI/ NTPC may, in its discretion, waive, after recording the reasons thereof, any of the Conditions Precedent set forth in this Article.
>
> 7.1 (c) Obligation of Operator
>
> a. Fulfill entire Project Requirements and Scope of Work as stipulated in Article 2.2.
>
> b. ensure coal transportation through IWT for target quantity to NTPC power site in lime from midstream unloading point to coal stack yard of Power Plant;

c. (iii)Transfer the Unloading Infrastructure and Material Handling System at Re 1/-(Lumpsum Transfer price) to NTPC after expiry of this agreement due to efflux of time or as per clause 14.1 (c) due to early termination of this agreement as the case may be.

d. Operate and maintain Unloading infrastructure & Material Handling System for the Term of this Agreement;

e. bear and pay all wharfage, anchorage and any other charges levied by KoPT for Trans-shipment Mechanism at the Transfer Point; KoPT has approved a concessional wharfage charge on coal of Rs. 15 PMT plus service tax and. Nil anchorage charge on mother vessel/ trans loader/ daughter vessel/barges for this project for 3 MMTPA of coal for a period of 7 years.

With regard to operation of Transhipment Infrastructure in the area West of Sand heads in the vicinity of Lat. 21°00' to 21º 33' and Long. 87° 10' notified by KoPT as waters under their limits of port, it may be noted that in case the operator has to pay charges in excess of the concessional charges (as detailed in letter attached as Annexure-V of the Addendum issued on 18th Feb 2011) to State Government, Government agencies or any other Port Trust, such additional charges shall be reimbursed to the Operator.

(vi)bear and pay all cost, taxes, expenses and charges in connection with or incidental to the performance of the obligations under this Agreement;

(vii)comply with all applicable laws and obtain all applicable permits in all material respects. The Operator shall follow all the applicable rules, regulation, and lor any notification/order of KoPT in relation to operation of transhipper and plying of barges in KoPT waters including but not limited to barges need 10 have specified speed, comprehensive insurance for wreck removal and third party liability, onboard VHF sets and all vessels should have plying certificate from appropriate authority as per their respective plying area.

(viii) Develop Standard Operating Procedures (SOP) for operation and maintenance of Project Assets in discussion with NTPC;

(ix) take adequate preventive measures to comply with safety and security standards of NTPC as well as local Statutory Authority at own cost and expense.

47. As per Articles 3.1(c) read with Article 7.1(c)(vii) of the TPA, all permits and clearances related to the Project were the responsibility of the JITF and, if Permits/Licenses/Clearances were granted subject to conditions, all such conditions were to be satisfied in full.

48. The impugned award, incorporates no discussion on Article 3.1(c) which according to me, was a vital contractual clause.

49. Thus, it is clear from the TPA reached between the parties and upon reading of the Impugned Award, that the Learned Arbitral tribunal ignored the vital contractual clause, namely, Article 3.1C(ii) which required the Operator, i.e. JITF, to procure all applicable permits/licences/clearances and maintain them during construction and operation.

50. Clause 7.1C(vii), was also not taken into account, which imposed upon the JITF, the obligation to comply with applicable laws and obtain applicable permits.

51. Upon perusing of the impugned award, the learned arbitral tribunal fails to take into account, the contractual clauses which placed responsibility on JITF to procure all sorts of environmental clearance.

52. In these circumstances, even if NTPC's status might have been as project proponent under environmental law, the contractual allocation between NTPC and JITF specifically placed relevant clearance obligations on JITF.

53. The learned Solicitor General has pointed out letters dated 25.02.2014 and 30.04.2014 which reminded the JITF that it was responsible for obtaining the clearance for Coal Transportation through Inland Waterways as the same was a Condition Precedent of the Appellant as per Article-3 of TPA. These letters were clearly not taken into account by the learned Arbitral Tribunal.

