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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	28.03.2024
Pronounced On	14.10.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.) No.159 of 2020
and
A.No.790 of 2020
and
A.No.1919 of 2021
in
E.P.SR.No.19361 of 2021

Bharat Heavy Electricals Limited,
Power Sector – Southern Region,
690, Anna Salai, Nandanam,
Chennai – 600 035. ... Petitioner

Vs.

Offshore Infrastructures Limited,
22, Udyog Kshetra,
Mulud Link Road,
Mulund (W), Mumbai – 400 080. ... Respondent

Prayer: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 03.09.2019 passed by the Sole Arbitrator in Arbitration Case No.35 of 2016.

For Petitioner : Mr.Krishna Srinivas
Senior Counsel
for M/s.S.Ramasubramaniam and Associates

For Respondent : Mr.K.Gowtham Kumar

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ORDER

This Arbitration Original Petition has been filed by the petitioner, who was the respondent before the Arbitral Tribunal, under Section 34 of the Arbitration and Conciliation Act, 1996. In this Original Petition, the petitioner has challenged the Impugned Award dated 03.09.2019 passed by the Arbitral Tribunal.

2. Before the Arbitral Tribunal, the Respondent was the Claimant while the Petitioner was the Respondent in the Arbitral Proceedings. The Award has been passed by a sole Arbitrator who constituted the Arbitral Tribunal.

3. By the Impugned Award, the Arbitral Tribunal has awarded a Sum of **Rs.7,15,72,645/-** together with interest thereon @ 18% p.a. from 10.08.2015 to the respondent. The Arbitral Tribunal has also awarded a sum of **Rs.27,08,823/-** to the respondent towards the Cost of Arbitration. The Arbitral Tribunal has also directed the petitioner to release, the Bank Guarantee furnished by the Respondent-claimant towards Security Deposit of **Rs.40,50,000/-** under **Claim No.4**.

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4. The Respondent-claimant has filed **E.P.SR.No.19361 of 2021** before this Court to enforce the impugned Award to recover the aforesaid amount from the petitioner.

5. The Respondent-claimant has also filed **A.No.1919 of 2021** in **E.P.SR.No.19361 of 2021** while the petitioner has filed **A.No.790 of 2020** in **Arb.O.P.(Com.Div.) No.159 of 2019.** The prayer in **A.No.1919 of 2021** and **A.No.790 of 2020** read as under:-

A.No.790 of 2020	**A.No.1919 of 2021**
To grant interim stay of the Award dated 03.09.2019 and pending disposal of the petition to set aside the Award thereby render justice.	a) Call upon the Respondents/ Judgement Debtor to forthwith state on affidavit the particulars of the assets held by the Respondent/ Judgement Debtor, including moveable and immoveable, as provided in Order XXI Rule 41(2) of the Code of Civil Procedure, 1908 and in event of failure of the Respondent/Judgement Debtor to produce detailed particulars of their assets, including ?xed, tangible, intangible, moveable and immoveable as set out in the ? nancial statements and otherwise as provided in Order XXI Rule 41(2), this Hon'ble Court may be pleased to pass necessary orders as provided in Order XX1 Rule 41(3) of the Code of Civil Procedure, for detaining the

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A.No.790 of 2020	A.No.1919 of 2021
	Respondent/Judgement Debtor and or their representative in their civil prison. b) any other orders in the facts and circumstances of this case.

6. For the sake of Clarity, the petitioner in **Arb.O.P.(Com.Div.) No.159 of 2019** shall be referred to as Award Debtor and the respondent in **Arb.O.P.(Com.Div.) No.159 of 2019** who has filed **E.P.SR.No.19361 of 2021** to enforce the Impugned Award shall be referred to as the Award Holder.

Facts of the case

7. The Award Debtor is a company established under the Government of India and operates under the Ministry of Heavy Industries, specializing in the manufacture of equipment for integrated power plants. In February 2009, the Award Debtor was awarded a contract by Mangalore Refineries and Petro Chemicals Limited (MRPL) for the establishment of a 1 x 220 MW Co-Generation Captive Power Plant at Mangalore, Karnataka.

8. As part of the contractual obligations, the Award Debtor was

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responsible for the piping works, which encompassed erection, testing, and commissioning of piping systems. The Award Debtor divided the piping works into three distinct packages, namely **Package A**, **Package B**, and **Package C**. The Award Debtor thus floated a tender for sub-contracting the contracted work to various sub-contractors in respect of these packages.

9. The Award Holder participated in the tender process and submitted its bid on 27.12.2011 for all three packages. The Award Debtor awarded **Package B** to the Award Holder as evidenced by a fax Letter of Intent (LOI) dated 16.02.2012. The Award Debtor's Bid for Package B was for a sum of **Rs.7,80,00,000/-**. The description of work awarded to the Award Holder for **Package B** involved handling, erection, alignment, welding, testing, and commissioning of various piping systems for the 1x122 MW Co-Gen CPP at MRPL, Mangalore. Drawings were also released by the Award Debtor on **07.03.2012**. The Award Holder also conveyed its acceptance to the letter of intent of the Award Debtor on **28.03.2012**.

10. On **29.03.2012**, the Award Debtor issued a Letter to the Award Holder laying out the scope of piping for Indian Boiler Regulation (IBR) System that

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was to be executed. On **26.04.2012**, a detailed Letter of Intent was issued by the Award Debtor to the Award Holder, outlining the contractual terms, scope of work, rates, and payment schedule.

11. On **27.04.2012**, following the issuance of a Detailed Letter of Intent on **26.04.2012**, the Award Debtor amended the Award Holder's scope of work to include additional tasks involving the following:-

i. Medium pressure (MP) steam,
ii. Low pressure (LP) steam and
iii. Carbon Steel seamless (CS) IBR piping

12. The Award Holder however expressed its concerns regarding this change, indicating that it would lead to additional work and associated costs. These concerns were communicated on **28.04.2012** and reiterated on **02.05.2012** and **25.05.2012** by the Award Holder.

13. During a meeting held on **25.07.2012**, the Award Holder agreed to undertake the additional work, which was purportedly categorized under **Package C** and allegedly based on the understanding that suitable compensation arising out of the work would be addressed.

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14. According to the Awards Holder, the modifications to the scope of work implied that the actual Inch Dia (ID) and Equated Inch Dia (EID) would be double the agreed ID/EID as per the technical conditions of the Award Holder vide the increased contract (TCC) and therefore the Award Holder requested the Award Debtor for additional compensation for these changes in its letter dated **30.07.2012**.

15. Following the letter on **30.07.2012**, the Award Holder sent additional communications on **01.09.2012** and **09.09.2012** regarding the rising costs associated with the revised scope of work. The Award Debtor, in response, on 10.09.2012 stated that the matter would be reviewed at its Headquarters.

16. A meeting is said to have been held on **05.10.2012** which involved Senior Management from the Award Debtor's side, resulting in instructions to finalize the rates for the additional work by **15.10.2012**. However, this deadline was purportedly not met by the Award Debtor.

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17. Despite ongoing reminders from the Award Holder about the revised rates, no definitive action was taken by the Award Debtor. A summary table reflecting the increased costs was processed and was also certified by the Award Debtor on **03.11.2012**.

18. The Award Holder has also gave an unqualified acceptance on **22.01.2013**, almost a year later to the detailed letter of intent dated **26.04.2012** on **22.01.2013**.

19. Meanwhile, the Award Holder proceeded with the work, operating under the assumption that the Award Debtor would agree to the revised rates for the additional tasks, but was ultimately denied additional compensation after significant work was completed.

20. In a meeting on **20.08.2013**, the Award Debtor denied the Award Holder's request for additional compensation for the work completed.

21. Meanwhile according to the Award Holder, they had made several requests for time extensions due to delays attributed to the Award Debtor, which were granted throughout the course of the project. After the completion

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of work, the Award Holder submitted emails on **13.07.2015**, **14.07.2015**, **16.07.2015**, and **20.07.2015** and requested payments for the additional work performed by the Award Holder.

