IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 984 of 2018

Hindustan Petroleum Corporation Limited ...Petitioner

Versus

G. R. Engineering Private Limited ...Respondent

Mr. Zal Andhyarujina Sr. Advocate a/w Mr. Vijay Purohit, Ms. Ishani Khanwilkar, Ms. Nitika Bangera, vis. Niyati Bogayta i/b P & A Law Offices Adv. For Petitioner.

Mr. Haresh Jagtiani, Sr. Adv. a/w Mr. Suprabh Jain, Mr. Pushpvijay Kanoji, Mr. Pranay Kamdar i/b Suprabh Jain Adv. For Respondent.

CORAM : SOMASEKHAR SUNDARESAN, J.

RESERVED ON : January 29, 2025

PRONOUNCED ON : June 18, 2025

JUDGEMENT:

Context and Background:

1. This Petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("***the Act***") challenges an arbitral award dated May 2, 2018 ("***Impugned Award***") passed in favour of the Respondent, G.R. Engineering Private Limited ("***GRE***") by an arbitral tribunal allowing a claim against the Petitioner, Hindustan Petroleum Corporation Ltd. ("***HPCL***").

2. HPCL invited bids and awarded GRE a contract to construct twelve "mounded bullets" to store liquified petroleum gas at HPCL's refinery at Mahul ("***Project***"). Specific elements of the mounded bullets were to conform to the usage of reinforced cement concrete ("***RCC***") of "M30 grade". The Project was to be completed by December 5, 2007 but was completed on February 2, 2010. Disputes and differences between the parties arose out of HPCL computing liquidated damages in the payments due on invoices raised by GRE. HPCL also withheld various other amounts on the payments made to GRE, which led to the arbitration proceedings.

3. The Impugned Award holds in GRE's favour on various counts. The Learned Arbitral Tribunal held that the amount withheld by HPCL on account of Civil Works (Rs. 1,99,07,227); under-insurance (Rs. 25,64,026); Customs Duty variation (Rs. 86,38,491.50); Service Tax (Rs. 3,08,85,583); normalising 'Dished Ends' (Rs. 5,00,000); and liquidated damages (Rs. 5,83,67,973) ought not to have been withheld. The Impugned Award directed the payment of such sums by HPCL to GRE. The Impugned Award also awarded interest at the rate of 7% per annum from the date of filing of the claim (September 6, 2012) until the date of actual payment.

4. The core challenge to the Impugned Award is based on alleged perversity in the findings on the following counts, namely:-

(a) Manner of dealing with the facts relating to the Civil Works, with particular regard to consideration of a report by an expert not introduced by HPCL as a witness, as also the contention that disputes relating to Civil Works was not arbitrable;

(b) Denial of Liquidated Damages in the teeth of the contract between the parties; and

(c) Manner of dealing with the claims in relation to under-insurance, service tax and Customs Duty.

5. Each of these heads is dealt with below. I have heard, at length, Mr. Zal Andhyarujina, Learned Senior Counsel on behalf of HPCL and Mr. Haresh Jagtiani, Learned Senior Counsel on behalf of GRE, and examined the record with their assistance, bearing in mind the scope of Section 34 of the Act.

Withholding on Civil Works:

6. HPCL withheld an amount of Rs. ~1.99 crores on the premise that the Civil Works carried out did not conform to the M30 standard. HPCL's challenge to the Impugned Award in this regard can be summarised thus:-

(a) Various government agencies are entitled to inspect the Project and point out discrepancies in the execution, and recommend

recoveries. HPCL is entitled to effect withholding of amounts. In such event, under Clause 8.b of the General Conditions of Contract ("***GCC***"), GRE is not entitled to raise any dispute. According to HPCL, the withholding was done pursuant to the recommendation of its own vigilance department, which is a "government agency". Therefore, this facet of the matter was not arbitrable. HPCL finds fault with the Learned Arbitral Tribunal having rejected an application under Section 16 of the Act in this regard;

(b) In the course of the arbitration, a report dated May 18, 2009 prepared by one Prof. R.S. Jangid of IIT, Mumbai ("***Jangid Report***") was relied upon by GRE and the Learned Arbitral Tribunal took it on record as HPCL's witness despite HPCL not having introduced such document as its evidence. Instead, HPCL sought to rely on the report dated June 18, 2009 of another IIT Professor, Prof. Ravi Sinha ("***Sinha Report***") and another report by Prof. Sinha and Prof. Alok Goyal (also of IIT) dated March 5, 2010 ("***Sinha Goyal Report***"), which were the only two expert reports sought to be relied upon by HPCL;

(c) The Sinha Report has been wrongly interpreted to hold that the Civil Works met the stipulated standard while the Jangid Report

is being relied upon as HPCL's evidence when that report was actually introduced into the record by GRE and not by HPCL;

(d) The stipulated standard of M30 was a strict standard and any deviation was not acceptable at all, and therefore the Impugned Award falls outside the scope of the contract between the parties;

(e) The Impugned Award wrongly interprets evidence in the form of cross-examination to refer to "as-built drawings" of the mounded storage bullets, to hold that the requirement of meeting the M30 standard had been met; and

(f) Clause 5.k of the GCC provided that acceptance of sections of the Civil Works would not constitute a waiver of any portion of the contract between the parties and would not absolve GRE. Therefore, absence of complaints by HPCL during the stage-wise inspection of the Project would not absolve GRE of the requirement to meet the M30 standard and HPCL's failure to object earlier was wrongly held in the Impugned Award as being relevant.

