2026:DHC:6881

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

\+ O.M.P. (COMM) 11/2016, I.A. 847/2016 & I.A. 5605/2021

Judgment reserved on: 10.07.2026
Judgment pronounced on: 19.08.2026

CONTAINER CORPORATION OF INDIA LTD. .....Petitioner
Through: Mr. Sanjay Jain, Sr. Adv. with Mr. R. K. Joshi, Mr. Ojusya Joshi, Ms. Harshita Sukhija, Mr. Nishank Tripathi and Ms. Rishika Agrawal, Advs.

versus

HINDUSTAN ENGINEERING AND INDUSTRIES LTD. .....Respondent
Through: Mr. Mohit Chaudhary, Mr. Kunal Sachdeva, Mr. Lakshay Yadav, Ms. Aarushi Suri and Ms. Shreya Panday, Advs.

\+ O.M.P. (COMM) 50/2016

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Through: Mr. Sanjay Jain, Sr. Adv. with Mr. R. K. Joshi, Mr. Ojusya Joshi, Ms. Harshita Sukhija, Mr. Nishank Tripathi and Ms. Rishika Agrawal, Advs.

CORAM:
HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

JUDGMENT

% **19.08.2026**

INTRODUCTION

1. The present two petitions under Section 34 of the Arbitration and Conciliation Act, 1996[1], arise out of the Arbitral Award dated 13th October 2015[2] rendered by the learned Sole Arbitrator, Justice Lokeshwar Prasad (Retd.), in Arbitration Case No. 01/2010. OMP (COMM.) NO.11/2016 has been filed by Container Corporation of India Limited[3], whereas OMP (COMM.) NO.50/2016 has been filed by Hindustan Engineering and Industries Limited[4]. Both petitions assail different portions of the impugned Award. Since the petitions arise out of same arbitral award and issues are closely connected and depended on each other, they are being disposed of by this common judgment.

2. Brief Factual Matrix

2.1 CONCOR, a public sector undertaking under the Ministry of Railways, Government of India, undertook the 'Container Transport Logistics Project'[5], with financial assistance from World Bank. As part of the project, CONCOR floated a global tender, being International Competitive Bidding No. CON/T/ICB/CW/300 on

[1] "the Act", hereinafter
[2] "impugned Award" hereinafter
[3] "CONCOR" or "the Purchaser", hereinafter
[4] "HEIL" or "the Supplier", hereinafter

16.04.1994 for the design, manufacture, and supply of 300 sets of five-wagon container flat units, consisting of 1,500 bogie container flat wagons. The contract allowed the quantity to be increased or decreased by up to 15%.

2.2 CONCOR's case is that the World Bank provided a loan of about US$94 million for the project, a significant part of which was allocated for purchasing container flat wagons. The wagons were not intended to be procured as individual units, but as a fleet for container transportation. They were required to be supplied in formations of nine five-wagon sets, each formation comprising forty-five wagons and constituting one rake, for deployment at Tughlakabad and Kolkata.

2.3 For the purpose of selection, the tender process had two stages: technical evaluation and commercial bidding. The technical bids, which were opened on 15.09.1994, were first examined, and only those bidders whose bids were found acceptable were permitted to participate in the commercial stage. Eleven bidders participated in the technical stage, out of whom five bidders proceeded to the commercial stage.

2.4 The tender, as originally issued, had Clause 2.1 of the Technical Specifications, which required the container flat wagons to be of a proven design that had been in commercial use on an advanced

[5] "project" hereinafter

railway system for at least two years. Clause 2.1, as originally framed, read as under:

> *"**Proven design**- The container flat wagons offered shall be of proven design which has been in use on any advanced railway system in commercial service for at least two years. The offered design should have the capability of commercial operation up to a speed of 100 kmph on Indian Railway track system. The Bidder shall give the following information in respect of the container flat offered in his Bid:…"*

2.5 Before the submission of the technical bids, CONCOR issued Amendment No. 1 dated 16.06.1994, whereby the Clause 2.1 was amended to read: "*The container flat wagons shall have design features which have been in use on any advanced railway system successfully for at least two years.*"

2.6 Further amendments to the tender conditions were issued by Amendment No. 2 dated 08.07.1994, Amendment No. 3 dated 06.08.1994 and Amendment No. 4 dated 04.09.1995. These amendments formed part of the bidding documents applicable to the bidders. Amendment No. 4 laid down requirements relating to the submission of design data and important drawings.

2.7 HEIL submitted its technical bid on 11.09.1994. It submitted two technical proposals. Proposal-I was based on technology from Trinity Industries Inc., USA, while Proposal-II was based on a design developed with RITES. In relation to the RITES-based proposal, HEIL referred to the BFKX/BFKI container flat wagons and represented that the relevant design features had been successfully used on Indian Railways since 1975.

2.8 The representations contained in HEIL's technical proposal are relevant to determine the nature of the design and performance obligations undertaken by HEIL under the Contract. During the proceedings, CONCOR relied upon the tender documents, Amendments Nos. 1 to 4, HEIL's technical proposal, the correspondence exchanged before submission of the commercial bid and letter dated 20.09.1995 by the RITES. According to CONCOR, these documents also showed that HEIL was aware of the amended tender conditions before submitting its commercial offer.

2.9 After being qualified in the technical round, HEIL submitted its commercial bid on 17.10.1995, which was opened on 19.10.1995. HEIL quoted a price of about Rs.55.25 lakhs per five-wagon set for the bid based on Trinity technology, while it quoted about Rs.51 lakhs per set for the RITES-based proposal. The RITES-based bid also offered an additional discount of Rs.50,000/- per set if 65% of the payment was made against proof of dispatch, instead of on delivery at the destination.

2.10 Through the Notification of Award dated 03.04.1996[6], CONCOR accepted HEIL's RITES-based design proposal and exercised the option to increase the quantity by 15%. As a result, the quantity was increased to 345 sets of five wagons each, totaling 1,725 wagons. The formal agreement was signed on 17.04.1996 for a total

[6] "Notification of Award" hereinafter

contract value of Rs.1,71,81,35,000/- (includes General Conditions and Technical Specifications)[7].

2.11 As per the terms of the Contract, the project commences from the date of the Letter of Intent, i.e., 03.04.1996. According to this schedule, HEIL was required to submit design data and important drawings by D+30, i.e., 03.05.1996. The prototype was to be shipped by 01.08.1996, delivered by 31.08.1996, and prototype testing was to be completed by 29.11.1996. Thereafter, bulk supplies were to commence, with shipment by 28.12.1996 and delivery by 28.01.1997. The entire quantity was to be shipped by 28.12.1997 and delivered by 28.01.1998.

3. RELEVANT CONTRACTUAL CLAUSES

3.1 Before turning to the events which arose during the performance of the contract, it would be useful to take note of the important terms of the contract agreed between the parties in regard to their obligations in relation to design, drawings, prototype approval and delivery. The following clauses also form the basis for this Court to examine the parties' rival contentions regarding responsibility for delay and other issues challenged in the present petition:

i. Clause 1.1.1 of the Technical Specifications stated that the scope of work included the design, manufacture, supply, and commissioning of the wagons. It means that the contract was

[7] "Contract" hereinafter

not simply for manufacturing wagons based on a complete design provided by CONCOR. HEIL was responsible for developing and providing the design needed to manufacture wagons that met the contractual specifications and operational requirements.

ii. Clause 1.2.1 required HEIL to submit design data, calculations, and important drawings for approval before manufacturing the prototype and before engaging subcontractors for critical components. This approval process allowed CONCOR and RDSO to review the technical aspects at different stages.

iii. Clause 1.3 means that approval of the design was only an approval of the general acceptability of the design features and did not relieve HEIL of its responsibility for the performance of the wagons. HEIL was also required to specifically bring to CONCOR's notice any deviation from the contractual specifications in its proposal or drawings.

iv. Clause 1.6 required HEIL to make any changes needed during prototype manufacture or testing without claiming additional cost. Clause 1.7 required HEIL to submit corrected drawings after prototype development.

v. Clause 1.13.1 stated that HEIL would remain fully responsible for the design, construction, and performance of the wagons, even after approval of drawings, inspection, testing, or acceptance by CONCOR. This clause was extensively relied upon by CONCOR before the Arbitrator and this Court.

vi. The Contract also provided for advance payment to HEIL. Clause 11 of the Special Conditions permitted CONCOR to provide an interest-free advance against the required security. Pursuant thereto, CONCOR paid HEIL an advance of Rs.33,48,58,200/- on 21.06.1996. Clause 16.3 of the General Conditions separately provided for payments against proper invoices or claims. The advance payment was a financial facility provided to help HEIL with mobilisation and procurement of materials.

vii. Clause 17 of the General Conditions provided that prices would remain firm except to the extent price adjustment was permitted under the Special Conditions.

viii. Clause 12.1 of the Special Conditions prescribed the following formula for price adjustment: $P1 = P0 \times \{a + b(L1/L0) + c(M1/M0)\} - P0$. The fixed component was specified at 15 per cent, the labour component at 25 per cent and the material component at 60 per cent.

ix. The same clause also specified the reference dates and indices to be used for calculating the price adjustment. The base date was thirty days prior to the closing date of the bid, while the adjustment date was one month prior to the date of shipment.

x. Clause 12.2(b) placed limits on the payment of escalation. It provided that no price increase would be allowed beyond the original delivery period unless the extension letter specifically provided for it. It further provided that, ordinarily, no escalation would be payable for delays caused entirely by the Supplier. The Purchaser, however, was entitled to the benefit of any reduction in prices.

xi. Clause 19 of the General Conditions required any changes or modifications to the contract to be made in writing. Clause 22.1 required HEIL to follow the agreed delivery schedule. Clause 22.2 provided for contractual consequences in case of unjustified delay. Clause 22.3 required HEIL to inform the Purchaser about events that could affect timely completion and allowed the Purchaser to grant an extension of time after considering the circumstances.

xii. Clause 23.1 allowed CONCOR to impose liquidated damages at the agreed weekly rate, up to the specified limit, for delays in delivery, except where the delay was covered by *force majeure*. It did not require termination of the contract before liquidated damages could be imposed.

xiii. Clause 24 dealt with termination for default, while Clause 25 dealt with *force majeure* events and protected the supplier from the consequences of delay to the extent such delay was caused by such events, subject to notice to CONCOR.