22. The Award Debtor responded that payments could not be processed until a "no-claim certificate" was issued by the Award Holder. After negotiations, this certificate was issued on **08.09.2015** by the Award Holder. However, in a subsequent meeting on **28.11.2015**, the Award Debtor demanded an unconditional "no-claim certificate", which raised concerns regarding its necessity under the contract terms.

23. Following unsuccessful attempts to resolve the matter amicably, the Award Holder initiated arbitration proceedings on **07.12.2015**. Due to challenges in appointing a Sole Arbitrator, this Court constituted the Arbitral Tribunal and appointed Hon'ble Mr.Justice S.Rajeswaran (Retired) as the Arbitrator.

24. Before the Learned Arbitrator, the pleadings were duly completed The Award Debtor's Claim before the Arbitral Tribunal were as under:-

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Table-I

S.No.	Claim	Amount
1.	Outstanding Bills of Final RA Bill, RA Bill, PVC Bill and ORC Bill	**30,91,530/-**
2.	Claim towards increased Equated Inch Dia Bill raised by the Award Holder (Respondent herein)	**2,57,19,314/-**
3.	Refund of Retention Money withheld by the Award Debtor (Petitioner herein)	**37,77,565/-**
4.	Release of Security Deposit (Bank Guarantee)	**40,50,000/-**
5.	Damages suffered by Award Holder (Respondent herein) due to delay	**3,89,84,236/-**
	Total	**7,56,22,645/-**
6.	Interest at 18%	
7.	Costs of Arbitration	

25. The Award Debtor denied its liability in its statement of defence before the Arbtiral Tribunal.

26. Following issues were framed by the Arbtiral Tribunal:-

1) Whether there was any alteration in the scope of work in terms of Inch Dia/ Equated Inch Dia and if so, whether the same would entitle the Claimant to make claim No.2 ?

2) Whether the Claimant has fulfilled its obligations and

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completed the work allotted to it under the Contract ?

3) Whether time was the essence of the Contract ?

4) Which party was responsible for the delay in completion of the work and the consequences there to?

5) Whether the Claimant was bound to submit unconditional No Claim Certificate for claiming the payments against the outstanding bills and whether the final bill submitted by the Claimant conforms to the provisions of the Contract?

6) Whether the Claimant is entitled to claim the payments sought for, as per the Claims viz., Claim Nos. 1 to 5 made in their Claim statement ?

7) Whether the Claimant is entitled to any interest as claimed in Claim No.6? If so, for what amount and for what period and at what rate?

8) Whether the parties are entitled to costs ?

9) To what other reliefs are the parties entitled ?

27. In support of its claim, the Award Holder filed 210 documents, which are marked as **Exhibits C1** to **C210**. Similarly, the Award Holder filed 22 documents, which are marked as **Exhibits R1** to **R22**. The respective Parties examined their witnesses.

28. The Award Holder examined Thiru.Vishal R.Sachdev, the Managing Director of the Award Holder Company as CW1 while Award Debtor examined

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Thiru.Kasi Rajan, the Additional General Manager of the Award Debtor Company as RW1. Both the witnesses were cross examined by the learned counsel for either side. Thereafter arguments were heard and the Award was passed by the sole Arbitrator on **03.03.2019**.

29. Vide the Impugned Award dated **03.03.2019**, the Arbitral Tribunal allowed all the above claims of the Award Holder as detailed in **Table-1**.

Submissions on behalf of the Award Debtor:-

30. The learned counsel for the Award Debtor submitted that the Award Holder raised claims for compensation based on a compensation awarded to another contractor, M/s.Bridge and Roof, who executed package A. It is further submitted that the Award Holder raised a bill on 31.03.2013 for compensation towards Additional Equated Inch-Dia, for a Sum of **Rs.3,05,66,539/-.**

31. It is further submitted that the Award Debtor repudiated the claim vide Ex.C36 letter dated **24.08.2013**, stating that the Award Holder did not fulfill the conditions required for compensation under the package offered to M/s. Bridge and Roof and that the Award Holder did not carry out any additional work or extra work or Additional Equated Inch Dia or Additional

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Weld Joints. It was therefore submitted that there was no question of treating the Award Holder and Bridge and Roof being unequally which was wrongly found by the learned Arbitrator.

32. It is further submitted that the Award Holder completed the work only in January 2015, which was well beyond the contractual period of **five months**, and raised a final bill on **14.07.2015** for **Rs.35,28,254/-.** It is submitted that the Award Holder initially claimed **Rs.3,39,69,557/-** towards Equated Inch-Dia Bills vide **Ex.C61 Letter** dated **20.07.2015** from the Award Debtor. However, the Award Holder later reduced the claim to **Rs.2,57,19,313.71/-** before the Arbitral Tribunal in the Statement of Claim.

33. It is further submitted that by this time, the Award Debtor had already paid a Sum of **Rs.7,55,65,778/-** to the Award Holder as per the Award Holder's own Statement of Claim in Annexure CA1 filed along with the Statement of Claim, as against a Billed amount of **Rs.7,86,57,207.28/-** which the Award Holder accepted without protest which included payments towards the work done, Price Variation, Overrun Compensation etc., leaving a balance of **Rs.30,91,530/-** (Rs.7,86,57,207.28/- - Rs.7,55,65,778/-) as Outstanding Bills of

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Final RA Bill, RA Bill, PVC Bill and ORC Bill.

34. It is submitted that vide **Ex.C61 letter** dated **20.07.2015**, the Award Holder provided a detailed breakdown of the amounts claimed, totaling **Rs.4,18,86,760/-**, and categorically asserted that apart from the enumerated claims, it had no other claims against the Award Debtor. It is further submitted that the Award Debtor requested a no-claim certificate from the Award Holder, reiterating its repudiation of the compensation demand for Additional Equated Inch-Dia.

35. It is further submitted that the Award Holder however reiterated its claims in a letter dated 10.08.2015 and threatened to initiate arbitration if the amounts were not settled within 15 days. It is further submitted that even in this letter, no claims were made for damages or delays, contrary to the Award Holder's later statement of claim.

36. It is further submitted that on 08.09.2015, the Award Holder issued a no-claim certificate, stating that it had no claims against the Award Debtor, except those listed in its letter dated **10.08.2015.** It is further submitted that a meeting was held on **28.11.2018**, where the Award Debtor provided a point

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wise rebuttal to the Award Holder's claims.

37. It is submitted that arbitration was eventually initiated, and the Award Holder's claims were summarized, including outstanding bills, Equated Inch-Dia compensation, retention money, security deposit release, damages due to delay, interest, and costs, totaling **Rs.7,56,22,645/-.** It is further submitted that the learned arbitrator passed an Award on 03.03.2019 in favour of the Award Holder, awarding all the claims of the Award Holder.

38. It is further submitted that the contract between the parties comprised several documents, including the invitation to tender, technical and special conditions of contract, general conditions, and price bids. It is further submitted that the time schedule provided in the detailed letter of intent required the completion of work within five months from the commencement of work on-site.

39. It is further submitted that the bill of quantities provided in the contract specified the measurement of work in metric tonnes and included details of piping systems and Equated Inch-Dia calculations. It is further submitted that the Award Holder's bid covered all possible types of piping

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within the specified systems.

40. It is submitted that the scope of work was clearly defined under Clause 1.2.0 of the Detailed Letter of Intent (LOI) dated 26.04.2012, which broadly described the work in line with the Tender Specification and Clause 1.9.0 concerning accepted rates. It is further submitted that Clause 1.9.0 specified the rates quoted in reverse auction, emphasizing that the rates were quoted in terms of Rs. per Metric Ton for three systems of piping: Carbon Steel (IBR), Carbon Steel (Non-IBR), and Alloy Steel. The notes to Clause 1.9.0 highlighted that the fabrication work of piping and supports was to be carried out per tender clauses and the work executed would be measured and priced at the unit rate accepted by BHEL.

41. It is further submitted that the scope of works under the Technical Conditions of Contract (TCC), Volume IA, Part I, Chapter II, Clause 1.2.1, included detailed provisions for all three packages (A, B, and C), and additional work under Package C was not different in terms of the type of piping but involved certain additional tasks specific to Package C. It is further submitted that the differentiation between the packages was based on additional tasks, not on the system or type of piping, and the Notes to Chapter II of the TCC clearly provided that no additional payment would be made for any increase in welding

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or joints due to site requirements.