7. A careful examination of the material on record, in my opinion, leads to an inexorable conclusion that none of the aforesaid contentions lends itself to acceptance.

8. It is apparent that there was no specific government agency that made any recommendation for withholding of the amount under the head of Civil Works. Clause 8.b explicitly provides that the Project was subject to inspection by various "Government agencies of Government of India". Upon inspection by such agencies, if it were pointed out that the contract work had not been carried out according to the tender conditions and if any recoveries were recommended, the same shall be recovered from running bills, and no dispute on such account could be raised and subjected to arbitration. The provision is explicit in its terms. If any agency of the Government of India were to conduct an inspection and make a recommendation to withhold any amount, the provision would kick in. Admittedly, no external agency of the Government of India was at all involved in HPCL's decision to withhold the amount.

9. HPCL seeks to attribute the withholding of amounts, to a view taken by HPCL's own vigilance department invoking its reporting relationship with the Central Vigilance Commission (***"CVC"***). It is apparent that the vigilance department of HPCL is nothing but an internal department of HPCL. Merely because guidelines of the CVC would have to be followed by HPCL's vigilance department, it would not follow that vigilance department of HPCL is an inspection agency of the Government of India for purposes of Clause 8.b of the GCC. Evidently, the scope of Clause 8.b of the GCC covers agencies of the

Government of India that would be entitled to conduct inspection of the Civil Works – this could be agencies with competence to conduct inspection of civil works, such as industrial safety inspectors or petroleum regulatory agencies and the like. I am not persuaded that a dispute between the parties can simply be placed even outside the scope of a solemn arbitration agreement for no reason other than the premise that HPCL has a vigilance department.

10. That apart, the Impugned Award finds that there is not even a report from HPCL's vigilance department recommending a retention from the running bills. Therefore, even if HPCL were to contend that its own vigilance department is an agency of the Government of India, the other ingredient of the need for a recommendation of retention by such agency is sorely missing.

11. Consequently, in my opinion, the Learned Arbitral Tribunal was not wrong in rejecting the contention that the dispute on account of withholding of amount on the premise of non-compliant Civil Works is not even arbitrable.

12. The next objection in relation to Civil Works is that the Learned Arbitral Tribunal was wrong in permitting the Jangid Report to come into the zone of adjudication, since it is only the Sinha Report that HPCL desired to press into evidence. The Learned Arbitral Tribunal having treated the

Jangid Report as HPCL's evidence, Mr. Andhyarujina contends, is completely perverse and has led to a patently illegal process in adjudicating the matter. I am unable to agree that this presents a ground for interference with the Impugned Award.

13. It is apparent, HPCL was desirous of having the mounded bullets examined by IIT, Mumbai. This led to Prof. Jangid examining the matter. Evidently, no such inspection and consequential preparation of the Jangid Report would have been possible unless HPCL enabled access and there had been interaction with HPCL and GRE by Prof. Jangid. That led to a draft report from Prof. Jangid, which both the parties had access to. It is apparent that HPCL was not happy with the findings in the Jangid Report. This appears to have led to Prof. Sinha and Prof. Goyal being asked to repeat the exercise – potentially, only at the request of HPCL.

14. Since HPCL chose not to introduce the contents of the Jangid Report, and GRE legitimately had access to the Jangid Report, evidently, GRE sought to press it into service as constituting material contrary to HPCL claims . It is trite law that strict rules of procedure in evidence law are not to be expected in arbitration proceedings, where the focus has to be on the substance of the claims and determination -of where the truth lies, rather than get bogged down by procedure and manner of introducing evidence. If the Jangid

Report – in fact, the first report from IIT, Mumbai – was inconvenient and not acceptable to HPCL, the inspection by Prof. Jangid being a fact-finding exercise, the Learned Arbitral Tribunal cannot be faulted for taking into consideration the contents of the same.

15. It was open to HPCL to seek permission of the Learned Arbitral Tribunal and put questions to confront Prof. Jangid once the Jangid Report was let into the scope of adjudication. However, it appears that HPCL advisedly took the view that opposing introduction of the Jangid Report and relying purely on the fact that GRE could not confirm Prof. Jangid's signature on it would be strategically adequate. That apart, the Learned Arbitral Tribunal has not considered the Jangid Report to the exclusion of the Sinha Report or in conflict with the Sinha Report. Merely allowing the Jangid Report into the mix of material on record to enable a just consideration of what transpired when the mounded bullets were inspected, is not something that can be found fault with.

16. The Sinha Report too has been considered by the Learned Arbitral Tribunal as returning a finding on GRE's technical compliance. The Sinha Report, in Chapter 2 titled "Structure Description" explicitly states that "the tank mound ***has been constructed using M30 concrete***". It goes on to state that all the horizontal members i.e. the beams and the slabs are designed

using M30 concrete. The basement raft as well as the walls has been constructed from the same grade of concrete. This is a clear and explicit finding, which cannot be wished away. It would be impossible to find fault with the assessment of evidence by the Learned Arbitral Tribunal.