3.2 There are no differences between the parties as to the existence of the aforesaid clauses. The real dispute, however, arises as to how those clauses were to operate when the contract moved from the stage of agreed terms to actual execution, and how those contractual provisions were to be applied or interpreted to the events that unfolded during its execution.

4. EVENTS OCCURRED DURING THE EXECUTION OF THE CONTRACT

4.1 HEIL submitted the first set of drawings on 10.05.1996. CONCOR pointed out that the drawings were incomplete and that certain important design details had not been furnished.

4.2 On 11.06.1996, CONCOR noted that detailed drawings for the slackless drawbar arrangement and twist locks had not been provided and therefore, the final approval of the key drawings cannot be granted. On the same date, RITES made certain changes to the drawings. Conditional approval was, however, granted to enable HEIL to proceed with prototype manufacturing.

4.3 The position was reiterated by RDSO in its letter dated 14.06.1996. It recorded that the arrangements for the slackless drawbar and twist locks had not been included and that final approval of the important drawings could not be given. Thus, from this stage itself, it is evident there was a difference between the parties as to whether the deficiencies in the drawings were issues falling within HEIL's design responsibility or requirements which newly introduced by the CONCOR during the approval process.

4.4 The subsequent drawings were submitted over the following months. The wheel manufacturing drawings, along with the finite element analysis, were submitted on 06.08.1996. The drawings for the keystone/slack-free drawbar arrangement were submitted on 05.10.1996 and approved on 16.10.1996. CONCOR calculated the delay in submission of these drawings at about 173 days.

4.5 The drawing for the automatic twist-lock was submitted through RITES on 17.01.1997. CONCOR calculated the delay of 274 days with reference to the original contractual schedule. As per the HEIL, delay is not attributable to them as the drawings had undergone repeated modifications during the approval due to the requirements raised by CONCOR and RDSO.

4.6 These developments also affected the progress of the prototype. The prototype was to be shipped by 01.08.1996 and delivered by 31.08.1996. HEIL offered the first prototype in January 1997. However, the prototype underwent further modifications and was cleared for dispatch on 22.03.1997.

4.7 There was also an issue regarding the cylindrical roller bearings. The first prototype received by RDSO did not have the required bearings. These were subsequently provided in the second prototype on 04.06.1997 which was finally approved by RDSO on 25.09.1997, following which the wagons were cleared for series production. CONCOR also referred to subsequent letters of HEIL dated 26.08.1998 and 18.01.2000 in relation to the date of final approval.

4.8 The first rake was, however, not delivered within the original schedule. It was required to be delivered by 28.01.1997, whereas it was actually delivered on 28.04.1998. The delay also continued beyond the prototype approval stage as well.

5. BULK SUPPLIES AND EXTENSIONS:

5.1 During this period, HEIL sought extensions of the delivery period from time to time. CONCOR granted ten extensions, starting from 06.01.1998, which extended the delivery period up to 31.12.1998. The second extension, communicated in October 1998, extended the period up to 31.07.1999. The third extension dated 30.06.1999 extended it up to 31.03.2000, and the fourth extension dated 21.03.2000 extended it up to 31.12.2000.

5.2 The fifth extension dated 27.12.2000 extended the delivery period up to 30.04.2001. The sixth extension dated 29.03.2001 extended it up to 30.06.2001, followed by the seventh extension dated 21.06.2001 extending it up to 31.07.2001. The eighth extension dated 03.08.2001 extended the period up to 22.08.2001, the ninth extension dated 21.08.2001 extended it up to 15.09.2001, and the tenth extension dated 14.09.2001 extended the period up to 05.10.2001.

5.3 The extension letters are important because it recorded that the extensions were granted without prejudice to CONCOR's rights under Clause 23 of the General Conditions, including its rights to claim liquidated damages and other contractual remedies. HEIL accepted the extensions and continued to perform the Contract.

5.4 During the extended period, CONCOR continued to correspond with HEIL regarding the progress of supplies. On 17.12.1997, CONCOR referred to the concerns expressed by the World Bank review mission regarding the progress of the project. The parties discussed the supply schedule on 06.02.1998, and on 20.08.1998 CONCOR raised the issue of the gap between the delivery of the first rake and the subsequent supplies.

5.5 By letter dated 17.11.1998, CONCOR referred to Clause 23.1 in relation to the delayed deliveries and stated that liquidated damages could not be waived. On 11.03.1999, CONCOR again referred to the delay and reserved its rights in respect of levying liquidated damages and other contractual remedies.

5.6 On 02.07.1999, in response to HEIL's request for further relief, CONCOR agreed to defer immediate recovery subject to certain conditions and reserved its rights in respect of liquidated damages if the revised terms agreed between the parties were not met.

5.7 The correspondence during this period also records the continuing differences between the parties regarding the reasons for the delay. HEIL referred to the technical issues and other circumstances affecting the progress of the work, while CONCOR continued to raise concerns regarding the pace of production and supply.

5.8 During the extended delivery period, there were also disruptions at HEIL's manufacturing plants. The Tiljala plant faced lockout and industrial unrest from 12.06.1999 to 15.07.2000. At Santragachi plan as well, the industrial disruption disturbed the HEIL's work from 28.03.2001 to 28.05.2001.

5.9 From March to June 1999 and May to October 2000, the difficulties also arose in regard to availability and transportation of axles from Romania to Kolkata. The contract was finally completed with the supply of the entire agreed quantity on 16.09.2001 after a delay of 1326 days. The delay was spread over different stages of the contract, beginning with the design and prototype stage and continued throughout the manufacture and supply of the remaining wagons.

5.10 CONCOR held HEIL to be responsible for the delay and imposed liquidated damages in terms of Clause 23 which forms the basis of the disputes between the parties. As the disputes remain unresolved, it was referred to arbitration.

5.11 Sri K.C. Tandon was appointed as the Arbitrator on 05.11.2002. He conducted the proceedings for about six years but withdrew on 01.07.2008 on account of ill-health. He was substituted by Shri

Ashoka Baijal who entered upon the proceedings on 07.08.2008, but he also withdrew on 22.10.2009 due to ill-health.

5.12 The repeated change in Arbitrators delayed the completion of the proceedings. Finally, Justice Lokeshwar Prasad (Retd.) was appointed as the Sole Arbitrator with the consent of both the parties, who entered upon the reference on 22.03.2010. The impugned Award notes that the pleadings, documents, evidence, and records from the earlier proceedings were taken into consideration, and both parties were heard on the basis of the complete arbitral record.

6. HEIL'S PLEADINGS AND CLAIMS BEFORE THE TRIBUNAL:

6.1 HEIL filed its Statement of Claim on 17.12.2002. As recorded in the impugned Award, the aggregate claim raised by HEIL was approximately Rs.77.55 crores, including interest and other consequential claims. The principal claim was for refund of Rs.18,88,43,273/- recovered or adjusted by CONCOR towards liquidated damages in terms of Clause 23.

6.2 HEIL's claim for refund of liquidated damages was based on the argument that time was not an essential condition of the contract. HEIL contended that CONCOR had accepted the RITES-based design, that delays in design development and approval were caused by repeated technical comments and changes from CONCOR and RDSO, and that later delays were due to events beyond its control. HEIL further argued that since CONCOR had repeatedly granted extensions and accepted delayed performance, it could not later recover liquidated damages for the entire delay period.

6.3 HEIL relied on Annexure-C of its Statement of Claim to demonstrate that the original design was significantly changed during technical review, prototype development, and approval. According to HEIL, the changes and the time taken in the approval process affected the contractual schedule and contributed to the delay in supply.

6.4 HEIL also raised a claim for escalation under Clause 12 of the Special Conditions. In support of the claim, HEIL relied upon Annexure-F attached with Statement of Claims. In respect of the first rake, this included the escalation bill submitted in April 1998, the revised bill dated 25.08.2000, the forwarding letter dated 30.08.2000, the labour and material price indices, exchange-rate documents and subsequent correspondence.

6.5 Apart from liquidated damages and escalation, HEIL raised several other claims, including expenses for change in spring material, modification of jigs and fixtures, loss from scrapping work-in-progress, idle labour costs, additional wheel sets and bearings, higher freight charges, differential interest on margin money, bank guarantee commission, restoration of conditional price reduction, interest, and costs.

6.6 HEIL also claimed that the Rs.50,000/- reduction per five-wagon set should not be applied to the contract price, since the reduction was conditional upon CONCOR making 65% of the payment against proof of dispatch. HEIL contended that, as CONCOR did not make payment in accordance with that condition, it was not entitled to the benefit of the reduced price.

6.7 Before the learned Arbitral Tribunal, HEIL relied upon the clauses relating to extension of time and *force majeure*, and the clauses in relation to approval of drawings and designs. As per HEIL, liquidated damages were compensatory in nature and were not recoverable in the circumstances pleaded by it. It also relied upon the subsequent conduct of the parties, including the extensions of time, acceptance of delayed supplies and continuation of the Contract without termination.