42. It is further submitted that the Award Debtor had the explicit right to vary the work as per its discretion, as provided in several clauses of the contract, including Note 2 of Clause 1.9.2 of the LOI, Chapter II, and the Bill of Quantities. It is further submitted that the contract terms specified that quantities were only approximate and could be varied based on design considerations, and the contractor had to perform the work as per site-specific requirements without any entitlement to additional payment.

43. It is further submitted that the contract clearly provided for compensation in case of quantity variation under Clause 2.14 of the General Conditions of Contract (GCC). It is further submitted that no compensation was payable if the final executed contract value remained within the limits of (+) or (-) 15%, and in this case, no claim was raised by the Award Holder as the executed value was within the permissible variation as the actual executed value was 888.91 MT as opposed to the Contract Value of 1,041 MT and is within the limit of (-) 15%. (15% of 1041 is 884.45 MT) and therefore, no compensation was payable by the Award Debtor to the Award Holder.

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44. It is submitted that no claims were made under Clauses 2.15 or 2.16 of the GCC for extra or supplementary work, indicating no additional work was allocated to the Award Holder contrary to its plea in the arbitration. It is further submitted that the contract explicitly stated that no additional payment would be made for an increase in the quantum of welding or additional weld joints, as reiterated in the TCC and Clause 2.6 of the GCC.

45. It is further submitted that the payment terms were clear, with progressive payments made against monthly running bills up to 85% of the value of erected tonnage, and the remaining 15% on a pro-rata basis upon the achievement of milestone events. It is further submitted that there was no dispute on the work done or payments made, with the Award Holder having received **Rs.7,55,65,778/-** against a billed amount of **Rs.7,86,57,307.28/-** without any protest, including payments for price variation and overrun compensation.

46. It is further submitted that the contract provided that the final bill must be accompanied by an unqualified "No Claim Certificate" as per Clauses

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2.6.11 and 2.32.2 of the GCC. It is further submitted that overrun compensation and price variation were adequately provided for in case of time extension, as stipulated under Clauses 2.12 and 2.17 of the GCC. The Award Holder had duly received overrun compensation, as reflected in their own statements filed with the statement of claim.

47. Regarding **Claim No.2** before the Arbitral Tribunal for compensation of additional equated inch dia/weld joints, it is submitted that on 07.03.2012, the Award Debtor provided the list of drawings for the Award Holder's scope of work, which included MP, LP Steam, and Spray water piping. It is further submitted that a preliminary schedule was also shared on 29.03.2012, showing the IBR System piping scope for three packages and submitted that his was only a preliminary schedule and the first allocation of work pertaining to IBR Piping alone.

48. It is further submitted that on 27.042012, following the Detailed LOI issued on 26.04.2012, the Award Debtor detailed the scope of work providing a break up piping system-wise ie. Alloy Steel, CS (Carbon Steel) IBR, CS Non IBR and he Metric Tonnage under the three systems to be erected was mentioned as 1,000 MT. It is further submitted that the Award Holder, on

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28.04.2012, and again on 2.05.2012, requested to carry out only 548 MT of piping, differing from the scope detailed by the Award Debtor and that MP and LP system has been added.

49. It is further submitted that on 03.05.2012, the Award Debtor clarified that the drawings issued on 07.03.2012, included the MP and LP piping, which were within the Award Holder's scope. It is further submitted that meetings on 25.07.2012, confirmed the Award Holder's agreement to handle MP and LP Piping, with the Award Debtor handling IBR approvals.

50. It is further submitted that MP and LP Steam Piping were included in the Contract and covered under the Bill of Quantities. It is further submitted that the contract stipulated rates for piping per Metric Ton and that the Award Holder had been paid according to these rates.

51. It is submitted that that on 30.07.2012, the Award Holder first raised concerns about increased Inch-Dia/Equated Inch-Dia, claiming nearly a doubling of this metric without evidence. It is further submitted that on 01.09.2012, the Award Holder sought compensation for additional weld joints and Inch-Dia, due to the inclusion of Partial LP and MP types of piping based

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solely on increased joints, requesting a rate for the above.

52. It is further submitted that on 05.10.2012, a meeting was held where the Award Holder reiterated its claim for increased inch dia and the Award Debtor stated that its Top Management would finalise the rate by 15.10.2012 and the Award Holder was asked to submit its rates. It is further submitted that on 15.10.2012, the Award Holder provided rates for additional equated inch dia as follows:-

Sl.No.	System	Qty (Difference in Equated inch Dia)	Rate
1	CS (IBR)	22202" Dia	Rs. 700/Inch Dia
2	AS (IBR)	5777" Dia	Rs. 1,200/Inch Dia
3	CS(Non-IBR)	154" Dia	Rs. 500/Inch Dia

53. It is submitted that the rate was quoted system-wise ie. CS (IBR), AS (IBR) CS (Non IBR); and that the rates were not quoted for individual types of piping like MP, LP etc. It is further submitted that the rate is quoted for absolute increased Equated Inch-Dia for each system. For Example, for the alleged increased Equated Inch-Dia of 22,202 in the CS IBR system, the rate of **Rs.700/-** per Equated Inch-Dia and that the rate is not quoted for Equated Inch

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Dia/Metric Ton, which is what the Award Holder's eventual claim is based on.

54. It is further submitted that on 22.10.2012, the Award Holder claimed that the equated weld joints exceeded contract quantities and reiterated its compensation request. It is further submitted that the Award Debtor had offered a compensation package to another bidder of **Package A** for additional weld joints, based on a formula, and stated that for the tonnage erected, payment would adhere to the contract agreement.

55. It is further submitted that on **02.11.2012**, the Award Debtor provided estimates showing actual Inch-Dia/Equated Inch-Dia was less than the contract quantities. It is further submitted that on 22.01.2013, the Award Holder accepted the Detailed LOI dated 26.04.2012 without modifying the rates and later billed for additional Equated Inch-Dia on 10.04.2013 of **Rs.3,05,66,539/-**.

56. It is submitted that on **07.06.2013**,, the contract was signed without changes to rates or terms, and the Award Debtor repudiated the Award Holder's claim on 24.08.2013, noting that the Award Holder did not meet the conditions for compensation. It is further submitted that the Award Debtor had already paid for the erected tonnage as per the contract, except for the Final RA Bill

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which was the subject matter of Claim No.1 in the Arbitration.

57. It is further submitted that Claim No. 2 was based on Annexure CA 2 to its statement of Claim, which showed that the Award Holder executed less Inch-Dia compared to the tender amount. It is further submitted that the claim for compensation was based on an "EID/MT" ratio, not on actual work done.

58. It is further submitted that an increase in EID/MT does not imply additional work, and the Award Holder's claim for compensation was based on an erroneous comparison of derived ratios rather than absolute quantities. It is further submitted that the findings in the Arbitral Award are perverse, as they ignored the actual executed quantities and the terms of the contract.

59. It is further submitted that the learned Arbitrator's conclusions regarding increased Inch-Dia and compensation were flawed, as they did not align with the contract terms and the actual executed work.

60. It is further submitted that the claims for discrimination and compensation are unfounded as the Award Debtor offered the same compensation package to the Award Holder as to another bidder but the Award

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Holder did not meet the criteria for compensation.

61. Regarding **Claim Nos. 1, 3, and 4** on payment along with final bill it is submitted that these claims are not payable as the Award Holder did not provide an unconditional no-claim certificate. It is further submitted that the contract's provisions related to the Final Bill clearly require such a certificate, and in its absence, no claims can be entertained.