17. The Jangid Report is also consistent with the aforesaid finding. It holds that ready mix concrete of M30 grade had been used for constructing the structure and that it was executed under the supervision of EPCM Consultant, part of the Engineers India Ltd. ("***EIL***") which designed the structure. It also notes that the quality of the concrete was monitored at various stages such as cube testing at the concrete plant as well as at the site during construction. The report concludes that "the quality of RCC as well as sand used in the LPG Mounded structure conforms to that specified in its design." The observed concrete strength from various tests was found to satisfy the design graded of M30 concrete and no sign of distress was observed on the constructed LPG mounded structure to give any doubt about the quality of the concrete. The structure was held to be safe and stable with ability to withstand the design load. This is what HPCL was evidently unhappy with, since it did not endorse the stance adopted by HPCL, which perhaps led to a request for a second opinion from IIT, Mumbai.

18. It was clear during the hearing that the material on record does not contain any evidence as to what led to the second opinion being sought – the Sinha Report is dated one month after the Jangid Report. Be that as it may, arbitral proceedings are meant to enable focus on substantial justice without being bogged down by procedural processes. This is not to indicate that in arbitration, one could do away with the basic requirements of a just process. However, what is to be remembered is that the process followed by the Learned Arbitral Tribunal was not unjust. I am not satisfied that HPCL has made out a case that the Learned Arbitral Tribunal has erred or caused injustice by letting a firm and clear finding from a professor of IIT Mumbai, and that too upon being commissioned by HPCL, into the zone of adjudication. The only reason for Prof. Jangid to get involved was that HPCL had invited IIT, Mumbai to conduct the study. The Jangid Report was not to the liking of HPCL but since it was a fact-finding report, its contents were not at all irrelevant – on the contrary, its findings are indeed relevant. If HPCL had reason to disagree with the Jangid Report, it was open to HPCL to seek issuance of summons to Prof. Jangid and to confront his findings by putting questions to him. Evidently, nothing of that sort was done, and HPCL advisedly chose to rely on a procedural argument that unless HPCL introduced the Jangid Report, it could not have been considered.

19. The Learned Arbitral Tribunal could have accepted the Jangid Report as a report introduced into evidence by GRE (instead of HPCL). This would have hardly made any difference. The objective of the adjudication was to arrive at the truth and to get to a finding of fact. It was not necessary to get bogged down by the label of which party was introducing the evidence. In the facts and circumstances of the case, no infraction has been caused by the introduction of the Jangid Report.

20. As stated above, even the Sinha Report has contents that are consistent with the Jangid Report. Therefore, I am not convinced that the standard of perversity or patent illegality has been attracted for this Court to interfere with Impugned Award. In fact, in the cross-examination of Prof. Sinha during the arbitral proceedings, it became apparent that Prof. Sinha was unaware of the Jangid Report authored by his own college. It is apparent from the material on record that GRE's case is that one day after the Jangid Report i.e. May 19, 2009, fresh core samples were taken for review by Prof. Sinha and the result of testing done on May 19, 2009 was not acceptable to HPCL, which led to a second investigation by Prof. Sinha on June 1, 2009. A revised report was issued which was said to not have been shared with GRE despite repeated requests.

21. Quite apart from these, the analysis and findings of the Learned Arbitral Tribunal in this regard are quite lucid, rational and plausible. It would be inappropriate for me to consider taking another view since the scope of jurisdiction under Section 34 of the Act is not appellate in character – even an appellate court ought not to substitute the wisdom of the court below with its view merely because another view is possible. In the facts of the matter at hand, the Learned Arbitral Tribunal has noted that during construction, there had been no objection or grievance. That apart, the Sinha Report has returned a finding that there is no evidence of GRE having cut corners with the standard of concrete used. GRE, according to the Sinha Report, indeed used concrete of M30 standard . Despite use of concrete of the standard stipulated, if the outcome was that the strength of the retaining wall was below the M30 grade, the Sinha Report has indicated that it could be due to inadequacies and deficiencies in the technical specifications prescribed in the tender. Therefore, it has been reasonably concluded that GRE could not be blamed.

22. The Impugned Award notes that GRE has repeatedly offered to effect remedies should HPCL be of the view that the outcome is of below M30 standard despite concrete of M30 grade having been used. However, HPCL has neither accepted the proposal nor had any remedies carried out at the hands of any other contractor. It was noted that the mounded bullets had

been used without any repair for seven years. The Learned Arbitral Tribunal has noted that the Jangid Report is based on core tests, which according to Prof. Sinha are most reliable to determine the actual strength. Noting that the stipulation of the standard is to ensure that the structure is safe and stable, and that the structure was indeed used without any remedial measures being taken, the Learned Arbitral Tribunal has concluded that in the light of the positive finding that GRE had not cut corners by deliberately economising on the standard of concrete deployed, there can be no basis to effect a retention of amounts on the premise that the Civil Works are not up to the stipulated standard.

23. More importantly, the Impugned Award has also relied on the factual position that HPCL had certified to the Chief Controller of Explosives of the Petroleum and Explosives Safety Organisation (the regulatory agency tasked with ensuring industrial safety in storage, handling and use of petroleum products in India) that the structure is in conformity with the stipulated safety standards. Therefore, taking the two reports, the certifications provided by HPCL itself to the regulators (who in fact had the powers to inspect the mounded bullets) and the fact that no remedial measures have in fact been effected as a corollary to a view that the mounded bullets were sub-standard, the Learned Arbitral Tribunal has also noted that no basis has

been shown to arrive at the quantification of the amount withheld at Rs. ~1.99 crores.