7. <u>CONCOR'S DEFENCEE AND COUNTER-CLAIM BEFORE THE TRIBUNAL:</u>

7.1 CONCOR argued that the delay was not caused by any act or omission on its part. Before the Tribunal, CONCOR submitted that HEIL was aware of the tender amendments before submitting its bid, had confirmed compliance with the required design features, accepted the contractual timelines, and was responsible for design development, prototype compliance, and performance of the wagons.

7.2 CONCOR relied on the sequence of delayed drawings, prototype development, and approvals. It argued that the technical comments raised by CONCOR and RDSO were not changes introduced by the Purchaser but were necessary to ensure that HEIL's drawings and components met the contractual specifications.

According to CONCOR, the conditional approvals and technical clearances were part of the agreed approval process and did not shift responsibility from HEIL, particularly in view of Clauses 1.3 and 1.13.1 of the Technical Specifications.

7.3 In relation to the extensions of time, CONCOR contended that the extensions were granted to enable completion of the Contract and without prejudice to its rights under Clause 23 and other contractual provisions. It denied that the grant of extensions amounted to acceptance of the delay or waiver of its right to claim liquidated damages. CONCOR also disputed HEIL's claim of *force majeure* and contended that the requirements relating to notice and the effect of the alleged events on performance under Clause 25 had not been satisfied.

7.4 CONCOR defended the levy and recovery of liquidated damages under Clause 23 of the General Conditions and relied upon Sections 73 and 74 of the Indian Contract Act, 1872[8]. It contended that the delayed supply of the rakes affected container movement operations and resulted in losses which were difficult to quantify. According to CONCOR, the liquidated damages stipulated in the Contract provided the agreed measure of compensation, subject to the contractual limit.

7.5 CONCOR also raised counterclaims, which were stated in the impugned Award to be approximately Rs.522.81 crores. The principal claim was towards loss of traffic revenue on account of the non-availability of wagons. Other claims included interest paid to the

World Bank on advance payments, additional bank guarantee charges, exchange-rate losses and commitment charges. CONCOR also raised a claim for compensation beyond the liquidated damages already recovered.

7.6 CONCOR opposed HEIL's escalation claims by relying on Clauses 12.1 and 12.2(b) of the Special Conditions. It argued that escalation was not automatic and could only be granted if the contractual formula was satisfied, and on the basis of the prescribed adjustment date and the applicable labour and material indices. CONCOR further contended that escalation beyond the original delivery period was not payable in respect of delays attributable solely to HEIL.

7.7 CONCOR also opposed HEIL's claim for restoration of the conditional price reduction. It argued that HEIL had already received the benefit provided under the Contract and that restoring the reduction would go against the agreed commercial terms.

8. <u>EVIDENCE AND ISSUES FRAMED:</u>

8.1 The impugned Award records the oral evidence led by HEIL through its witness K.C. Paharia and by CONCOR through its witnesses Harpreet Singh, Anil K. Gupta and Harish Chandra.

[8] "ICA" hereinafter

8.2 The witnesses were subjected to cross-examination, and the parties placed extensive documentary material and written submissions before the Tribunal.

8.3 CONCOR filed an application dated 05.04.2004 seeking production of documents relating to utilization of the advance amount of Rs.33.48 crores, procurement records for steel and critical components, the dates of opening of letters of credit and related material. By order dated 07.04.2004, the Tribunal directed HEIL to produce the documents sought by CONCOR.

8.4 HEIL did not produce the complete set of documents as ordered by the Tribunal. By order dated 03.05.2004, the Tribunal recorded the position regarding the non-production of the documents and left the issue to be addressed at the appropriate stage.

8.5 After completion of the pleadings and evidences, the Tribunal framed twenty-eight issues, including Issue No. 27A. The following issues were framed by the Tribunal after modifications:

> *"(1) Whether the claimant is entitled to claim refund of the liquidated damages amounting to Rs. 18,88,43,273.00 or any other amount deducted by the Respondent from the claimant's bills? -OPC*
>
> *(2) Whether the Claimant is entitled to claim escalation charges amounting to Rs. 30,45,01,960.45 (including interest) or any other amount on that account from the Respondent? -OPC*
>
> *(3) Whether the Claimant is entitled to claim from the Respondent the extra costs incurred by it amounting to Rs. 1,03,77,517.37 (including interest) or any other amount owing to the change in specifications of material of springs? -OPC*

(4) Whether the Claimant is entitled to claim from the Respondent the extra expenses incurred amounting to Rs. 20,27,250.00 (including interest) or any other amount on account of modification of jigs and fixtures? -OPC

(5) Whether the Claimant is entitled to claim from the Respondent an amount of Rs. 24,77,750.00 (including interest) or any other amount towards loss suffered by the Claimant owing to the scraping of the work in progress? -OPC

(6) Whether the Claimant is entitled to an amount of Rs. 8,48,72,500.00 or any other amount from the Respondent as compensation on account of idling of workers? -OPC

(7) Whether the Claimant is entitled to claim from the Respondent the extra expenses incurred amounting to Rs. 28,49,112.36 (including interest) or any other amount on account of supplying 8 wheel sets and 16 bearings to the Respondent? -OPC

(8) Whether the Respondent is entitled to a reduced price of Rs. 50,000 per set of 5 wagons? -OPC

(9) Whether the Claimant is entitled to claim from the Respondent a compensation amounting to Rs. 92,25,511.75 or any other amount on account of increased cost or freight? -OPC

(10) Whether the Claimant is entitled to claim from the Respondent the differential interest amounting to Rs. 90,81,924.75 or any other amount on marginal monies kept by the Claimant with its bankers for the additional period to secure the Respondent by the Performance Bank Guarantee and Advance Bank Guarantee? -OPC

(11) Whether the Claimant is entitled to claim from the Respondent the refund of commission amounting to Rs. 4,40,19,148.57 (including interest) or any other amount paid by the Claimant to the bank on reducing basis for the additional period during which it was compelled to keep the Advance Bank Guarantee and the Performance Bank Guarantee valid? -OPC

(12) Whether the Respondent is entitled to claim amounts over and above and in addition to the liquidated damages deducted from the bills of the Claimant? -OPR

(13) Whether the claim of the Respondent on account of the loss of traffic is within the purview of the contract between the parties? -OPR

(14) Whether the delay in performing the contract was not attributable to the Claimant? -OPC

(15) Whether the Claimant had submitted the complete drawings meeting the technical specifications as required under the contract in time? -OPC

(16) Who had sought the changes in the designs and the drawings from time to time? -OPC

(17) Whether the Claimant was not aware that the contract is financed by the World Bank and the payment of the bills have to be made after the receipt of the money from the World Bank? -OPR

(18) Whether the lock out at the claimant's plant and the non-availability of the vessels from Romania was a force majeure condition? If so to what effect? -OPC

(19) Whether the Respondent is entitled to a claim of Rs. 514.43 crores or any other amount on account of the loss of traffic? -OPR

(20) Whether the Respondent is entitled to an amount of Rs. 5,65,75,112 or any other amount on account of interest paid by the Respondent to the World Bank on the advance amount? -OPR

(21) Whether the Respondent is entitled to claim any additional guarantee fee of Rs. 1,21,48,841 from the Claimant? -OPR

(22) Whether the Respondent's claim on account of the exchange rate fluctuations fall within the purview of the contract between the parties? -OPR

(23) Whether the Respondent is entitled to an amount of Rs. 77,76,638 or any other amount on account of exchange rate fluctuations? -OPR

(24) Whether the Respondent is entitled to claim additional commitment charges amounting to Rs. 73,05,874 or any other amount paid to the World Bank? -OPR

(25) Whether the claim Nos.2 to 9 are de hors the contract? -OPR

(26) Whether the Claimant was liable to make regular supplies of the wagons after the approval of the prototype? -OPR

(27) Are the parties entitled to any interest? If so, at what rate and what amount and for what period?

(27-A) Whether any of the parties is entitled to any cost, if so, to what extent?

(28) Relief.”

9. AWARD AND ISSUE-WISE FINDINGS:

9.1 The Tribunal first considered the issue whether time was of the essence of the Contract and relied upon the clauses given in the Contract for extension of time, the repeated extensions granted by CONCOR, and the continued acceptance of supplies. On that basis, the learned Arbitral Tribunal concluded that time was not of the essence of the Contract.

9.2 Subsequently, the Tribunal examined the tender conditions, amendments and technical history of the procurement. It reproduced both the original and amended versions of Clause 2.1 of the Technical Specifications and, therefore, noticed that the contractual requirement relating to “proven design” had subsequently been modified. It also considered HEIL’s RITES based proposal and the subsequent process of prototype development and approval.

9.3 The Tribunal’s main reasoning at pages 42 to 47 and 57 to 59 was based on the view that the amended Clause 2.1 had permitted a design which was not a proven or tested design and that CONCOR had deliberately opted for such design. The Tribunal further held that the adoption of this design required changes at different stages, including preparation of key drawings, approval of the prototype and manufacture of the wagons, and that this was a major factor contributing to the delay. On this basis, the Tribunal held that HEIL could not be held responsible for the delay arising from the said process.

9.4 While deciding Issue No.14, the Tribunal relied upon its earlier findings that time was not of the essence of the Contract and that the delay in performance could not, in the facts of the case, be attributed to HEIL. The Tribunal did not repeat those findings while dealing with Issue No.14, but stated that the reasons given earlier would form part of its reasoning on the issue.