54. The principle that an arbitral tribunal cannot rewrite a contract equally means that a tribunal cannot disregard a material contractual provision while giving effect to another. A reading of Article 7.3 divorced from Articles 3.1(c)(ii), 7.1(c)(vii), the regulatory framework and the actual conditions of lawful performance is not, in my respectful view, a complete contractual construction.

55. On the above basis, the finding of learned single judge on claim 3 are upheld.

56. With respect to claim 5A, Hari Shankar, J has held that since termination was illegal, it resulted in breach of contract by NTPC and JITF was entitled to compensation in terms of genuine pre-estimated damages.

57. Hari Shankar, J observes that "*if the compensation in the agreement is in the form of a genuine pre-estimate of the loss suffered by the party as a consequence of breach, which the parties knew as likely to result from breach, there was no question of the party suffering as a result of the breach being required to prove loss*".

58. While, I agree with the proposition laid by my brother. However, in the present dispute, the compensation with respect to wrongful termination is not in form of genuine pre-estimate of the loss suffered. Instead, in my opinion, the TPA offers compensation post termination through Article 14.1 (c).

59. Hari Shankar, J has reasoned that Article 14.1 (c) can only be applied when there is termination of contract specifically by JITF on the ground of NTPC.

60. I respectfully disagree with the interpretation adopted by my learned brother as Article 14.1(c) expressly prescribes the compensation upon termination due to NTPC default.

61. Therefore, even assuming *arguendo* NTPC's termination was wrongful, the learned Arbitral Tribunal could not convert five future years of MGQ into ₹1,108.93 crore of termination damages while ignoring the specific termination-compensation mechanism chosen by the parties. According to me, the award of this claim, presents the clearest instance in which arbitral Tribunal crossed from interpretation into rewriting the contract, by treating the claim as a genuine pre-estimate of damages rather than compensation arising out of termination.

62. The reason is no brainer i.e. where the contract specifically states the consequence of a breach, an arbitrator cannot ordinarily replace that consequence with a different remedy simply because it considers the latter more appropriate.

63. Clause 1.4(a) of the TPA, clearly stipulates that where there is ambiguity or discrepancy between Articles, the specific Article relevant to the issue under consideration shall prevail.

64. Therefore, I concur with the finding of the learned Single Judge that termination compensation issue was specifically covered by Article 14.1(c) and Article 14.1(c) must prevail over Article 7.3.

65. In this regard, Article 1.4 and 14.1 is reproduced here:-

1.4 **Ambiguities within the Agreement**

In case of ambiguities or discrepancies within this Agreement, the following shall apply:

(a) **Between two Articles of this Agreement, the provisions of specific Articles relevant to the issue under consideration shall prevail over those in other Articles**;

(b) Between the Articles and the Annexures, the Article shall prevail, save and except as expressly provided in the Articles or the Annexures;

(c) Between the dimension scaled form the drawing its specific written dimension, the latter shall prevail; and

(d) Between any value written in numerals and that in words, the latter shall prevail.

(e) Between the provisions of this Agreement and any other documents forming part of this agreement, the former shall apply.

Article 14

14.1 Compensation

(a) **Termination due to Force Majeure Event**

(i) No payment shall be paid by any party in case operation stops due to Force majeure.

(ii) The period of operation shall be increased by the same duration for which event. of force Majeure exists.

(b) **Termination due to Operator Event of Default**

If the termination is due to Operator Event of Default, NTPC shall forfeit the Performance security submitted by Operator.

(c) **Termination due to NTPC Default**

In the event this Agreement is terminated due to NTPC Event of Default then NTPC shall buyback the Unloading Infrastructure and Material Handling System at (1) Debt Due plus (2) 1.00% (one hundred percent) Equity.

Provided, however, for the purposes of this Agreement Debt Due and Equity shall not exceed the value as determined on a normative capital cost of [Rs. 90 crores] that is financed on Debt to Equity ratio of 70:30 and assuming that the repayment over 7 (seven) years period after COD,

(d) **Termination due to IWAI Default**

No payment shall be paid to any parties to this contract in case project terminated due to IWAI Event of Default.