62. Regarding **Claim No. 5** on the alleged damages suffered by Award Holder due to delay, it is submitted that the learned Arbitrator erred grievously in awarding this claim by ignoring several critical facts as detailed below:-

a) **Estoppel:** The Award Holder had stated in its Letters dated 20.07.2015 and 10.08.2015, and in its No Claim Certificate, that no claims were made apart from those specified in these documents. Since damages for delay were not included, there should be no entitlement to compensation under this new head of claim.

b) **Primary Cause of Delay:** Documents submitted show that the Award Holder was primarily responsible for the delay.

c) **Contributory Delay:** Even if the Award Debtor caused some delay, the Award Holder also contributed to it, thus should not be compensated for its own

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default.

d) **Contractual Provisions:** The contract provides for Overrun Compensation and Price Variation under Clauses 2.12 and 2.17 of the GCC.

e) **Payment of Overrun Compensation:** The Award Holder has received Overrun Compensation as stated in Annexure CA1 to its statement of Claim before the Arbitral Tribunal. In other words, the sum of **Rs.7,55,65,778/-** paid includes the payment made towards Overrun Compensation.

f) **No Additional Claims:** No case has been made for additional compensation beyond what is covered by Overrun Compensation.

g) **Indian Contract Act:** No case has been made for the application of Sections 55 and 73 of the Indian Contract Act.

h) **Section 73:** The Ld. Arbitrator's reliance on Section 73 is misplaced since it applies only where no penalty is stipulated. The contract provides for overrun compensation, which has been received by the Award Holder without protest.

i) **Administrative Expenses**: The Ld. Arbitrator's conclusion that the claim relates to administrative expenses is considered perverse, as no intelligible

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distinction justifies separate compensation for such expenses.

j) **Contractual Acceptance:** The Award Holder unconditionally accepted the contract provisions regarding compensation for extensions, thus covering all incurred expenses, including any administrative costs.

63. In light of the above, it is prayed that the Court set aside the Award dated 03.03.2019 in its entirety and pass appropriate orders to ensure justice.

64. In support of their submissions, the learned counsel for the Award Debtor has relied on the following decisions:-

i. **South East Asia Marine Engineering and Constructions Limited** Vs. **Oil Inidia Limited** (2020) 5 SCC 164.

ii. **PSA Sical Terminal (P) Ltd.** Vs. **Board of Trustees of V.O Chidambranar Port Trust Tuticorin** (2021) SCC OnLine SC 508.

iii. **Union of India** Vs. **Bharat Enterprise,** MANU/SC/0335/2023.

iv. **Unibros** Vs. **All India Radio,** MANU/SC/1176/2023.

v. **Kanchan Udyog Limited** Vs. **United Spirits Limited,** (2017) 8 SCC 237.

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vi. **Central Coalfields Limited and Anr.** Vs. **SLL-SML (Joint Venture Consortium)** (2016) 8 SCC 622.

vii. **Silippi Constructions Contractors** Vs**. Union of India and Anr.,** (2020) 16 SCC 489.

Submissions on behalf of the Award Holder :-

65. The learned counsel for the Award Holder submits that the Award Debtor has not demonstrated any valid grounds for setting aside the Award under Section 34 of the Arbitration and Conciliation Act, 1996. The learned counsel asserts that the Award is well-reasoned, consistent with the law, and has duly considered all evidence presented by both parties.

66. It is further submitted that the Arbitrator's decision on several key points is highlighted. The Arbitrator accepted the Award Holder's claims for increased payments due to changes in the scope of work that were not included in the original contract. The compensation awarded was based on the agreed terms and the conduct of the parties, especially the Award Debtor's prior compensatory actions toward similarly situated entities, thus establishing a precedent. Furthermore, the Arbitrator's findings on the completion of work and the requirement for a no-claim certificate were based on evidence and

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reflected an accurate interpretation of the contractual obligations.

67. It is further submitted that the arbitration proceedings were conducted in full adherence to the laws of arbitration, established procedures, and principles of natural justice. The learned counsel confirms that no claims of illegality or impropriety in the conduct of the proceedings have been made. It is further submitted that the Arbitrator meticulously considered the rival arguments and arrived at conclusions based on the interpretation of the contract terms and the evidence provided.

68. It is further submitted that the Award Debtor has not specified any particulars or details of alleged errors in fact or law within the Award, rendering their claim of erroneous application of fact or law unsustainable.

69. The Hon'ble Supreme Court's decision in **Delhi Airport Express Metro Line** Vs. **DMRC,** (2022) 1 SCC 131 is referenced, which establishes that an erroneous application of law does not constitute a ground for setting aside an Award under Section 34 of the Arbitration and Conciliation Act, 1996. It is submitted that the Arbitrator's findings do not relate to laws affecting

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public interest or policy, thereby making the Award Debtor's claims meritless.

70. It is further submitted that several legal precedents support the Arbitrator's discretion in interpreting contracts and awarding compensation, reinforcing the Award Holder's position.

71. Citing the Hon'ble Supreme Court's decision in **DDA** Vs. **Skipper Construction Company Pvt. Ltd.,** (1996) 4 SCC 622, it is argued that an Arbitrator is not confined to a strict interpretation of contracts but has the liberty to grant relief based on the circumstances of each case.

72. It is further submitted that the issues in the present proceedings do not involve public policy considerations that could invite scrutiny under Section 34 of the Arbitration and Conciliation Act, 1996 and submitted that the findings of the Arbitrator should be upheld.

73. It is further submitted that the Award Debtor claims payment should be on a tonnage basis, overlooking the fact that the scope of work was altered to include Medium Pressure (MP) and Low Pressure (LP) steam piping, which

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were not part of the original contract.

74. It is further submitted that during a meeting on 25.07.2012, the Award Debtor acknowledged that the additional work was not initially part of the awarded package.

75. It is further submitted that the Award Debtor did not raise grievances regarding payment for increased Inch Dia (ID) and Equated Inch Dia (EID) until 24.08.2013, by which time the piping work was completed and submitted Prior assurances of payment had been given by the Award Debtor.

76. It is further submitted that the Arbitrator correctly relied on Volume I-A Part I, Chapter IX, Clause 1.9.1 of the Technical Conditions of Contract (TCC), which specifies that the scope of work should be determined based on the approximate tonnage of Inch-Dia (ID) and Equated Inch-Dia (EID). The increase in ID/EID entitles the Award Holder to the claimed amount, as acknowledged by the Award Debtor in the 25.07.2012 meeting.

77. The Hon'ble Supreme Court's decision in **McDermott International Inc.** Vs. **Burn Standard Co. Ltd.,** (2006) 11 SCC 181 is cited, emphasizing

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that party conduct is crucial in contract construction, and correspondence must be considered.

78. It is further submitted that the Arbitrator's interpretation of the contract, taking into account the Award Debtor's conduct and correspondence, was reasonable and in line with established principles of contractual interpretation, making the Award Debtor's challenge on this ground lacking merit.

79. It is further submitted that the Award Debtor argues that compensation granted to M/s.Bridge and Roof should not set a precedent for similar compensation to the Award Holder, asserting that fairness and discrimination are irrelevant in contracts. The Award Holder notes the failure to mention the circumstances under which the Arbitrator referred to the compensation to M/s Bridge and Roof.

80. It is further submitted that the Arbitrator correctly observed that the Award Debtor had compensated M/s Bridge and Roof for a similar increase in ID/EID and that both parties were under similar contracts as confirmed during cross-examination before the Arbitral Tribunal.

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81. It is further submitted that the Award Debtor's failure to treat similarly placed parties equally, negatively impacts its conduct, which was relevant to the Arbitrator's decision.

82. The Hon'ble Supreme Courts decision in **Eastern Coalfields Ltd.,** Vs. **Rungta Projects Ltd.,** (2018) SCC OnLine Cal 6555 is cited, affirming that reliance on trade usages and commercial practices is valid. It is submitted that the Award Debtor compensated M/s Bridge and Roof for a similar issue, this commercial practice supports the Award Holder's claim.

83. It is further submitted that the Award Debtor has not established grounds to question the Award, which is based on a plausible interpretation of facts and settled law.

84. It is further submitted that the Award Debtor alleges that payments were awarded despite the Award Holder's failure to fulfill contractual obligations. The Award Holder counters that a summary on 03.11.2012 showed

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completion of 889 MT against a reduced quantum of 782 MT.

85. It is further submitted that material reconciliation for all completed works was provided on 26.02.2015 and verified by the Award Debtor. It is further submitted that the Award Debtor did not raise any concerns regarding non-completion of work until the arbitration proceedings and therefore the Arbitral Tribunal noted contradictions in the Award Debtor's conduct and found no merit in the allegation of non-completion of the work, based on the evidence.