9.5 Issues Nos. 15 and 16 were dealt at pages 128 and 129 of the impugned Award. The Tribunal recorded that these issues stood covered by its findings on Issue No. 14 and, on that basis, decided both issues in favour of HEIL. Issue No. 26, concerning the regularity of supplies after approval of the prototype, was also dealt with in the same manner, with the Tribunal referring to its findings on the attribution of delay.

9.6 While deciding Issue No.18 at pages 60 to 67, the Tribunal accepted HEIL's case regarding the Tiljala and Santragachi disruptions and the asserted non-availability of vessels for transportation of axles from Romania. It held that the notices issued by HEIL were sufficient in the circumstances and that CONCOR's continued acceptance of supplies weakened the objection regarding delay in notice. The issue was, accordingly, decided in favour of HEIL.

9.7 On Issue No.1, at pages 71 to 83, the Tribunal relied upon its conclusions that time was not of the essence, delay was not attributable to HEIL, extensions had been granted by CONCOR, and circumstances beyond HEIL's control had contributed to delay. On that basis, it directed refund of the entire amount of Rs.18,88,43,273/- recovered towards liquidated damages.

9.8 On Issue No.2, at pages 83 to 99, the Tribunal considered HEIL's escalation claim. In relation to escalation, the Tribunal allowed only the first claim forming part of Annexure-F. It considered the initial escalation bill dated 28/29 April 1998, the revised bill No. SP-980010E-WGN/REV dated 25.08.2000, the forwarding letter dated 30.08.2000, the relevant labour indices, foreign exchange material and Metal Bulletin data relating to September 1995 and December 1997.

9.9 The revised bill claimed a basic escalation amount of Rs.49,39,893/-, sales tax of Rs.3,95,191.44 and a total amount of Rs.53,35,084.44. The Tribunal excluded freight of Rs.2,00,000/- and sales tax and awarded Rs.47,39,893/- towards the first rake escalation claim.

9.10 The Tribunal rejected the escalation claims corresponding to Serial Nos. 2 to 12 of Annexure-F for the reasons recorded at pages 94 to 98 of the award. It noted that, for these claims, the requisite supporting material, including contemporaneous bills, invoices or written demands, had not been produced. It also found that the adjustment dates corresponding to the respective shipments had also not been established, and the relevant labour, material and exchange-rate indices had not been furnished. The Tribunal further noted that the calculations appeared to have been made with reference to a common date rather than the respective dates required under the contractual formula.

9.11 On Issue No.3, at pages 99 to 107, the Tribunal rejected HEIL's claim for additional expenditure relating to spring material. It held that HEIL was responsible under the Contract for meeting the required specifications and that the evidence supporting the claim was insufficient.

9.12 Issues Nos.4 and 5 relating to modification of jigs and fixtures and loss on scrapped work-in-progress were not adjudicated since HEIL, through its counsel on 16.09.2013, stated that the said claims were not being pressed.

9.13 On Issue No. 6, dealt with at pages 108 to 113 of the award, the Tribunal rejected HEIL's claim of Rs.8,48,72,500/- towards idle labour costs. It held that HEIL had failed to establish that the plant remained unused during the period claimed, that 935 workers remained idle on account of the wheel-set issue, or that the wage expenses were incurred as a result of any action or instruction of CONCOR.

9.14 On Issue No. 7, dealt with at pages 113 to 115, the Tribunal considered HEIL's claim relating to eight wheel sets and sixteen bearings. It understood HEIL's own pleadings to mean that these supplies were outside the original scope of the Contract. Since the Tribunal's jurisdiction was confined to disputes arising out of the Contract, it declined to adjudicate the claim and left HEIL at liberty to pursue an appropriate remedy before the competent forum.

9.15 Issues Nos. 8 and 17 were considered together at pages 115 to 124 of the impugned Award. On Issue No. 17, the Tribunal held that the fact that the project was financed in part by the World Bank did not make CONCOR's payment obligations dependent upon reimbursement by the World Bank, as the World Bank was not a party to the Contract. On Issue No. 8, the Tribunal held that CONCOR had not satisfied the condition for retaining the price reduction and accordingly directed payment of Rs.1,72,50,000/- to HEIL.

9.16 Issue No. 9, concerning the claim for increased freight, was not pressed by HEIL on 19.09.2013 and was accordingly not adjudicated by the Tribunal. Issue No. 10, relating to differential interest on margin money, was rejected for reasons recorded at pages 125 to 127 of the impugned Award. The Tribunal held that HEIL had not established that the interest earned was unreasonably low or that the differential amount claimed was recoverable from CONCOR.

9.17 Issue No. 11, concerning bank commission for continuation of guarantees, was rejected at pages 127 to 128 of the award. The Tribunal held that maintenance of the guarantees formed part of HEIL's contractual obligations during the period of performance and that the commission claimed, including for the period in question, had not been sufficiently proved.

9.18 On Issue No. 25, dealt with at page 129 of the award, the Tribunal recorded that Issues Nos. 4, 5 and 9 had been given up. It then referred to its findings on Issues Nos. 2, 3, 6, 7 and 8 and held that the remaining claims could not be treated as claims dehors the Contract.

9.19 Issue No. 26, concerning the supply of wagons at regular intervals after approval of the prototype, was also dealt with at page 129. The Tribunal referred to its findings on Issue No. 14 and, on that basis, decided Issue No. 26 in favour of HEIL.

9.20 Issues Nos.12, 13 and 19 to 24 relating to CONCOR's counterclaims were considered together at pages 130 to 132. The Tribunal recorded that the counterclaims were founded upon delay attributable to HEIL. Since it had already concluded that time was not of the essence and delay was not attributable to HEIL, it rejected all the counterclaims.

9.21 Under Issue No. 27, the Tribunal awarded simple interest at the rate of 9% per annum on the amounts found payable to HEIL, to be calculated from the respective dates on which the amounts became payable until the date of actual payment.

9.22 On Issue No. 27A, concerning costs, the Tribunal awarded costs of Rs.22,50,000/- in favour of HEIL. The Tribunal also noted that complete proof of the professional expenses claimed had not been placed on record.

9.23 Issue No.28 constituted the final relief. The Tribunal awarded the following as a final relief:

> *"(i) that as against the claim, of the claimant, amounting to Rs.53,78,40,317.79 (Rupees fifty three crores seventy eight lacs forty thousand three hundred seventeen and seventy nine paisa only) (the above figures exclude the amount of claim preferred in issue nos 4,5 and 9, which were given up by the claimant and the amount of interest claimed on the principal amount) this Arbitral Tribunal awards a sum of Rs. 21,08,33,166/- (Rupees twenty one crores-eight lacs thirty three thousand one hundred sixty six only) in favour of the claimant and directs that the respondent shall pay to the claimant the above sum of Rs. 21,08,33,166/- (Rupees twenty one crores eight lacs thirty three thousand one hundred sixty six only);*
>
> *(ii) that the awarded amount of Rs. 21,08,33,166/- (Rupees twenty one crores eight lacs thirty three thousand one hundred sixty six only) shall carry simple interest @ 9% per annum from the date the same had become due and payable to the claimant by the respondent till actual payment;*
>
> *(iii) that the respondent shall also pay a sum of Rs. 22,50,000/- (Rupees twenty two lacs fifty thousand only) to the claimant towards the cost of these proceedings; and*
>
> *(iv) that the counter claims, preferred by the respondent, as already decided, are hereby rejected."*

9.24 Since, both the parties were dissatisfied by the impugned Award, they filed cross objection petitions under Section 34 of the Act, before this Court. The objection petition filed by the CONCOR was registered as OMP(COMM) NO.11/2016, whereas HEIL's objection Petition was registered as O.M.P. (COMM.) 50/2016.

10. <u>CONCOR'S SUBMISSIONS IN OMP(COMM) NO.11/2016:</u>

10.1 Learned Senior Counsel appearing for the CONCOR argued that the impugned Award suffers from patent illegality because the Tribunal, despite noticing the amendment to Clause 2.1 of the Technical Specifications, failed to give effect to its terms and proceeded on an erroneous interpretation of the amended clause.

10.2 It was submitted that the original clause required an established and proven wagon design, while the amended clause allowed designs with features that had been successfully used for a period of two years. Learned Counsel submitted that HEIL had submitted its bid after the amendment and had represented that the design features in its RITES proposal were already successfully used before in Indian Railways. Therefore, the Tribunal erred in treating the Contract as an experimental development project for which the purchaser knowingly undertook the risk.

10.3 Learned Senior Counsel took the Court through the documents forming part of the record, including Amendment Nos.1 to 4, HEIL's technical proposal, pre-bid correspondence and the RITES letter dated 20.09.1995. The submission was that HEIL and RITES were fully aware of the amended terms of the Contract and HEIL had submitted its bid with full knowledge of the amended technical specifications.

10.4 He relied upon Clauses 1.2.1, 1.3, 1.6, 1.7 and 1.13.1 of the Technical Specifications. It was submitted that HEIL was required to furnish complete design material within the timeline fixed as per the Contract and any approval by CONCOR or RDSO amounted only to technical acceptance and not a transfer the responsibility for design and performance to CONCOR. It was further submitted that any modifications required during prototype development were to be carried out by HEIL without additional cost and that HEIL continued to remain responsible for the design, construction and performance of the wagons.

10.5 According to learned Senior Counsel appearing for the CONCOR, the Tribunal's erroneous understanding of the amended Clause 2.1 formed the basis of its conclusion that HEIL was not responsible for the delays in design development and prototype approval and by proceeding on that basis, the Tribunal wrongly placed the responsibility for these delays on CONCOR, and also wrongly rejected the CONCOR's claim for liquidated damages and its counterclaims.