24. I do not agree with HPCL's contention that the Impugned Award does not give any reasons to dismiss the argument that payment ought to be made only for work actually done. I find that the Impugned Award is at pains to point out that the Sinha Report has returned a finding that no corners were cut and the concrete deployed was indeed of the M30 grade. The work actually carried out is the effort put in and there is a clear finding of fact that no corners were cut. Therefore, this would indeed constitute reasons for rejecting the contention that GRE ought not to be paid the full amount.

25. I find that the holistic view of the Learned Arbitral Tribunal in relation to the Civil Works is logical and rational and eminently plausible and defensible. In my opinion, no case has been made out warranting any interference with the same. The finding of the Learned Arbitral Tribunal that the withholding of amounts on the premise of the Civil Works not being in conformity with the contract is untenable, in my opinion, does not call for any interference.

Denial of Liquidated Damages:

26. HPCL's contention is that the Project was for a value of Rs. 116 crores and was to be completed in fifteen months reckoned from September 6, 2006, the date of issuance of the Letter of Intent. The deadline, therefore, was December 5, 2007. This period was meant to include the mobilisation and demobilisation period. Under the contract, any delay in completion of the work would attract liquidated damages at the rate of 0.5% of the total contract value for every week of delay subject to the maximum of 5% of the total contract value. Indeed, GRE could seek an extension of time by applying two months prior to the scheduled expiry of the contract and HPCL had to respond to the request at least 30 days prior to the expiry of the contract.

27. GRE sought extensions from time to time and HPCL accorded them, issuing four "change orders" extending the deadline, but asserting in every single one of them that the change of deadline was without prejudice to the two provisions that contained the liquidated damages clause – Clause 5.d and Clause 10 of the GCC, and also stating that all terms and conditions of the contract remain the same and unchanged. HPCL contended in the arbitration that by such conditionality, despite the extension of deadline, time remained the essence of the contract, and the liquidated damages could

not be considered waived. Thereafter, HPCL issued a letter dated August 4, 2008, explicitly asserting that GRE's request for waiver of liquidated damages was rejected.

28. Mr. Andhyarujina would contend that all through the relevant time, there was no objection raised by GRE. A year later, on August 17, 2009, HPCL had complained to GRE that because of the delay on GRE's part, its investment of more than Rs. 100 crores was lying idle without any returns. Eventually the Project was completed on February 4, 2010 i.e. more than two years beyond the original deadline. Therefore, HPCL's case is that since all terms and conditions remained the same, and the right to collect liquidated damages had always been reserved, that right was never impacted by the extensions of deadline. It is also contended that even when it was made clear on August 4, 2008 that the request for waiver of liquidated damages was refused, there was no contemporaneous protest from GRE.

29. Computing liquidated damages at the rate of 0.5% per week, HPCL's finance department appears to have computed such damages and hit the cap of 5% of the contract value, to withhold the full amount of liquidated damages of Rs. 5,83,67,973. HPCL would also argue that GRE had provided a bank guarantee for the amount, which indicated that GRE had agreed that this was liable to be recovered. Therefore, it was contended that HPCL's

deduction of Rs.~5.83 crores towards liquidated damages when paying GRE's bills was a valid deduction.

30. The Learned Arbitral Tribunal has taken a view that nothing is payable towards liquidated damages by GRE – primarily on the premise that HPCL is required to prove its losses *"in a more concrete fashion"*. The Learned Arbitral Tribunal has held that liquidated damages may be awarded only to the extent of the loss actually proven. According to the Learned Arbitral Tribunal, HPCL did not seriously urge the aspect of loss of return on investment (of Rs. 100 crores) towards the Project. The Learned Arbitral Tribunal has commented that had HPCL shown (for example) that the delay led to loss of production and alternate purchases had to be made at a higher price, it could have shown that it suffered damage and losses, and therefore have been entitled to claim liquidated damages.

31. Mr. Jagtiani on behalf of GRE would submit that the jurisdiction under Section 34 of the Act not being one of appellate review, this Court should give the Learned Arbitral Tribunal a lot of play in the joints in coming to an otherwise correct view. He would submit that in one sense the Learned Arbitral Tribunal has a "right to be wrong" but unless the Impugned Award is in conflict with the fundamental policy of the law of India or in conflict with the most basic notions of morality or justice, the award would not be in

conflict with public policy of India and is not liable to be set aside. Mr. Jagtiani would contend that the Learned Arbitral Tribunal has interpreted the contract to mean that time was not of the essence of the contract and had come to this conclusion on appraisal of various facts, various provisions of contract and in reliance upon judgements of the Supreme Court and this Court to support his findings.

32. Mr. Jagtiani would contend that since the Learned Arbitral Tribunal had satisfied itself in reliance upon judgements of the Supreme Court and of this Court, that for a claim on liquidated damages to be successful, actual loss must be proved, the Learned Arbitral Tribunal is right in holding that without proving loss liquidated damages cannot be claimed by simple reliance upon a clause in the contract. He would contend that such findings could be regarded as neither against public policy nor perverse.