86. It is further submitted that the Arbitral Tribunal's findings were based on sufficient evidence, and the Award Debtor cannot sustain a Section 34 petition on this ground due to the lack of merit in the allegation of non-completion of the work.

87. It is further submitted that the Award Debtor claims delays in execution, but the Arbitrator noted that the Award Debtor granted uncontested extensions to the Award Holder due to issues attributable to the Award Debtor.

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88. It is further submitted that the Arbitrator's findings are grounded in the Supreme Court's ruling in **Hind Construction Contractors** Vs. **State of Maharashtra**, AIR 1979 SC 720, which correctly indicate that clauses for extension render time essentiality ineffective.

89. It is further submitted that the Arbitrator's finding that time was not of the essence was a correct interpretation based on the Award Debtor's conduct.

90. It is further submitted that the Award Debtor argues that an unconditional No Claim Certificate is required for claiming outstanding payments. However, the Arbitrator relied on Clause 2.23.2 of the General Conditions of Contract (GCC), which does not mandate such a certificate.

91. It is further submitted that the Arbitrator found that the format for the No Claim Certificate was for reference only, not prescriptive.

92. The Hon'ble Supreme Court's decision in **R.L. Kalathia & Co.** Vs. **State of Gujarat,** (2011) 2 SCC 400 is cited, stating that a No Claim Certificate does not bar claims made under coercion or undue influence.

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93. It is further submitted that the No Claim Certificate did not waive the Award Holder's rights to claim outstanding amounts, as it was submitted under the condition of due payments. It is submitted that the Arbitrator correctly interpreted it as not barring claims under the contract.

94. It is further submitted that the Award Debtor's reliance on the No Claim Certificate is therefore misplaced.

95. It is further submitted that the Award Debtor challenges the Award on the grounds of excessive and punitive interest. It is submitted that the Arbitrator awarded interest in accordance with Section 31(7)(b) of the Arbitration and Conciliation Act, 1996, from the date of the Award to the date of payment, within permissible limits.

96. It is further submitted that the Award Debtor has not demonstrated exceptional circumstances that would warrant interference with the interest Award, which is discretionary.

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97. The Hon'ble Supreme Court's decision in **State of Haryana** Vs. **S.L.Arora and Company,** (2010) 3 SCC 690 is cited, affirming that the Arbitrator has the discretion to award reasonable interest. It is further submitted that the Award of interest by the Arbitrator is lawful, and the Award Debtor's challenge to it is without merit.

98. It is further submitted that the Award Debtor's challenge to the Arbitral Award lacks merit and submitted that the Arbitrator issued a reasoned Award after considering all evidence and contractual terms. Hence prayed for dismissing the Original Petition filed by the Award Debtor.

99. I have considered the arguments advanced by the learned counsel for both sides. I have also perused the Impugned Award and the documents filed by the parties herein before the Arbitral Tribunal.

100. Discussion in the Impugned Award runs to almost 95 pages out of 157 pages dealing with the discussion of each of the 9 issues framed by the Arbitral Tribunal. As such, as far as the scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 is concerned, this Court can neither substitute the decision of the Arbitral Tribunal nor its reasoning nor correct the

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same.

101. The Hon'ble Supreme Court in **Ssangyong Engineering and Construction Co. Ltd.** Vs. **National Highway Authority of India,** (2019) 15 SCC 131, has held that an Award can be set aside on the ground of "patent illegality" under Section 34(2-A) of the Arbitration and Conciliation Act, 1996, only where the illegality in the Award goes to the root of the matter and shocks its conscience. The Hon'ble Supreme Court further held that the erroneous application of law by an Arbitral Tribunal or the re-appreciation of evidence by the Court under Section 34(2-A) of the Arbitration and Conciliation Act, 1996, is also not available.

102. The Hon'ble Supreme Court further also held that the above ground is available only where the view taken by the Arbitral Tribunal is an impossible view while construing the contract between the parties, or where the Award of the tribunal lacks any reasons. The Hon'ble Supreme Court further held that an Award can be set aside only if an Arbitrator/Arbitral Tribunal decides a question beyond the contract or beyond the terms of reference, or if the finding arrived at by the Arbitral Tribunal is based on no evidence, ignores vital evidence, or is based on documents taken as evidence without notice to the parties.

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103. The Hon'ble Supreme Court in **The Project Director, NHAI** Vs. **M.Hakim,** (2021) 9 SCC 1, has held that the power to set aside an Arbitral Award under Section 34 of the Arbitration and Conciliation Act, 1996, does not include the authority to modify the Award. It further held that an Award can be set aside only on limited grounds as specified in Section 34 of the Arbitration and Conciliation Act, 1996, and it is not an appellate provision.

104. The Hon'ble Supreme Court further held that an application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside an Award does not entail any challenge on the merits of the Award.

105. The Hon'ble Supreme Court **in Patel Engineering Ltd** Vs. **NEEPCO,** (2020) 7 SCC 167, has held that patent illegality as a ground for setting aside an Award is available only if the decision of the Arbitrator is found to be perverse or so irrational that no reasonable person would have arrived at the same 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.

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106. The Hon'ble Supreme Court in **McDermott International Inc.** Vs. **Burn Standard Co. Ltd,** (2006) 11 SCC 181, has held that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is well within the Arbitrator's jurisdiction to consider the same.

107. The Hon'ble Supreme Court in **Sutlej Construction Ltd.** Vs. **UT of Chandigarh,** (2018) 1 SCC 718, has held that when the Award is a reasoned one and the view taken is plausible, re-appreciation of evidence is not allowed while dealing with the challenge to an Award under Section 34 of the Arbitration And Conciliation Act, 1996 for setting aside an Award. It further held that the proceedings challenging the Award cannot be treated as a First Appellate Court against a decree passed by a Trial Court.

108. The Hon'ble Supreme Court in **Sheladia Associates Inc.** Vs. **TN Road Sector Project II, Represented by its Project Director,** 2019 SCC Online Mad 17883, reminded itself of the Hodgkinson principle which has been explained by the Hon'ble Supreme Court in the oft-quoted and celebrated Associate Builder's Case viz., **Associate Builders** Vs. **Delhi Development Authority**, (2015) 3 SCC 49. It held that Hodgkinson principle in simple terms means that the Arbitral

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Tribunal is the best judge with regard to quality and quantity of evidence before it. It further held that if there is no infraction of Section 28(3) of the Arbitration And Conciliation Act, 1996, the question of challenge on the grounds of public policy does not arise.

109. Although the learned counsel for the Award Debtor has labored hard to argue that the Award suffers from patent illegality, I do not find any reason to accept the arguments of the learned counsel for the Award Debtor, **except for** the compensation awarded towards Claim No.5 for damages purportedly suffered by the Award Holder, amounting to Rs.3,89,84,236/-, incurred as additional expenditure due to the delay in the work.

110. The Table in **Ex.C.25** and **Annexure No.CA-2** to Statement of Claims filed by the Award Holder before the Award Tribunal indicates that the Equated Inch-Dia had drastically increased for Carbon Steel Piping (IBR) from what was contemplated in the tender document and what was actually executed by the Award Holder. There are also indications that the Equated Inch-Dia for Alloy Steel piping (IBR) and Carbon Steel Piping, (Non-IBR) had reduced. However, the Equated Inch-Dia by metric tone had increased for Alloy Steel piping (IBR) and Carbon Steel Piping (IBR), with a partial reduction concerning Carbon Steel

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Piping (Non-IBR). The snapshot of **Ex.C25** and **Annexure No.CA-2** are recapitulated below for comparison:-

Difference based on the tender and as per final execution/DWG calculation

Description	**Weight (MT)**		**Inch Dia (ID)**		**EQU.ID**		**ID/MT**		**EQU.ID/MT**	
	*	#	*	#	*	#	*	#	*	#
SUB TOTAL (AS)	270	147.753	2745	2609	18120	15308.01	10.17	17.26	67.11	103.61
SUB TOTAL (CS-IBR)	319	466.037	7423	18185	21305	51299.38	23.27	41.27	66.79	110.05
SUB-TOTAL (CS-Non-IBR)	452	275.116	38299	17612	57844	23080.49	84.73	84.89	127.97	83.89
Total	**1041**	**888.906**			**97269**	**89677.88**				

* As per Tender
#As per final execution /DWG Calculation

111. The Arbitral Tribunal has discussed the issues and has come to a conclusion that the Award Holder was indeed entitled to the claim. This aspect therefore cannot be disturbed.