10.6 Learned Senior Counsel next relied upon the chronology of design and drawing submissions. It referred to the incomplete drawing submission dated 10.05.1996, subsequent submission of brake-beam and wheel drawings on 06.08.1996, drawbar related drawings on 05.10.1996, automatic twist-lock drawings on 17.01.1997 and the subsequent delay in prototype completion. According to him, these delays had already occurred before the industrial disruptions and shipping difficulties which HEIL subsequently relied upon as *force majeure* circumstances.

10.7 It was further argued that Issues Nos.15 and 16 were separately framed because HEIL's Annexure-C claimed that changes were introduced by CONCOR and RDSO. Learned Senior Counsel submitted that CONCOR had specifically denied these allegations through detailed item-wise replies. According to him, the Tribunal, by treating these issues as covered by Issue No. 14, failed to examine the to and fro of changes between the parties and determine whether those changes were required to bring HEIL's design in conformity with the contractual requirements or amounted to new requirements introduced by CONCOR or RDSO, and therefore, whether the resulting delay was attributable to HEIL or to the Purchaser.

10.8 Learned Senior Counsel also assailed Issue No.26 on the ground that it was an independent issue requiring adjudication. It was submitted that even after final prototype approval, HEIL remained responsible to supply rakes at regular intervals. The reliance was placed on letters exchanged during that period demonstrating delays in the subsequent supplies, and it was argued that the Tribunal failed to determine whether these post-approval delays were attributable to HEIL.

10.9 In regard to the extension letters on which the Tribunal has relied upon, it was submitted that each extension was granted only to allow completion of a public procurement Contract and not as a waiver of its rights given in the Contract. It was contended that the initial and subsequent extension letters expressly reserved CONCOR's right to levy liquidated damages under Clause 23 and to invoke its other contractual remedies. Once HEIL accepted the extensions and continued the work without objecting to these conditions, it was submitted that the letters could not subsequently be given a different meaning by the Tribunal. In support of its contention, reliance was placed on Section 55 of the ICA.

10.10 In relation to liquidated damages, learned Senior Counsel relied upon Clause 23 of the General Conditions and Sections 73 and 74 of the ICA. It was argued that the Contract itself fixed the rate of liquidated damages and the maximum amount that could be claimed for delay. According to learned Senior Counsel, the delay in supplying the operational rakes affected the container transportation activities, and it was difficult to calculate the exact loss caused by each delayed rake and therefore, CONCOR is entitled to claim the agreed liquidated damages within the limit fixed under the Contract.

10.11 On *force majeure*, it was argued that the HEIL did not meet the requirements of Clause 25 because it failed to give proper and timely notice explaining the event, its duration, and how it affected performance of the Contract. It was also submitted that even if the claimed *force majeure* events were accepted, they could only account for the delays occurring during the affected periods and could not explain the earlier delays relating to the drawings, prototype development and delivery of the first rake.

10.12 Learned Senior Counsel also referred to its application dated 05.04.2004 requesting HEIL to produce procurement and utilization records, along with the Tribunal's orders dated 07.04.2004 and 03.05.2004. It was argued that HEIL had failed to produce complete records showing how the advance payment was utilised, whether orders for steel and other key components had been placed and whether letters of credit had been opened. According to him, the Tribunal failed to consider the effect of this non-production

10.13 Regarding the first-rake escalation, the argument was that Clause 12.1 provided a specific formula for calculating escalation and required the adjustment date to be based on the shipment date. It was submitted that HEIL had failed to establish the correct adjustment date as required under the Contract and, therefore, the Tribunal erred in allowing the escalation claim without properly applying the formula provided under Clause 12.

10.14 Regarding restoration of the conditional price reduction, learned Senior Counsel relied on letters dated 02.07.1999 and 07.07.1999. It was argued that the parties had agreed to a revised payment arrangement involving direct payment and subsequent reimbursement and therefore, HEIL was not entitled to recover the reduced amount of Rs.1,72,50,000/-.

10.15 It was also argued that the rejection of its counterclaims was based only on the Tribunal's finding that the delay was not caused by HEIL which is itself in contravention of the explicit clauses of the Contract. It was submitted that, even if finding on attribution of delay is accepted, the counterclaims ought to have been examined separately on the basis of the terms of the Contract, submissions advanced and the evidence submitted and could not have been rejected merely on the basis of the finding on Issue No. 14.

10.16 As far as limited scope of judicial review is concerned, it was submitted that the amended Section 34 of the Act applies to the present proceedings as the petitions were filed after Arbitration and Conciliation (Amendment) Act, 2015[9] came into force. It was further argued that, even if the award were examined under the earlier public policy standard, the impugned findings would still be open to challenge. Reliance was placed upon the principles laid down by the Supreme Court in ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI***.

10.17 Finally, it was submitted that sending the matter back to the Tribunal would not be appropriate because the issues involved were not merely of incomplete reasoning, but required reconsideration of the evidence, interpretation of the Contract and determination of responsibility for delay.

11. HEIL'S SUBMISSIONS IN OMP(COMM) NO.11/2016:

11.1 At the outset, Learned Counsel appearing for HEIL submitted that CONCOR's challenge essentially seeks a rehearing of the matter on merits after a full-fledged arbitral adjudication. It was argued that the impugned Award was passed by a former Judge after years of proceedings involving witness evidence, cross-examination and extensive documentary material, on the basis of which the Tribunal had taken a plausible view. In such circumstances, Section 34 does not permit this Court to re-examine disputed questions relating to the design, technical approvals, *force majeure* or responsibility for delay.

[9] "2015 Amendment Act" hereinafter

11.2 It was highlighted that the Tribunal had considered Amendment No. 1 and interpreted the distinction between the original requirement of a "proven design" and the amended requirement of "design features". According to him, the interpretation adopted by the Tribunal was a plausible one based on the Contract, and this Court cannot substitute its own interpretation merely because another view is possible.

11.3 Learned Senior Counsel submitted that CONCOR had consciously selected the RITES proposal over the Trinity proposal after technical evaluation, exercised its option to increase the quantity and continued with the Contract without raising any objection that the design failed to meet Clause 2.1 and therefore, CONCOR could not subsequently blame HEIL for difficulties arising from a design which CONCOR had itself accepted.

11.4 It was also argued that the development of railway rolling stock involved technical review, testing and safety checks, during which the drawings went for changes and the mere fact that changes were made to the drawings did not establish that HEIL's original design was defective or that the resulting delay was attributable to HEIL.

11.5 Regarding Issues Nos. 15 and 16, it was argued that Issue No. 14 was the main issue concerning responsibility for delay and that the Tribunal had already considered the relevant facts and evidence in detail at earlier part of the impugned Award. According to the learned Counsel for HEIL, Issues Nos. 15 and 16 were closely connected with

Issue No. 14, and the Tribunal was not required to repeat the same analysis separately under each issue. It was submitted that the findings on Issues Nos. 15 and 16 had to be read along with the discussion and findings under Issue No. 14 and on a holistic reading of the impugned Award, the underlying reasons for Issue Nos.15 and 16 are clearly discernable.

11.6 On the issue of time, HEIL relied on the clauses given in the Contract for extension of time, the ten extensions granted by CONCOR, the continued acceptance of supplies by the CONCOR and the fact that the Contract was never terminated. It was argued that the Tribunal's finding that time was not of the essence was a matter of interpretation of the Contract and, therefore, should not be interfered with.

11.7 It was further pointed out that several extension letters referred to Clause 22.3, which permitted extension of time after considering the circumstances affecting performance. According to learned Counsel for HEIL, CONCOR had continued the Contract for several years by granting successive extensions and accepting delayed supplies and therefore, at the later stage, the CONCOR cannot attribute the delay for the entire extended period to HEIL and claim compensation for the same.

11.8 On *force majeure*, reliance was placed on the industrial disruptions at Tiljala and Santragachi and the problems in transporting Romanian axles. It was argued that the Tribunal had considered these events along with the technical issues and the approval process and, after examining the evidence as a whole, had rightly concluded that the entire delay could not be attributed to HEIL.

11.9 Regarding liquidated damages, he argued that the mere existence of a clause for a fixed sum did not automatically entitle CONCOR to recover it. Relying upon Sections 73 and 74 of the ICA, it was submitted that CONCOR had failed to establish the loss caused by the delayed deliveries and therefore, the Tribunal had rightly rejected the claim for liquidated damages on the basis of the evidence before it.

11.10 Regarding the application for production of documents, HEIL argued that the Tribunal was aware of the orders dated 07.04.2004 and 03.05.2004 and had considered the parties' submissions on the failure to produce records. It was submitted that merely because the impugned Award did not separately discuss whether an adverse inference should be drawn did not mean that the Tribunal ignored the issue.

11.11 On first-rake escalation, he supported the Tribunal's decision and relied on various documents, including the original escalation bill dated 28/29 April 1998, revised bill dated 25.08.2000, covering letter dated 30.08.2000, later correspondence dated 25.09.2000 and 26.11.2001, labour cost indices, exchange-rate confirmation from Punjab National Bank, and Metal Bulletin data.

11.12 It was further argued that Clause 12.2(b) only limited escalation claims after the original delivery period and did not cancel escalation that had already accrued during the original Contract period. It was submitted that the Tribunal correctly used December 1997 indices to ensure that escalation was calculated only for the original delivery period and did not include any increase during the extended period.