33. I have given my anxious consideration to the issue, particularly since the articulation of the analysis by the Learned Arbitral Tribunal is skimpy. The Impugned Award simply records the summary of contentions of each party and what was said by each side. It is recorded that HPCL relied upon nine other clauses of the GCC and that it relied upon multiple judgements. However, I find that the conclusion in relation to the issue of liquidated damages is devoid of any analysis of these contentions of the parties. While

reliance by HPCL upon multiple provisions of contract and on case law is recorded, there is simply no analysis on why, in the Learned Arbitral Tribunal's view, such contentions are worthy of rejection. Neither the clauses nor the case law are dealt with and discussed by the Learned Arbitral Tribunal. I have examined the Impugned Award bearing in mind the fact that the arbitrator was a person technically qualified on the subject matter of the Project and not an expert in law, and therefore must be given a bigger play in the joints to arrive at conclusion without the need for intricate or clinical analysis of law.

34. However, it is difficult not to notice that the Learned Arbitral Tribunal has been vague in setting out what has weighed with the Learned Arbitral Tribunal and in what manner. First, the Learned Arbitral Tribunal acknowledges that in any contract, if there is a delay, *"there will be some loss of investment"*. Second, the Learned Arbitral Tribunal has gone on to say that HPCL *"is supposed to prove his loss in a more concrete fashion"*. Third, the Learned Arbitral Tribunal has stated that the *"aspect of loss of investment was not seriously urged"* by HPCL. The Learned Arbitral Tribunal has asserted that *"liquidated damages can only be awarded to the extent of the loss which he proves"* and concluded that losses caused to HPCL has not been adequately proved.

35. I have tried to juxtapose the contentions made by Mr. Andhyarujina and Mr. Jagtiani with the flow of thinking recorded in the Impugned Award. In sharp contrast with the clear articulation of issues in relation to the standard of M30 concrete recorded in the Impugned Award, there is hardly any deliberation in relation to liquidated damages. The four statements set out in the preceding paragraph is all that the Learned Arbitral Tribunal has had to say in the matter (in two short summary paragraphs). Despite the contentions of the parties having been recorded over three pages, there is hardly any deliberation over why which contention is acceptable and which one is not.

36. I am unable to accept Mr. Jagtiani's contention that the Learned Arbitral Tribunal has interpreted the contract to mean that time was not of the essence of the contract and that this conclusion has been arrived at on appraisal of facts and various provisions and judgements. There is no analysis of either the provisions of the contract pressed into service by HPCL or of any judgements cited by the parties to support the findings. On the facet of liquidated damages, it is not apparent that there are articulated reasons in the Impugned Award. The absence of reasons is what manifest arbitrariness is about. Regretfully, despite adopting a light-touch approach and giving full leeway to the Learned Arbitral Tribunal for not being legally trained, I am not convinced that the Impugned Award passes muster on the

touchstone of absence of manifest arbitrariness in relation to its handing of liquidated damages.

37. It is not as if HPCL had simply stated that all other conditions of the contract remained unchanged when it granted time to complete performance. This is what the Learned Arbitral Tribunal has stated. On each occasion, HPCL highlighted and specifically stated that the extension was without prejudice to Clause 5.d and Clause 10 of the GCC, which stipulate liquidated damages. GRE did not raise any protest. Much is made about the letter dated August 4, 2008, which GRE states was unsolicited and HPCL asserts was pursuant to a solicitation of a waiver of liquidated damages. Even on this issue – of whether there was a request for a waiver by GRE – there is no finding in the Impugned Award.

38. GRE contended that assuming these clauses still applied, HPCL had not proven losses. The Learned Arbitral Tribunal has not even returned a finding that it was assuming that liquidated damages were not waived. GRE asserts that the Learned Arbitral Tribunal has interpreted the contract to mean that time was not of the essence, but the Impugned Award is silent in this regard.

39. Liquidated damages are meant to be a reasonable pre-estimate of damages and losses, arrived at by the contracting parties exercising their

autonomy, for application when it is difficult to prove actual loss. In my opinion, it was necessary for the Learned Arbitral Tribunal to return a finding on whether it was difficult to prove the damages, particularly, when the Learned Arbitral Tribunal had stated at the threshold of the two-paragraph conclusion that there would always be some loss of investment, owing to a delay. The Learned Arbitral Tribunal has gone on to give an example of an operational loss – alternate purchases being made at a higher price, instead of production, even while opening the purported reasoning with an acknowledgement that there would be a loss of investment.

40. The Impugned Award records that according to GRE it sought an extension of time four times *"with a request to waive liquidated damages"* and that HPCL had *"accordingly issued revised purchase orders without rejecting the request of the Claimant to waive liquidated damages"*. Even a plain reading of the four change orders would show that this contention is wrong on the face of the record – every single change order explicitly records that the consent to keep the contract alive beyond December 5, 2007 (the contracted delivery date) was without prejudice to, among others, Clause 5.d and Clause 10 of the GCC (which are the very provisions governing liquidated damages).

41. Seen from this perspective, I am not persuaded to accept the defence of the Impugned Award mounted by Mr. Jagtiani. It is apparent that the Learned Arbitral Tribunal has simply allowed GRE's claim that no liquidated damages were payable at all, without according reasons. There is not even any consideration to each and every "change order" explicitly making a reference to the contractual provisions on liquidated damages as not being waived. It could well be that the parties reiterated with each change order that it would be difficult to prove loss arising due to delay with precision and therefore the iteration of the two clauses on liquidated damages were underscored – evidently with no contemporaneous protest. There is nothing to analyse the claim of GRE asserting that only the allegedly unsolicited change order of August 4, 2008 made a retrospective change to the position.