112. That apart, the major chunk of the claim is towards the increase in the scope of work from what was initially contemplated. This has been considered by the Arbitral Tribunal in **Issue No.1**. Relevant portion from the Impugned Award is also extracted below:-

> "42) *Ex.C25 is a summary of Inch-Dia based on work out from drawings. This summary i.e. Ex.C25 was signed by the above*

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mentioned Thiru J.Kasi Rajan, Deputy General Manager of the Respondent Company as well as Thiru L.A. Siddiqui, Resident Construction Manager of the Claimant Company. A perusal of the Ex.C25 will show that it has two main columns, one is 'As per Tender' and the other is 'As per DWG Calculation'. This summary would clearly show that there is a definite change/ alteration in the scope of work, in terms of ID/EID. Ex.C25 would also show that in respect of AS Piping, the EID per MT at the time of tender was increased to 108.01 from 67.11. Similarly, in case of CS-IBR piping, the EID per MT had increased from 66.79 to 119.70. In so far as CS-Non IBR is concerned, the EID/MT has reduced from 127.97 to 109.82. Therefore, there is justification on the part of the Claimant to state that though the tonnage of piping has corne down, the ID/ EID has increased sharply for AS and CS-IBR piping. This make it clear that the additional EID, based on the drawing issued by the Respondent, which is far in excess number of joints contemplated at the time of the Tender, based on the ID/ EID as contemplated in Clause 1.9.2 of TCC.

43) However, this was resisted by the Respondent claiming that on the basis of Clause 1.9.1 of TCC, the work is expressed in terms of erected weight to be in MT and the notes following Clause 1.9.1, 1.9.2 and 1.9.3 of TCC makes it clear that the quantities indicated is only tentative and liable for variation at the discretion of the Respondent. Further, relying on note to Chapter-II of TCC, it is submitted on behalf of the Respondent that the Contractor is not entitled for any additional payment even if there is any increase in quantum of welding and the Contractor shall weld the joints of site routing piping as per site requirement and no extra payment shall be made for such additional joints. As Note to Chapter-II of TCC was heavily relied on by the Respondent, the same is extracted below for better appreciation :-

"Note to Chapter-II (Scope of works):

The Welding process, weld joint and material specification may change to suit site requirement.

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The list is furnished only for estimation purpose. The contractor is not entitled for any additional payment even if there is any increase in quantum of welding.

The contractor shall weld the joints of site routing piping as per site requirement, no extra payment shall be made for such additional joints."

44) I am unable to accept this submission made on behalf of the Respondent by relying on the above extracted note to Chapter-II (Scope of Works).

45) The first part of the above mentioned note relates to change in welding process, weld joint and material specification to suit the site requirement, which is not relevant to Claim No.2. It is not the case of the Claimant that there has been a change in either welding process or weld joints or material specifications. The second part of the note refers to the list having been furnished only for estimation purpose. The list what is set out in paragraph 1.2.1.0 to 1.2.2.2 of TCC is also not relevant as this is not the case of the Claimant and their claim is based on the estimation based on the above said list. The third part of the note refers to weld of joints of site routing piping as per site requirements. This note stipulates that no extra payment can be made for such additional joints. It is not the case of the Claimant that additional joints are required as per site routing piping. Hence, this is also not relevant for the purpose of deciding Claim No.2 made by the Claimant. According to the Respondent, the Claimant is not entitled to any additional payment even if there is increased in the quantum of welding. There is no controversy with regard to this submission made on behalf of the Respondent. What is claimed under Claim No.2 is not the increase in the quantum of welding, but the payment due to the Claimant for distinct ratios of EID/ MT compared in Clause 1.9.2 of TCC. In the above extracted note to Chapter-II (Scope of Work) the last portion of the Clause reads "for further detailed scope of works refer relevant chapters in this Book". There is no ambiguity, with regard to the above mentioned sentence, according to which, other relevant chapters are

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required to be seen for detailed scope of work. One such relevant Chapter is Volume I-A Part-I, Chapter IX under Clause 1.9.2, the detailed scope of work having regard to approximate Tonnage of Inch-Dia and Equated Inch-Dia have been provided. This is the scope of work, which has to form the basis of cost estimation by the Claimant as it is evident from Note-II appended below Clause 1.9.3. I have already extracted Clause 1.9.2 of TCC, in which, for all the three packages not only approximate quantity in MT has been given but also corresponding ID and EID are also mentioned therein. This issue was raised in Ex.C5 and also it found mentioned in the Minutes of the Meeting dated 25.07.2012 (Ex.C9), where the Claimant is directed to carry out 8285 ID which piping was from another Package and not originally covered in Claimant's scope of work. This addition of MP and LP Steam Piping therefore grossly changed the quantities of ID & EID while having the effect of reducing of tonnage. Therefore, the reliance placed on by the Respondent to Notes to Chapter-II (Scope of Work) will not be helpful to them and it is not acceptable by this Tribunal."

113. Thus, I find no reasons to conclude that the aforesaid amount awarded vide Impugned Award rendered was patently illegal or was susceptible to be set aside on account of it being in conflict with the fundamental/public policy as is contemplated under Section 34 of the Arbitration and conciliation Act, 1996.

114. As far as C**laim No.1** for Outstanding Bills for a sum of **Rs.30,91,530/-** is concerned also, it cannot be disputed that the amount was not payable. This was considered in **Issue No.6** by the Arbitral Tribunal. It is based on **Ex.C.67**. Relevant portion of the Impugned Order reads as under:-

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*"**ISSUE N0. 6**:- Whether the Claimant is entitled to claim the payments sought for, as per the Claims viz., Claim Nos.1 to 5 made in their Claim statement ?*

ClaimN0,1 –Payment against the outstanding bills:

1) The case of the Claimant that the following bills remain unpaid eventhough admitted by the Respondent on the frivolous ground that no unconditional No Claim Certificate was submitted by the Claimant.

(a) Final Bill	*Rs. 19,16,942.00*
(b) Price Variation Bill Nos.9 & 10	*Rs. 6,10,218.00*
(c) ORC Bill No.6	*Rs. 5,64,370.00*
Total	***Rs. 30,91,530.00***

2) To decide this Claim, Ex.C67 could be easily referred to. Ex.C67 is the Minutes of the Meeting between the Claimant and the Respondent held on 28.11.2015, at Chennai. In paragraph 2 of Ex.C67, the claims raised by the Claimant in the letter dated 22.07.2015 was mentioned and the present status of the Claim was also narrated in a tabular column. A close reading of the tabular column would show that in SI.No.A, R.A. Bills was raised for Rs.26,49,009/- by the Claimant for which the status given by the Respondent was that only a balance of Rs.19,16,942/- is payable which will be paid along with the final bill/ Therefore, the final bill amount claimed in Claim No.1 tallies with the present status given in Ex.C67. Similarly, Column No.B deals with PVC Bills (9 & 10) for an amount of Rs.6,10,218/- claimed.The present status as per the Respondent for this amount of Rs.6,10,218/- is that a sum of RS.77,13 1/- for PVC-9 is yet to be paid and a sum of Rs.5,33,087/- for PVC 10 to be paid along with final bill, which means a sum of Rs.6,10,218/- for price variation is to be paid by the Respondent, which tallies with the amount claimed in Claim No.1. Further, in Ex.C67, column No.D, refers to ORC Bill No.6, for which the Claimant claim by the Claimant. a sum of

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Rs.8,80,411/- and the present status given by the Respondent in Ex.C67 is that they verified ORC Bill No.6 and found that only a sum of Rs.5,64,370/- is payable along with the final bill. This also deals with the amount claimed in Claim No.1.