11.13 Regarding the conditional price reduction, learned Counsel argued that the reduced price was available only if 65% payment was released against proof of dispatch. Since CONCOR allegedly failed to follow this agreed payment arrangement, HEIL submitted that CONCOR was not entitled to retain the benefit of the reduced price.

11.14 Learned Counsel also raised an objection regarding the scope of judicial review. It was submitted that the impugned Award was passed on 13.10.2015, before the 2015 Amendment Act came into force, and therefore the ground of "patent illegality" introduced under Section 34(2A) could not be applied for the analysis of the present facts. It was further submitted that, even under the amended law, this Court cannot re-examine the evidence or substitute its own view for the findings of the Arbitral Tribunal on factual issues.

11.15 Learned Counsel for the HEIL submitted that the impugned Award has to be read as a whole and that isolated observations cannot be read out of the context of the Tribunal's overall reasoning. According to him, the Tribunal had considered the correspondence, technical material and contractual provisions together before concluding that the design approval and modification process materially contributed to the delay and therefore, due to the limited scope of interference of this Court under Section 34, no ground was made out for disturbing the award.

12. HEIL'S CROSS-PETITION AND CONCOR'S RESPONSE ON ESCALATION:

12.1 In O.M.P. (COMM.) 50/2016, HEIL has confined its challenge to the rejection of escalation claims corresponding to serial numbers 2 to 12 of Annexure-F.

12.2 Learned Counsel appearing for HEIL submitted that escalation under Clause 12.1 was a right flowing from the Contract and became payable once the conditions of the prescribed formula were satisfied. According to him, the necessary base indices, formula, quantities supplied and basic prices were already available on record and therefore, the Tribunal erred in rejecting them.

12.3 It was further submitted that the claim could not be rejected merely because separate escalation bills or invoices had not been raised. Relying upon paragraph 98 of ***McDermott International Inc. v. Burn Standard Co. Ltd.***[10], he argued that a right flowing from the Contract cannot be rejected merely because a specific billing procedure was not followed at the relevant time.

12.4 It was also submitted that once the Tribunal accepted the calculation method for the first rake, the same method should have been applied to the remaining rakes as well. According to learned

Senior Counsel, requiring separate bills or repeated demands would serve no real purpose as CONCOR had already disputed HEIL's entitlement to escalation.

12.5 *Per contra*, learned Senior Counsel for the CONCOR disagreed with this argument and submitted that Clause 12 does not provide for an automatic or fixed percentage increase. It was argued that the escalation formula requires consideration of specific factors for each shipment, such as the relevant adjustment date, labour and material indices, and the applicable price components. According to him, these particulars could not be assumed or carried forward from the first-rake claim.

12.6 Learned Senior Counsel for CONCOR relied upon the Tribunal's findings at pages 94 to 99 of the award. It was submitted that the Tribunal had found that HEIL had not produced relevant escalation bills, or supporting documents for Serial Nos. 2 to 12. It was also pointed out that the Tribunal had also noticed that the same date, 11.03.2002, had been shown against all these claims and also the necessary details regarding shipment dates, adjustment dates, spares, bogies and the relevant indices had not been furnished.

12.7 It was further submitted that the reliance on ***McDermott International*** *(supra)* was misplaced. That decision did not dispense with the requirement of proving the facts necessary to calculate an escalation claim under the Contract. According to him, this Court under Section 34 could not now supply the missing particulars, take

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[10] **(2006) 11 SCC 181**

fresh evidence or carry out calculations which had not been established before the Tribunal.

12.8 It was also argued that HEIL was not seeking correction of a legal error, but asking the Court to adjudicate eleven fresh monetary claims by applying the escalation formula afresh to claims which had been rejected by the Tribunal for failure to establish the necessary factual details. It was submitted that Section 34 does not permit the Court to convert the proceedings into an original adjudication of such rejected claims.

13. QUESTIONS FOR DETERMINATION:

13.1 In view of the pleadings, the findings recorded in the impugned Award and the grounds raised in the present petitions, this court finds the following issues for consideration-

a. Whether the present challenge to the impugned Award is maintainable under Section 34(2A) of the Arbitration and Conciliation Act, 1996, on the ground of "patent illegality", as introduced by the Arbitration and Conciliation (Amendment) Act, 2015.

b. Whether the Tribunal's interpretation of amended Clause 2.1 of the Technical Specifications, and its finding attributing the whole delay to CONCOR, was a valid and plausible interpretation of the Contract, or whether such finding on responsibility for delay warrants interference under Section 34 of the Act.

c. Whether the manner in which the Tribunal dealt with Issues Nos. 15, 16 and 26, relating to the drawings, changes in design and supplies after prototype approval affects the findings on delay and liquidated damages. This also involves consideration of the effect of non-production of documents, and the treatment of *force majeure* periods.

d. Whether the extensions of time granted by CONCOR and the reservations contained in the extension letters amounted to waiver or acceptance of delayed performance, or otherwise affected CONCOR's entitlement to claim liquidated damages under the Contract and Section 55 of the ICA.

e. Whether the Tribunal's decision allowing the first-rake escalation claim and to direct CONCOR to pay the amount deducted as a conditional price reduction is sustainable under the terms of the Contract or warrants interference under Section 34 of the Act.

f. Whether the Tribunal's rejection of HEIL's escalation claims corresponding to Serial Nos. 2 to 12 of Annexure-F suffers from any ground warranting interference under Section 34, and, if so, whether the Court can grant relief by way of modification, severance or remand.

g. Whether the Tribunal's findings in relation to CONCOR's counter-claims, and interest warrant interference under Section 34, and what effect, if any, the absence of an application under Section

34(4) has on the relief that may be granted, including the question of severability of the award.

ANALYSIS

14. APPLICABILITY OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015:

14.1 At the outset, as the challenge in the present petitions pertains to the applicability of Section 34(2A) inserted by the 2015 Amendment Act, which came into force on 23.10.2015, I deem it appropriate to first deal with the said issue.

14.2 The question of the applicability of the 2015 Amendment Act to "court proceedings" instituted on or after 23.10.2015 is no longer *res integra* and has been considered by the Hon'ble Supreme Court in several judgments. In ***BCCI v. Kochi Cricket (P) Ltd.***[11], the Supreme Court considered Section 26 of the 2015 Amendment Act and drew a distinction between the arbitral proceedings themselves and the "court proceedings" arising out of or in relation to such proceedings. It was explicitly clarified that 2015 Amendment Act is applicable on "court proceedings" commenced on or after 23.10.2015. The relevant observations are reproduced below:

> *"**39.** Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the*

[11] **(2018) 6 SCC 287**

Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to court proceedings which relate to the arbitral proceedings. ***The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force."***

(emphasis supplied)

14.3 The position was made explicit in ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India***[12]**,** where the Supreme Court directly considered the applicability of the amended Section 34. It held that the amended provision is applicable to Section 34 applications filed on or after 23.10.2015, irrespective of the date on which the arbitral proceedings had commenced. The said principle squarely governs the present petitions and the relevant observations are reproduced as follows-

"19. *There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of "public policy of India" in ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] ["Saw Pipes"] and ONGC v. Western Geco International Ltd. [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] ["Western Geco"] has been done away with, and a new ground of "patent illegality", with inbuilt exceptions, has been introduced.* ***Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or***

[12] **(2019) 15 SCC 131**

after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date."

(emphasis supplied)

14.4 As far as applicability of observations given in ***BCCI (supra)*** in respect to Section 34 proceedings are concerned, it was clarified in ***Shree Vishnu Constructions v. Military Engineering Service***[13]. The Supreme Court clarified that the observations in ***BCCI (supra)*** were made with reference to "court proceedings" under Sections 34 and 36 which had commenced after the 2015 Amendment Act came into force. The relevant observations are as follows-

> ***"25.*** *The submission on behalf of the appellant, as above, cannot be accepted for the simple reason that this Court in BCCI [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] was considering the Court proceedings under Sections 34 and 36. To that, this Court interpreted Section 26 in paras 37 to 39, reproduced hereinabove, and held that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced as understood by Section 21 of the principal Act, on or after the 2015 Amendment Act and to Court proceedings which have commenced on or after the 2015 Amendment Act came into force.* ***Therefore, any observations made by this Court in paras 37 to 39 in BCCI [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] shall be understood and construed with respect to Court proceedings which have commenced on or after the Amendment Act coming into force, namely, the proceedings under Sections 34 and 36.*** *Therefore, the decisions of this Court in Parmar Construction Co. [Union of India v. Parmar Construction Co., (2019) 15 SCC 682 : (2020) 2 SCC (Civ) 390] and Pradeep Vinod Construction Co. [Union of India v. Pradeep Vinod Construction Co., (2020) 2 SCC 464 : (2020) 1 SCC (Civ) 579] cannot be said to be per incuriam and/or in conflict with the decision of this Court in BCCI [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534]."*
>
> ***(emphasis supplied)***

[13] **(2023) 8 SCC 329**

14.5 The position also got affirmation in ***Hindustan Construction Co. Ltd. v. Union of India***[14], wherein the Supreme Court held:-

> ***"66. The result is that Kochi Cricket [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] judgment will therefore continue to apply so as to make applicable the salutary amendments made by the 2015 Amendment Act to all court proceedings initiated after 23-10-2015."***
>
> ***(emphasis supplied)***

14.6 In view of the above, the position in law is clear and leaves no scope for ambiguity. If the Section 34 proceedings are instituted after 23.10.2015, the amended Section 34 would apply.

14.7 In the present case, although the arbitral proceedings had commenced much prior to the amendment came into force, the present petitions under Section 34 were instituted after 23.10.2015, when the 2015 Amendment Act was already in force.