66. The expression and language of Article 14.1 (c) and Article 1 makes it clear that it is an independent clause and is triggered where there is termination on default of NTPC. There is no expression or word even *prima facie* indicating that Article 14.1(c) gets triggered only on specific termination by JITF on the ground of Default of NTPC.

67. To read this clause otherwise i.e. it only gets triggered where there is termination by JITF specifically on ground of default of

NTPC, would defeat the commercial bargain reached between the parties and would lead to rewriting of the contract.

68. Further, there is another aspect to this issue, in as much as Section 74 of the ICA does not in any manner permit every sum appearing anywhere in the TPA to be treated as a pre-estimated damages clause. The first inquiry remains as to what did the parties stipulate the amount to represent. As a matter of fact, it is a settled law, that compensation must be reasonable and connected to the legal injury resulting from the breach.

69. In the present case in hand, the tribunal did not identify words in Article 7.3 by which the parties agreed that the annual MGQ payment would constitute damages upon premature termination. Instead, the tribunal inferred the proposition from the commercial object of the project and JITF's investment expectations.

70. No doubt, commercial background may illuminate ambiguous words. However, in no circumstances can it create an omitted contractual remedy. To use the expected seven year investment recovery as the reason to convert an operating tariff formula into damages is, in substance, to supply a term which the parties never intended nor did they express.

71. Nor can the absence of a requirement to prove actual loss under a genuine Section 74 clause eliminate the need to establish that the stipulated amount is in fact the contractual measure of compensation for the breach in question.

72. According to me, the award for the remaining five years is particularly problematic. The learned Single Judge recorded that there were no operations by JITF during those five years. The tribunal nonetheless awarded the full amount computed by the Article 7.3 formula for that period. Thus, the result effectively grants JITF the contractual revenue stream for a period during which it did not perform the corresponding transportation services. That may in some circumstances be a legitimate measure of expectation damages. But before reaching that result the tribunal had to identify the legal source of the measure and undertake the discipline required by Sections 73 and 74. Instead, it moved directly from the existence of the MGQ to the amount of damages.

73. The fact that JITF had invested in the project and had to hand over assets for a token consideration explains the seriousness of the commercial consequences. It does not by itself establish that the entire hypothetical five-year operating revenue constituted reasonable compensation.

74. Hence, for the above reasons, I am unable to subscribe to the view taken by my brother on claim No. 5A.

75. According to me, the defects point expressed by the learned Single judge go to the root of the Award. They are not insulated merely because the arbitral tribunal had clothed itself with the jurisdiction over the disputes. The legal foundation for the grant of these claims is amiss.

76. To my mind, the learned Single Judge has very well set aside the impugned award on the ground of Patent illegality and has not exceeded his jurisdiction under Section 34 of the Act. Thus, the findings reached by the learned Single Judge deserve no interference.

OM PRAKASH SHUKLA, J.

Point of difference

As C. Hari Shankar J has upheld the arbitral award with respect to Claims 1, 3 and 3A and 5A and Om Prakash Shukla J has agreed with the decision of the learned Single Judge to set aside the arbitral award qua the said claims, the entire dispute with respect to these claims would be required to be referred as the point of difference. Accordingly, the point of difference is thus framed, for being placed before Hon'ble the Chief Justice for being placed before a learned Third Judge or a Larger Bench, as he would deem appropriate:

> "Whether the decision of the learned Single Judge, with respect to Claims 1, 3 and 3A and 5A is sustainable in law?"

The Registry is directed to place the papers before Hon'ble the Chief Justice for appropriate orders.

C. HARI SHANKAR, J.

OM PRAKASH SHUKLA, J.

SEPTEMBER 02, 2026/yg/aky/at