42. I have also considered whether I should treat the Impugned Award as one with "inadequate" reasoning as opposed to being "devoid of" reasoning – greater leeway being available with the former. Towards this end, I have examined the judgement of the Supreme Court in ***Kailash Nath***[1], which is primarily relied upon by both sides to present submissions on what is necessary in the context of the need to prove losses when dealing with liquidated damages.

[1] Kailash Nath Associates vs. DDA – (2015) 4 SCC 136

43. ***Kailash Nath*** was rendered in the context of a forfeiture of earnest money in an auction of land by the Delhi Development Authority in relation to one party that was inconsistent with the treatment given to other parties. In ***Kailash Nath***, the Supreme Court noted that the forfeiture of earnest money took place long after the agreement to sell that land to another party at a higher price was reached. In that context, it was also seen as a forfeiture without any loss being shown. In that context, the law on compensation for breach of contract under Section 74 of the Indian Contract Act, 1872 was declared in the following manner:-

> ***43.1.*** *Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*

43.2. *Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*

43.3. *Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.*

43.4. *The section applies whether a person is a plaintiff or a defendant in a suit.*

43.5. *The sum spoken of may already be paid or be payable in future.*

43.6. *The expression "whether or not actual damage or loss is proved to have been caused thereby" means that* ***where it is possible to prove actual damage or loss, such proof is not dispensed with****. It is only* ***in cases where damage or loss is difficult or impossible to prove*** *that the* ***liquidated amount*** *named in the contract,* ***if a genuine pre-estimate of damage*** *or loss,* ***can be awarded****.*

43.7. *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.*

[Emphasis Supplied]

44. The law declared in Paragraph 43.6 as extracted above must not be lost sight of. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded. ***Kailash Nath*** was pressed into service by both sides. A view was canvassed that ***Kailash Nath*** has rendered an absolute standard that liquidated damages clauses would never be regarded as a pre-estimate of losses without actual proof of losses. I have done my best to examine if the Impugned Award would be immune from interference bearing in mind Section 34 of the Act. I am constrained to note that one would have expected the Learned Arbitral Tribunal to deal with whether it is difficult or impossible to prove the loss in the instant case. One would have expected the Learned Arbitral Tribunal to then deal with whether the amount of 0.5% per week of delay, which is capped at 5% of the contract value, is reasonable, if it is difficult to prove the loss.

45. Indeed, there is no consideration whatsoever on the causation of delay and which party was responsible for the delay – the matter appears to have been argued simply on the basis of the contractual provision and implications of the law declared in, among others, ***Kailash Nath***. The Learned Arbitral Tribunal has analysed none of the case law. The Learned Arbitral Tribunal has indeed held that some loss on investment is bound to occur due to the delay, but has not dealt with whether it was difficult or impossible to prove

such loss. Purporting to deal with a loss on capital allocated for investment, the Learned Arbitral Tribunal has given an example of operational revenue loss. The Learned Arbitral Tribunal has held out an ambiguous standard of the need to prove loss in "a more concrete fashion" and held that HPCL has "not seriously urged" its contention of suffering losses, without even indicating what in HPCL's contentions was not concrete and how seriousness was meant to be discerned. The perceived absence of concreteness could be a pointer to the difficultly in proving the precise loss arising out of a delay of over two years.

46. For all the aforesaid reasons, regrettably, I am constrained to set aside this portion of the Impugned Award as being perverse and manifestly arbitrary for want of reasoning, and also being contrary to the fundamental policy of the law of India in relation to liquidated damages. This portion of the Impugned Award i.e. Paragraph 7 (under the heading "*Findings and Conclusions*") is liable to be quashed and set aside.

47. Without meaning to add more length to this judgement, it would be only apt to say that by now it is trite law that if any portion of an arbitral award deserves to be set aside, the Section 34 Court could do so if it is completely severable and its contents are not inseparably intertwined with the other components of the arbitral award found to be valid and legal. The

law on partial setting aside of portions of an arbitral award is now emphatically declared by a five-judge Constitutional Bench of the Supreme Court in ***Gayatri Balasamy***[2] – Part II of the majority judgement (*Per. Sanjiv Khanna, CJI* –paragraphs 33 to 36) and in the concurring contents of the separate judgement (*Per. K.V. Vishwanathan J* – paragraphs 142 to 152).

48. I have examined the Impugned Award from this perspective and I note that nothing in the component of the Impugned Award dealing with the challenge to the retention of liquidated damages that is being set aside in this judgement is interlinked and interconnected with the rest of the Impugned Award. Such partial setting aside will have no bearing or impact on the other portions of the Impugned Award.

Claims relating to Insurance, Service Tax and Customs Duty:

Insurance:

49. The contract between the parties stipulates the requirement that GRE ought to obtain insurance to the satisfaction of HPCL on terms provided in it. Under Clause 6.e.1.vii of the GCC, within two weeks of the award of the contract, the Works, Plant and Equipment was to be insured until final completion against loss or damage by accident, fire or any other cause. Under Clause 6.e.2 of the GCC, GRE was to maintain any other insurance as

[2] Gayatri Balasamy vs. M/s ISG Novasoft Technologies Limited – 2025 INSC 605

required in law or stipulated by HPCL. Neither clause stipulates the amount for which insurance was to be taken.