14.8 In view of the above, HEIL's argument that the old law should apply only because the impugned Award was passed before 23.10.2015 cannot be accepted. The relevant date for deciding the applicable law is the date when the Section 34 petition was filed, and not the date of the impugned Award.

14.9 Accordingly, since the present Section 34 petitions were filed after 23.10.2015, this Court shall examine the challenge on the basis of the amended legal framework.

15. SCOPE AND MEANING OF PATENT ILLEGALITY

[14] **(2020) 17 SCC 324**

15.1 The main ground on which the present challenge is pressed is that of "patent illegality" appearing on the face of the award. It is, therefore, necessary to first examine the scope of this ground and the limits within which the Court can interfere with an arbitral award on that basis.

15.2 The applicability of the amended Section 34 has been dealt with hereinabove. However, it has to be borne in mind that the application of the amended provision does not enlarge the scope of judicial review. Although the ground of patent illegality was expressly recognised as a statutory ground by the 2015 Amendment Act, the principle had already been recognised by the Hon'ble Supreme Court in ***ONGC v. Saw Pipes Ltd.***[15] The Supreme Court held that, in addition to the three grounds recognised in ***Renusagar Power Co. Ltd. v. General Electric Co.***[16]**,** "patent illegality" could also constitute a ground for setting aside an arbitral award. The Court further held that such illegality must go to the root of the matter. The relevant observations are reproduced below:-

> *"**30.** It is true that under the Act, there is no provision similar to Sections 23 and 28 of the Arbitration Act, 1940, which specifically provided that the arbitrator shall pass award within reasonable time as fixed by the court. It is also true that on occasions, arbitration proceedings are delayed for one or other reason, but it is for the parties to take appropriate action of selecting proper arbitrator(s) who could dispose of the matter within reasonable time fixed by them. It is for them to indicate the time-limit for disposal of the arbitral proceedings. It is for them to decide whether they should continue with the arbitrator(s) who cannot dispose of the matter within reasonable time. However, non-providing of time-limit for deciding the dispute by the arbitrators*

[15] **(2003) 5 SCC 705**
[16] **1994 Supp (1) SCC 644**

could have no bearing on interpretation of Section 34. Further, for achieving the object of speedier disposal of dispute, justice in accordance with law cannot be sacrificed. In our view, giving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice.

31. *Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to* ***the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal****. The result would be — award could be set aside if it is contrary to:*

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

15.3 The ground of public policy was also considered in ***DDA v. R.S. Sharma and Co.***[17], where the following was observed:

"21. From the above decisions, the following principles emerge:

[17] **(2008) 13 SCC 80**

(*a*) An award, which is
(*i*) contrary to substantive provisions of law; or
(*ii*) the provisions of the Arbitration and Conciliation Act, 1996; or
(*iii*) against the terms of the respective contract; or
(*iv*) patently illegal; or
(*v*) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(*b*) The award could be set aside if it is contrary to:
(*a*) fundamental policy of Indian law; or
(*b*) the interest of India; or
(*c*) justice or morality.
(*c*) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.
(*d*) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.
With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties".

(emphasis supplied)

15.4 Thus, it is clear that the concept of patent illegality was not unknown to the law governing arbitral awards even before the 2015 Amendment Act. The 2015 Amendment Act only gave statutory recognition to this principle by introducing Section 34(2A) and at the same time placed limits on its application by clarifying that an award cannot be set aside merely on the ground of an erroneous application of law or by reappreciating the evidence.

15.5 These limits are also consistent with the nature of the jurisdiction exercised by the Court under Section 34. As held in

McDermott International Inc. (supra), this Court cannot correct every factual or legal error made by the Arbitral Tribunal. A challenge under Section 34, therefore, cannot be used to re-examine the merits of the dispute or to substitute the Court's view with the Tribunal's view only because the Court's view is more plausible.

15.6 The distinction becomes particularly important where the challenge concerns the interpretation of the Contract by the Arbitral Tribunal. Where the contractual terms are capable of more than one reasonable interpretation, the interpretation adopted by the Tribunal, if otherwise possible on the terms of the Contract, would ordinarily fall within its domain, and this Court should endeavour to uphold it.

15.7 However, where the interpretation adopted by the Tribunal disregards the terms of the Contract or gives them an effect which the Contract does not permit, the question is no longer remains of merely choosing between two possible views. Such an interpretation may constitute an illegality going to the root of the award and may warrant interference under Section 34, whether the challenge is considered under the unamended or the amended Section 34.

15.8 This distinction has been recognised in ***DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.***[18]**,** where the Supreme Court reiterated that a reasonable interpretation of the Contract adopted by the Tribunal cannot be interfered with merely because another interpretation is possible. Similarly, in ***PSA Sical Terminals (P) Ltd.***

[18] (2024) 6 SCC 357

v. V.O. Chidambaranar Port Trust*[19]*, and ***State of Chhattisgarh v. Sal Udyog Pvt. Ltd.*[20]*,*** the Supreme Court emphasised that an arbitrator cannot rewrite the Contract or make a new agreement for the parties or introduce terms which the parties had never agreed upon.

15.9 Thus, while the choice between two possible interpretations is ordinarily left to the Tribunal, that discretion is not without limits. Where the interpretation adopted has no basis in the Contract, ignores its clear terms, or is otherwise such that no reasonable person could have arrived at it, interference by this Court is permissible in such circumstances. As explained in ***Ssangyong Engineering & Construction Co. Ltd. (supra),*** interference may also be justified where the award is based on no evidence, ignores vital evidence, is perverse, or proceeds on an interpretation of the Contract which is not a possible view of its terms.

15.10 The principles which emerge from the above is that the Court cannot re-examine the entire matter as an appellate court, reassess the evidence or substitute its own view of the Contract merely because another view is possible. However, the Court cannot uphold an award where the Tribunal has proceeded on a meaning of the Contract which the terms of the Contract do not support, or where material aspects which were necessary for deciding the dispute have not been dealt with.

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[19] 2021 SCC OnLine SC 508
[20] (2022) 2 SCC 275

15.11 Keeping the aforesaid principles in mind, this Court shall proceed to consider the rival contentions raised against the Issues framed and findings given by the Tribunal.

15.12 For clarity and proper consideration, the Court will examine these issues with reference to the corresponding findings of the Tribunal. The Court will first deal with the issues relating to the interpretation of the Contract, attribution of delay and liquidated damages, and thereafter will consider the findings on the individual claims and counter-claims.

16. THE EFFECT OF AMENDED CLAUSE 2.1 AND ISSUE NO. 14: ATTRIBUTION OF DELAY

16.1 It is not disputed by either party that the Tribunal was aware of Amendment No. 1 and had reproduced the amended Clause 2.1 in the impugned Award. Therefore, the challenge is not that the amendment was ignored. The issue is whether the Tribunal correctly understood the effect of the amendment when read with other clauses of the Contract relating to design responsibility, approvals, and prototype performance. Clause 2.1 and amended Clause 2.1 is reproduced herein for better understanding-

> ***Original Clause 2.1***: *"Proven design. The container flat wagons offered shall be of proven design which has been in use on any advanced railway system in commercial service for at least two years. The offered design should have the capability of commercial operation up to a speed of 100 kmph on Indian Railway track system. The Bidder shall give the following information in respect of the container flat offered in his Bid: ..."*
> ***Amended Clause 2.1***: *"The container flat wagons shall have design features which have been in use on any advanced railway system successfully for at least two years."*

16.2 To my mind, the change brought by the amendment is clear. The original Clause 2.1 required the container flat wagons to be of a proven design that had been in commercial use on an advanced railway system for at least two years. The amended clause required the design features of the wagons to have been successfully in use on an advanced railway system for at least two years. The amendment, therefore, did not remove the requirement of performance experience for those design features.

16.3 This distinction assumes significance in the present case because HEIL's own technical proposal referred to the BFKX/BFKI container flat wagons and represented that the relevant design features were similar to those used on Indian Railways since 1975. Therefore, the representation made by HEIL was not that it was offering an entirely new or untested design.

16.4 CONCOR accepted the RITES proposal after technical evaluation on the basis of this representation. Meaning thereby, it was clear to both parties that the Contract was not for developing a completely new or experimental design from scratch. Rather, it was a Contract for developing and supplying a specific wagon configuration using design features which, as represented by HEIL, had been successfully used for at least two years.

16.5 The Tribunal, however, while considering the original and the amended Clause 2.1, proceeded to hold as follows:

> *"From the contents of the above clauses of the Agreement in question, it is apparent that the Agreement in question was not a simple Agreement for the supply of finished goods as has been pleaded by the Learned Counsel for the respondent during the course of arguments. On the other hand the same was an Agreement, which was highly complex in nature because as already pointed out as per requirement within two weeks of the issue of Letter of Intent (LOI) the claimant was required to submit to the respondent the design data and key drawings for approval.* ***Initially, the design of the wagons to be supplied by the claimant had to be of a 'proven design', which had been in use on any advanced railway system in commercial services for at least two years but the same was amended and the claimant in terms of the amended clause was required to offer flat wagons, having design features, which had been in use on any advanced railway system successfully for at least two years. As a result of the above amendment it had become obligatory on the part of the claimant to develop a new design of the flat wagons instead of a 'proven design', which decidedly was likely to take more time as compared to the initially contemplated design of the wagons, which was a 'proven design'."***
>
> ***(emphasis supplied)***

16.6 In my view, the above interpretation cannot be inferred on a plain reading of the amended Clause 2.1. The amendment did not provide that HEIL was required to develop a new or unproven design. It merely substituted the requirement of a "proven design" of the complete wagon with the requirement that the wagon should have "design features" which had been successfully in use on an advanced railway system for at least two years.