3) Therefore, Claim No.1 amount was already admitted in Ex.C67 and only reason given for not paying the amount is that "no unconditional No Claim Certificate" was submitted by the Claimant, which this Tribunal held as unfair and what has been submitted as the No Claim Certificate, substantially complied with the requirement as per the Contract. Therefore, the Claimant is entitled to this admitted amount of Rs.30,91,530/- against the pending bills of PVC and ORC bills."

115. As far as **Claim No.2** towards increased Equated Inch-Dia for a sum of **Rs.2,57,19,314/-** is concerned also, as discussed earlier, it cannot be disputed that the amount was not payable to the Award Holder. Relevant portion of the Impugned Order reads as under:-

*"**Claim No.2 –Payment against increased Equated Inch-Dia:***

1) While deciding Issue No.1, I have elaborately considered the arguments advanced by both the parties, with regard to the claim of the Claimant for the increased Equated Inch-Dia and held that there was alteration in the scope of work in terms of Id/ EID. Therefore, the Claimant is entitled to make Claim No.2. Though the Claimant originally claimed a sum of Rs.3,39,69,557/- towards the increased Equated Inch-Dia, after finding that certain computation errors were noted, the Claimant corrected the and reduced amount to RS.2,57,19,314/- (including Service Tax). The details of this claim are given in page 36 of the Claim Statement which was perused by me and found to be in order. It is also an admitted case that such an amount has been paid to another contractor M/s. Bridge & Roof

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and the same was rejected for the Claimant, which was found to be discriminatory by this Tribunal. It has been explained that the particulars of this claim were prepared based on the primary documents on record signed by both the same the Claim parties, on 04.06.2015.

2) I have gone through the documents and found that the particulars given in the Annexure to the Claim Statement with regard to this claim deals with primary documents signed by both the parties on 04.06.2015. It is also not in dispute that this was testified by CW-1, but the same was not controverted at all by the Respondent while cross examining CW-1. RW-1 has also confirmed that these particulars were verified by the Erection Engineer of the Respondent, but no documents have been filed by the Respondent to contradict the contents and correctness of the commutations made in the document. The entire endeavour of the Respondent is that such a claim is not admissible at all as the same lies outside the terms of the contract, which argument was rejected by this Tribunal, while considering Issue No.1. Therefore, the Claimant is entitled to this amount of Rs.2,57,19,314/-."

116. Therefore, this Court cannot interfere with the Impugned Award as far as **Claim No.2**.

117. As far as **Claim Nos.3 &4** regarding refund of the retention amount and release of Bank Guarantee is concerned, the Arbitral Tribunal held as under:-

*"**Claim No.3 - Payment of Retention Money**:*

1) According to the Claimant, a sum of Rs.37,77,565/- is due and payable by the Respondent on account of Retention Money and the break up figures are as follows :-

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a) Retention Money	*Rs. 35,55,457.00*
b) Retention Money of ORC	*Rs. 2,22,108.00*
Total	***Rs. 37,77,565.00***

2) Ex.C67 is a document, which has to be gone into for the purpose of this Claim also. In Ex.C67 Column No.E reserve to Retention money with held and the amount is Rs.35,55,457/-. The present status as per the Respondent in Ex.C67 is that 50% of the Retention Money will be paid along with the final bill and 50% after final bill and on completion of the guarantee period, as per Contract. This is as per Clause 2.22.2 of GCC. Similarly, column No.F, deals with retention money of ORC amount of Rs.2,22,108/- and the present status in Ex.C67 as per the Respondent is that this amount is to be paid. In so far as Rs.35,55,457/- is concerned, is to be paid along with the final bill and 50% is to be refunded after expiry of the guarantee period. In this case, the work was completed in January 2015 and the guarantee period expired in January 2016. Therefore, the entire amount has become refundable. Hence, a sum of Rs.37,77,565/-, as already admitted by the Respondent is to be paid on the above terms and it has become an issue thereafter, due to the "unconditional No Claim Certificate" as demanded by the Respondent, was not submitted by the Claimant. This Tribunal has already concluded that the No Claim Certificate submitted by the Claimant, has substantially complied with such a certificate and therefore there is no justification at all in with holding the amount and the same is to be paid to the Claimant by the Respondent.

Claim No.4 - Release of Bank Guarantee of Rs.40,50,000/- submitted towards Refund of Security Deposit :-

1) Clause 1.11 of GCC refers to Return of Security Deposit and according to this clause security deposit shall be refunded/ bank guarantee released to the Contractor along with the final bill after deducting all expenses/other amounts due to BHEL under the Contract/ other contract entered into by them and

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BHEL. There is no dispute with regard to the security deposit of Rs.40,50,000/- in the form of a Bank Guarantee and therefore as per Clause 1.11 of GCC the same has to be refunded. This amount also was not released by the Respondent on the ground that no "unconditional No Claim Certificate" was issued. In view of the Tribunal's finding with regard to insisting such an unconditional No Claim Certificate, this amount is also to be paid by the Respondent to the Claimant.

118. Therefore, this Court cannot interfere with the Impugned Award as far as **Claim Nos.3&4** as well.

119. As far as **Claim No.5** for a sum of **Rs.3,89,84,236/-** (together with interest at 18%) towards damages purportedly suffered by Award Holder due to delay of the Award Debtor Company is concerned, the Arbitral Tribunal held as under:-

*"**Claim No.5 Payment towards damages/ loss suffered by the Claimant due to various defaults and violations on the part of the Respondent including delays in the work caused by the Respondent** :-*

1) A sum of Rs.3,89,84,236/- has been claimed in this Claim towards damages/ losses suffered by the claimant.

2) While considering Issue No.3 and 4, this Tribunal has come to the conclusion that the time is not an essence of the Contract and it is the Respondent who is responsible for the delay in completion of the work. While considering Issue No.4, the consequences of delay are not considered and therefore the consequences of the delay and Claim No.5 are now considered by this Tribunal together.

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3) Because of the delay, which is attributable to the Respondent, the Claimant submits that, they are entitled to the compensation as per Section 55 of the Indian Contract Act r/w Section 73 of the same Act. Annexure-3 to the Claim Statement deals with summary break-up of additional costs claimed by the Claimant, wherein the details are given for the total amount of Rs.3,89,84,236/-. Though the Claimant set out details of various expenses incurred by them during the course of the entire project in Annexure-III, the Claim is limited from August 2012 to January 2015 only. For the amount claimed in Annexure III to the Claim Statement, supporting documents were also produced by the Claimant in 15 volumes which are totally marked as Ex.C210 collectively. The ledger accounts of the Claimant related to this Contract was also produced by the Claimant which are marked as Ex.C208 and Ex.C209 collectively. In his chief examination, CW-1 deposed about the preparation of Annexure III and the documents in support thereof. There was no attempt on the part of the Respondent to controvert the same, by cross examining CW-1 in this aspect and the only explanation offered by the Respondent is that it is for the Claimant to prove the same. However, RW-1 in the cross examination has confirmed that the verification of the correctness of the entry in Annexure C-3 with the document filed by the Claimant in Ex.C208, Ex.C209 and Ex.C210 was carried out by the Respondent's finance department. However, RW-1 stated that he was not aware of any report prepared by the Respondent's Finance Department after verification of the entries done by them.

4) The following questions and answers by RW-1 are relevant in this regard.

> *"Q. 126. Who is in possession of the certified copies of various bills referred to in the column titled "Present Status" in the table at para 2 of the aforesaid Minutes of Meeting ?*
>
> *A. Respondent's Finance Department*

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Q. 127. Did you or the Respondent verify the correctness of the various entries given in Annexure CA-3 at pages 52 and 53 of the Statement of Claims with the documents filed by the Claimant in Volume 5 and Volumes 7 to 10 in these proceedings ?

A. I am not involved in the process.

Q.128. Who on the behalf of the Respondent was involved in the process related to verification of the entries in the aforesaid statement vis-a-vis the records filed by the Claimant in these proceedings?

A. The Respondent's Finance Department.

Q.129. Are you aware as to whether the Respondent's Finance Department prepared any report of the verification of the entries referred to in your answer to Q.Nos. 119 and 128?