50. It is HPCL's contention that the two-week deadline to take the insurance on the Works, Plant and Equipment for loss by accident, fire or any other cause was September 20, 2006. It is HPCL's case that after follow up and reminders on various site visits, fire insurance was taken on June 22, 2007 for a sum of Rs. 50 crores. On August 20, 2008, HPCL asked GRE to take insurance for the entire Project value i.e. Rs. 116 crores, which was obtained on August 22, 2008. On August 29, 2008, HPCL informed GRE that obtaining fire insurance was inadequate compliance and a "marine cum erection" insurance policy ("***MCE Policy***") ought to be taken. GRE obtained a quote for an MCE Policy and forwarded it to HPCL by September 11, 2008. On January 20, 2009, HPCL declared that GRE had failed to comply with the requirement of maintaining insurance. HPCL retained an amount of Rs. 25,64,026 on this count.

51. GRE would contend that the quantum of insurance is not mentioned in the contract. HPCL and EIL gave oral instructions to take insurance cover of Rs. 50 crores, which was taken. When HPCL asked GRE to enhance it to Rs. 116 crores, it was promptly complied with. Throughout the life of the contract, there was no loss or damage leading to an occasion to make an

insurance claim. HPCL has deducted an estimate of the insurance premium that would have been payable for the insurance policy although HPCL itself did not dip into its pocket to take insurance during that period. Finally, GRE contends that there is no provision in the contract to retain such amounts.

52. The core issue is whether HPCL was entitled to withhold Rs. ~25.64 lakh on account of breaches in relation to being adequately insured in time. Before considering the challenge to the Impugned Award which holds that HPCL was not entitled to retain the monies it deducted under this head, I must mention that the Impugned Award is not wrong in rejecting HPCL's contention that this component of GRE's claim was not arbitrable.

53. In a nutshell, HPCL's contention is that the Clause 1.5 of the GCC provides that on discrepancy, inconsistency, error or omission in the contract, the decision of EIL or HPCL or the site-in-charge would be final and binding on GRE, which would have to abide by it, and such decision would not be arbitrable. Clause 5.a.10 of the GCC also contains a similar provision in relation to any expressions, interpretations, statements, calculations of quantities, supply of material rates etc. and the site-in-charge or EIL would take a final and binding decision. The arbitration clause, in turn, provides that disputes and differences other than those on which decision of any person is final and binding would be arbitrable. The Learned Arbitral

Tribunal has rightly noticed that there was no dispute between the parties for a final and binding decision of EIL to have been rendered and has found that there was no final and binding decision.

54. That apart, I find that HPCL's proposition is extreme, unreasonable and not borne out by the provisions of the contract. The contract did not provide for a specific value of insurance. The value of insurance was a matter of consultation between the parties, and based on the consultation, insurance was taken as and when indicated. The dispute is about HPCL withholding what it believes would have been the premium payable had the insurance been taken on time. There was no reference to EIL on this matter at the relevant time. The Learned Arbitral Tribunal has rightly noted that the arbitration clause does not exclude the subject of insurance. The Learned Arbitral Tribunal is right in holding that the dispute about the retention of insurance premium on the premise of delayed compliance with taking insurance, is arbitrable.

55. It is seen that the insurance was to be taken by GRE in consultation with HPCL. The parties indeed consulted with each other and that resulted in insurance being taken, first for Rs. 50 crores, and then for Rs. 116 crores. The process of consultation can be an ongoing one and therefore, the two-week deadline was arguably an indicative procedural provision and not

necessarily a provision that had a hard-coded deadline. That apart, if the contract did not provide for the specific consequence of withholding such amount, for that specific provision being breached, the element of restitution of parties to their respective positions or the element of damages would need to be examined.

56. HPCL's claim is that it was entitled to withhold the amount attributable to insurance premiums for a policy value of Rs. 116 crores for the period during which such coverage was not available. The Learned Arbitral Tribunal's finding that none of the provisions pressed into service indicate a value for the insurance contract cannot be faulted. If the parties did not agree to the value of the insurable interest, it would follow that the computation of insurance premium that would have had to be paid, had insurance been taken in two weeks, would fall in the realm of conjecture.

57. Evidently, the contract did not provide for a penalty of this nature. The computation of the insurance premium that would have been paid is conjectural as explained above. That apart, as and when HPCL indicated the value of the insurance to be taken, GRE indeed obtained insurance. It is difficult to conclude that despite insurance being a requirement covered by the consideration value, GRE cut corners to save on the quantum of insurance premium.

58. On an overall analysis of the Impugned Award, one cannot find fault with the approach to the subject by the Learned Arbitral Tribunal in this regard. There is nothing perverse in this component of the Impugned Award, which is a well-reasoned articulation of an eminently plausible view. Therefore, it calls for no interference by this Court.

Service Tax:

59. HPCL refused to pay an amount of Rs. 3,08,85,583 to GRE pursuant to a claim relating to reimbursing GRE with financial implications arising out of newly-introduced imposition of service tax on the contract.

60. In a nutshell, the contract provided that should there be any variation in applicable taxes and duties on materials in the works or services performed by GRE or imposition of new levies due to subsequent legislation, the financial implications of such variation shall be reimbursed by HPCL at actuals. The base date for ascertaining variation would be the date of submission of the last price bid – December 6, 2005.