A. I am not aware."

5) Therefore, it is to be deemed that the Claimant has discharged their liabilities by verifying Ex.C208, Ex.C209 and Ex.C210 and also examining CW-1 with regard to the same. The Claimant has also cross examined RW-1 in this regard as stated above and thus discharged their liability with regard to this claim.

6) This claim was resisted by the Respondent by relying on Clause 2.12 and 2.17 of GCC by stating that the Claimant was paid Overrun Compensation and Price Variation Compensation. Clause 2.12 refers to Overrun Compensation which is payable by way of rates revision for periods beyond original contract period subject to certain terms and conditions. Similarly, Clause 2.17 of GCC deals with Price Variation Compensation, which happens due to variation in the index of Labour, High Speed Diesel Oil, Electrode, etc., As rightly pointed out by the learned counsel for the Claimant this claim is towards prolonging administration and other

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resources, their Machinery, Tools and Plant and other construction material in the extended period. This claim is related to the administration expenses and therefore there is difference between the claim for compensation made by the Claimant in this claim and the Overrun Compensation paid by the Respondent under Clause 2.12 and 2.17 of the GCC. While discussing and deciding the Issues 3 and 4, this Tribunal comes to the conclusion that time is not an essence of the Contract and the Respondent is responsible for the delay in completion of the work. The consequences of the delay, according to the Claimant, is compensation as per Section 55 and 73 of the Indian Contract Act, 1872, which reads as follows :-

> ***"55. Effect of failure to perform at a fixed time, in contract in which time is essential.-*** *When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract." Effect of such failure when time is not essential. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to*

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do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure." Effect of acceptance of performance at time other than that agreed upon.-If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.1 -If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so."

*"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. 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*

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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. -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.

Explanation.- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

7) When time is not the essence of Contract as held by this Tribunal while deciding Issue No.3, then the Claimant is entitled to compensation for any loss caused to them. Section 73 of the very same Contract Act has also dealt with the same, and it provides for compensation and how it has to be calculated. I have already narrated how this Claim has been made by the Claimant on the basis of Ex.C208, Ex.C209 and Ex.C210. Therefore, in such circumstances, the Claimant has clearly established their case for entitlement to compensation and they have also proved the quantum also and in such circumstances, this Tribunal awards a sum of Rs.3,89,84,236/- as compensation to the Claimant which is payable by the Respondent."

120. A reading of the Impugned Award and the records that have been filed before this Court both by the Award Debtor and by the Award Holder indicates that

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the above claim of **Rs.3,89,84,236/-** towards damages for the delay is based on **Annexure CA-3** to the Statement of Claim and was limited for the period from August 2012 to January 2015.

121. The Award records that in support of the above claim, documents in **Annexure CA-3**, were filed in 15 volumes which were collectively marked as **Ex.C210**. The ledger accounts of the Award Holder were also collectively marked as **Ex.C208** and **Ex.C209** in support of the claim in **Annexure CA-3** for **Rs.3,89,84,236/-**. These documents are not available before this Court.

122. The only basis on which the aforesaid amount has been awarded in the Impugned Award to the Award Holder was that there was no attempt on the part of the Award Debtor to controvert the contents of **Annexure CA-3** to the Statement of Claim and that the only explanation offered by the Award Debtor was that it was for the Award Holder to prove the same.

123. The Impugned Award further records that the Award Debtor's witness (RW1) during cross-examination has confirmed the verification of the correctness of entry in **Annexure-CA3**, which is nothing but an internal document maintained by the Award Holder.

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124. A reading of the **Annexure-CA3** to the Statement of Claim indicates that the Award Holder has claimed expenses under the following four heads towards damages for the delay:-

Sl. No.	Heads	Amount (In Rupees)
1.	Administrative and other expenses	47,11,000/-
2.	Construction Expenses	1,14,24,744/-
3.	Employees Costs	2,26,39,653/-
4.	Finance Costs	2,08,839/-
	Total	**3,89,84,236/-**

125. The Arbitral Tribunal has extracted question numbers 126 to 129 elicited for the Award Debtor's witness (RW1) in Paragraph 4 of Page No.139 of the Impugned Award and has concluded that the Award Holder had discharged its onus by proving **Ex.C208** to **Ex.C210** by examining its witness namely **CW1** and therefore has interpreted Sections 55 and 73 of the Indian Contract Act, 1872 in favour of the Award Holder to award the aforesaid Sum of **Rs.3,89,84,236/-**. However, a reading of the documents before the Arbitral Tribunal particularly **Ex.C61** dated **20.07.2015**, **Ex.C62** dated **23.07.2015** and **Ex.C63** dated **10.08.2015** of the Award Holder indicates that no claim was made by the Award Holder for the purported damages prior to institution of the Arbitral Proceedings.

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126. **Ex.C61** letter dated **20.07.2015**, is just prior to the invocation of an Arbitration Clause in **Ex.C63** dated **10.08.2015**. There, the claim was confined only for a sum of **Rs.4,18,86,760/-**. In **Ex.C61** letter dated **20.07.2015**, it has been clearly stated as follows:-

> "**With this letter we confirm that we do not have any other claims to make (except as mentioned in point no A, B, C, D, E & F) on this project.** If the above payment is not released to us within 30 days a monthly compounded interest of 18% as per the Interest Act, 1978 will become applicable on the outstanding amount till the date of payment."

127. In **Ex.C63** letter dated **10.08.2015** also, there is no whisper for any claim amount towards damages for **Rs.3,89,84,236/-**. In **Ex.C65** letter dated **08.09.2015**, the Award Holder had also enclosed a No Claim Certificate. This was purportedly at the insistence of the Award Debtor that the Award Holder should issue a No Claim Certificate related to the amounts payable to the Final Bill and connected thereto including the retention money, ORC and PVC bills. In **Ex.C65** letter dated **08.09.2015**, the Award Holder also stated that the disputed amounts be left for resolution in accordance with the terms of the contract. However, there are no records for any claim for damages for **Rs.3,89,84,236/-** prior to the institution of Arbitral Proceedings.

128. There are also no records to show that either in **Ex.C61** to **Ex.C63** and

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Ex.C65, or anywhere, the Award Holder had made claim for a sum of **Rs.3,89,84,236/-** towards damages. It is for the first time before the Arbitral Tribunal, in **Annexure-CA3** to the Statement of Claim along with **Ex.C208** to **Ex.C210**, the Award Holder presented a claim towards damages. It was incumbent on the part of the Award Holder to have prioritized the claim on the damages prior to the commencement of the Arbitral proceedings, which should have been claimed at the time of issuance of **Ex.C63** letter dated **10.08.2015**.

129. The Impugned Award of the Arbitral Tribunal to that extent call for interference as Award of **Rs.3,89,84,236/-** on damages purportedly suffered by the Award Holder due to delay is based on internal document which never surfaced prior to institution of the Arbitral Proceedings before the Arbitral Tribunal.

130. That apart, it was for the Arbitral Tribunal to have insisted on the Award Holder to clearly explain each of the entries in **Ex.C208** to **Ex.C210** before awarding the huge sum of **Rs.3,89,84,236/-** to the Award Holder.

131. Therefore, it has to be construed that the Awarding of **Rs.3,89,84,236/-** to the Award Holder was without any reason and therefore patently illegal warranting interference in accordance with the decision of the Hon'ble Supreme

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Court in various cases including that of the **Ssangyong Engineering and Construction Co. Ltd.** Vs. **National Highway Authority of India,** (2019) 15 SCC 131 under Section 34(2-A) of the Arbitration And Conciliation Act, 1996.

132. In the result, the Impugned Award dated **03.09.2019** to the extent it awards amount of **Rs.3,89,84,236/-** towards damages for delay alone is liable to be set aside and is accordingly set aside, leaving open for the Award Holder to proceed with the Execution Petition.

133. The Original Petition is thus partly allowed with the above observations. No Cost. A.No.790 of 2020 is closed.

134. Registry is directed to number the **E.P.SR.No.19361 of 2021** and list it for regular hearing.

14.10.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

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C.SARAVANAN, J.

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Pre-Delivery Order in
Arb.O.P.(Com.Div.) No.159 of 2020
and
A.No.790 of 2020
and
A.No.1919 of 2021
in
E.P.SR.No.19361 of 2021