61. HPCL's contention is that although a new Section 65(105)(zzzza) was introduced into the Finance Act, 1994 with effect from June 1, 2007 (pursuant to a notification dated May 22, 2007), the very same services were already amenable to service tax under Section 66 read with Section 65(105)

(zzd) read with Section 65(39)(a) of the Finance Act, 1994. Under these three provisions, HPCL would contend, the Project was taxable as of December 6, 2005. Therefore, HPCL would contend, there was no financial implication for HPCL to accommodate GRE for.

62. GRE's contention is that service tax on indivisible works contracts on a turnkey basis was introduced for the first time on June 1, 2007, which is evidently after December 6, 2005 and therefore the financial implications need to be covered by HPCL.

63. The Learned Arbitral Tribunal has taken a plausible reasonable view based on an explicit ruling on this very question by the Supreme Court in the case of ***L&T Ltd.***[3] declaring the law in this regard. Having examined the decision in ***L&T Ltd.*** and reading the analysis in the Impugned Award in this context, there would be no point in embarking on a prolix iteration of the issue any further. Suffice it to say, the Learned Arbitral Tribunal cannot be faulted for not second-guessing what the Supreme Court has explicitly declared.

64. HPCL has tried to contend that the contract between the parties could be regarded as a divisible contract and the new provision only covered indivisible contracts. Such a contention would not take the matter any higher

[3] Commissioner, Central Excise and Customs, Kerala vs. L&T Ltd. – (2016) 1 SCC 170

since HPCL has simply relied on attribution of values to components of the work, despite the contract explicitly providing in Clause 2.2 of the Special Conditions of Contract that the contract was an *indivisible* contract. The parties were *ad idem* that the contract was a composite indivisible contract. To move away from that to make such submissions is untenable and wasteful expenditure of resources.

Customs Duty:

65. HPCL retained another sum of Rs. 86,38,491.50 towards its claims on account of Customs Duty variation. This component too is related to the financial implications of new taxes imposed after the same base date i.e. December 6, 2005. A notification dated March 1, 2006 imposed additional duty at 4% on BQ Steel Plates which was used in the construction at the Project.

66. The primary dispute between the parties is HPCL's stance that the additional duty has no financial implication for GRE since it would get credit for the corresponding amount under the Central Value Added Tax. The Learned Arbitral Tribunal has examined the matter and come to the view that the contract did not provide for examining any corresponding benefits that may be available from the imposition of additional taxes after the base date. This is an eminently plausible view. For example, it would be arguable that

every new indirect tax after the base date, would also lead to a higher allowable expenditure in the books of accounts kept for computing taxable income for income-tax computation, and thereby reduce the income to be offered to tax. It could then be argued that such reducing in direct tax should also be factored into computing "financial implications". It is a reasonable and plausible view that when interpreting the contract one must look to the language of the contract and not extrapolate other hypothetical consequences outside of the contract.

67. Therefore, I have no reason to interfere with the plausible view taken by the Learned Arbitral Tribunal. It would be impossible to hold that these findings are perverse or contrary to the fundamental policy of Indian law.

68. The Learned Arbitral Tribunal has left the actual precise computation of financial implications under Customs Duty for the parties to compute based on the declaration made in the Impugned Award. According to the Learned Arbitral Tribunal, the computation must be based on exchange rates in the bills of entry and not on the exchange rates as of the base date. HPCL has suggested that this renders the Impugned Award unintelligible. I cannot agree. Clearly this element has been declared by the Learned Arbitral Tribunal in a specific manner. All that the parties have to do is pull out the bills of entry and examine the actual computation based on the exchange

rates prevailing on the date of the entry of the goods and computation of Customs Duty on that basis. There is nothing unintelligible in this regard to warrant any intervention in terms of Section 34 of the Act.

Conclusions:

69. In the result, the following conclusions are made, and corresponding directions are issued:

(a) The Impugned Award calls for no interference except insofar as it relates to the element of liquidated damages i.e. essentially the contents of Paragraph 7 (under the heading "*Findings and Conclusions*") dealing with the issue of Liquidated Damages, which is quashed and set aside for being devoid of reasons;

(b) The arbitration agreement between the parties subsists insofar as it relates to liquidated damages and the parties are free to have this element subjected to dispute resolution afresh by way of arbitration;

(c) No fault can be found with the findings returned on the facets of Civil Works, under-insurance, Service Tax and Customs Duty. Nothing contained in relation to these facets calls for any interference by this Court in exercise of the jurisdiction under Section 34 of the Act; and

(d) Any amounts deposited in this Court along with accruals shall be released to GRE after deducting the element of liquidated damages forthwith, and in any event within a period of four weeks from today.

70. The Petition is ***finally disposed of*** in the aforesaid terms. Considering that each side has prevailed in some facet of the matter, I have been persuaded not to impose costs.

71. Before parting, I must record my appreciation for the efforts of Learned Advocates and Learned Senior Counsel for both sides in restricting their verbal arguments and in providing concise written notes on submissions within the agreed time limits and the page length committed to in the Case Management Hearing. This approach has been of immense assistance in allocation of judicial time to various segments of this Court's docket. In this matter, both sides have kept their presentation crisp, clear and specific with accurate references to the voluminous material on the record. The delay beyond the conventional three-month period in delivery of this judgement is attributable solely to the Bench.

72. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN J.]