16.7 It is pertinent to note that the requirement of two years' successful use was expressly retained in the amended clause. However, the Tribunal while interpreting the amendment as permitting a new and unproven design, gave no effect to this express requirement of two years' successful use. In doing so, the Tribunal proceeded on a premise which is contrary to the express terms of the amended Clause 2.1.

16.8 The Tribunal proceeded further on the same premise and held that, by deleting the words "proven design", CONCOR had knowingly and deliberately permitted the use of a new and untested design and had thereby assumed the risks and consequences arising from its acceptance. The Tribunal's relevant findings are as follows:

> ***"To sum up it can be stated that by amending the language of clause 2.1 of the Agreement and doing away with the word 'Proven Design', the respondent knowingly and deliberately made way for the induction of a new design, knowing fully-well that the new design was not a tested and tried design and thereby the respondent took upon itself the risk of accepting an unproven design and thus naturally the respondent took upon itself the consequences, which may arise in future due to the acceptance of an unproven design.*** *It may not be out of place to mention that on a specific query made by the Tribunal on the point as to what compelled the respondent to switch over from a proven design to an unproven design -no satisfactory explanation could be given by the respondent to the above query of this Tribunal."*
>
> ***(emphasis supplied)***

16.9 In the above paragraph, the Tribunal held that CONCOR had knowingly accepted an unproven design and had thereby undertaken the risks and consequences arising from its development. The issue with the above reasoning is that the deletion of the words "proven design" cannot, by any stretch, lead to the conclusion that CONCOR had agreed to undertake the risks associated with the development of a new and untested design.

16.10 More importantly, as noted above, the Tribunal did not take into account the express requirement of two years' successful use of the design features. Therefore, the interpretation by the Tribunal is not merely another plausible view of the Contract but an interpretation which no reasonable person could have arrived at on a reading of the amended Clause 2.1.

16.11 The Tribunal's interpretation of the amended Clause 2.1 also has to be considered in the context of the other provisions of the Technical Specifications dealing with design, approval, prototype and performance. Clauses 1.2.1, 1.3, 1.6, 1.7 and 1.13.1 are relevant to determining whether the amendment to Clause 2.1 was intended to shift responsibility for design and subsequent technical development from HEIL to CONCOR. The said clauses are reproduced below-

> *"**1.2.1** Drawings*
> *The Supplier shall develop the design based on the details in this specification and sound engineering practices. The entire design data including design calculations and the key drawings shall be submitted to the Purchaser for the approval before commencing manufacture of prototype or placing orders on sub-contractors. The set of drawings must include key drawings of general arrangement and of all structural, mechanical and pneumatic components of wagon together with schematic diagra.*
>
> ***1.3** Approval of Design*
> ***Approval of design means general "acceptability" of the general design features. Notwithstanding the approval, the Supplier will be wholly and completely responsible for the performance of the wagon offered. The Supplier when submitting design proposals for approval to Purchaser shall draw specific attention to any deviation or departure from the specifications involved in his proposal or drawings.***
>
> ***1.6** Prototype*
> *The Supplier shall manufacture one prototype S-wagon unit for inspection and approval of Purchaser or his authorized representative before commencement of series production. Series manufacture shall not be proceeded with until prototype has been approved by the Purchaser or his authorized representative. Any modifications which may have to be carried out as against the acceptance criteria detailed in Clause-13 as a result of various trials shall be incorporated without any additional charges.*

1.7 Modification of drawings
The Supplier, after inspection and approval of the prototype unit shall correct, where necessary, his drawings to conform in every respect with the unit so approved and shall submit two copies of the corrected drawings to Purchaser

1.13 Guarantee
1.13.1 The Supplier shall be entirely responsible for the design, construction and the efficient performance of the container flat under contract notwithstanding any approval which may have been given to the detailed drawings prepared by the Supplier or to the manufacture of materials or parts employed by the Supplier or to the test carried out by the Inspecting Officer."

(emphasis supplied)

16.12 In my reading of the above clauses, the terms agreed between the parties are clear. The Contract provides for approval of the design, inspection and testing of the prototype. However, such approval or testing did not relieve HEIL of its responsibility. Clauses 1.3 and 1.13.1 expressly provided that HEIL would remain responsible for the performance of the design, construction and efficient performance of the wagons.

16.13 The Tribunal's finding that CONCOR had itself taken the risk of accepting an unproven design and the consequences arising therefrom, is clearly contrary to the above cited clauses. I am conscious that this Court cannot substitute its own interpretation merely because another interpretation is possible. However, the present case is not one where the Tribunal has merely preferred one possible interpretation over another. The error lies in the Tribunal having failed to consider the clauses which directly dealt with the allocation of responsibility between the parties, and which were material to the conclusion that CONCOR had assumed the risk of design development or for the issue of delay.

16.14 No doubt, these clauses permitted technical review by CONCOR and RDSO and recognised that changes could arise during prototype development. However, they expressly placed responsibility upon HEIL for the design, compliance with the specifications and performance of the wagons, notwithstanding approval, inspection or testing.

16.15 The Tribunal was undoubtedly entitled to examine whether any design change or technical requirement was a purchaser-directed variation beyond the Contract specifications and whether any resulting delay was caused by CONCOR or RDSO. This was also the purpose of Issues Nos. 15 and 16. But that question had to be answered by examining the particular changes and their effect on the agreed schedule. The acceptance of the RITES-based proposal in itself is not sufficient to transfer the entire responsibility for design development to CONCOR.

16.16 HEIL's argument that CONCOR could not later challenge a design once it is accepted is only partly correct. The acceptance was of HEIL's proposal under the amended Clause 2.1, which permitted the use of design features that had been successfully used earlier. It did not amount to an acceptance of every design detail or drawing that HEIL was required to submit during execution of the Contract.

16.17 Also, it is to be noted that the CONCOR's acceptance of the proposal did not give it an unrestricted right to demand a completely different commercial design without contractual justification. The relevant question that arises in such circumstances is whether a particular change was required for compliance with the Contract or constituted a new requirement introduced by CONCOR or RDSO. Only after making that determination, the responsibility for the delay could have been decided by the Tribunal.

16.18 However, when the issue of delay was adjudicated by the Tribunal under Issue No.14, it simply relied upon its earlier findings regarding the amended Clause 2.1 and the effect of the change in the design requirement. The Tribunal treated the decision of CONCOR to adopt the RITES-based design as a major factor for the abnormal delay and, on that basis, attributed the resulting delay to CONCOR. The relevant reasoning of the Tribunal is reproduced hereunder:

> *"…Since the present case of the parties mainly rests on facts, I do not consider it necessary to deal with the impact of those decisions on this Award. The position, which emerges out as a result of the above discussion, briefly stated, is that for the abnormal delay in the performance of the contract in question, the factors responsible are not the alleged acts of commission and/or omission on the part of the claimant but in the first place, as already explained in detail, it was the intention of the parties to the Agreement in question not to treat time as the essence of the contract.* ***Besides the above fact, the major factor, which has caused abnormal delay in the completion of the project was the decision with regard to the design of the wagons in question, chosen by none else but by the respondent itself for which the respondent has to blame none else but its own self. As already explained at length in the earlier part of this award the respondent, instead of opting for a 'proven design' had opted for all together a new design, which was not a tested design as a result of which it had become impossible to follow the time schedule and there was delay at every stage i.e. at the stage of preparation of key drawings; approval of prototype and even after the approval of prototype during the process of the manufacture of the wagons in question.*** *The question, as to what prompted the respondent to prefer an unproven and untested design, as compared to a tested design, a baffling question and despite specific query by this Tribunal no satisfactory explanation*

was forthcoming from the respondent though the claimant in the written submissions has thrown some indications questioning the motive of the respondent behind the above decision. However, this Arbitral Tribunal, in these proceedings would not like to comment on that controversy because the same is outside the scope of reference made to this Tribunal except holding that the above decision of the respondent was decidedly a major factor, which to a great extent, was responsible for the above inordinate delay. The other factors, such as the labour unrest and strike in the factories of the claimant at Tiljala, Santragachi and non availability of vessels at Romania, are the other causes which contributed to the delay in the execution of the contract. All these factors decidedly were beyond the control of the claimant and the correctness of the same is not disputed even by the respondent except taking shelter of technicalities by stating that the above occurrences were not promptly notified by the claimant to the respondent. For the above detailed reasons this Tribunal has no hesitation in holding that in the given facts it would be wholly unjust to hold the claimant responsible for the above delay."

(emphasis supplied)

16.19 Thus, it is clear that the Tribunal's finding on delay was not based upon an examination of each individual cause of delay. The Tribunal proceeded substantially on the conclusion that CONCOR had chosen an unproven and untested design and that this decision was responsible, to a substantial extent, for the delay in preparation of drawings, approval of the prototype and subsequent manufacture of the wagons.

16.20 Before attributing the delay to CONCOR, I am conscious that Tribunal was not required to undertake a day-to-day examination of each period of delay or to separately deal and give its findings on every drawing, design change, technical observation, approval, prototype issue or manufacturing stage. What the Tribunal was required to examine was, broadly, whether the changes and requirements which arose during the approval and development process were part of HEIL's contractual obligations or were additional requirements introduced by CONCOR or RDSO, and, depending upon that, to whom the resulting delay was attributable. If the Tribunal had undertaken that exercise, no interference is warranted by this Court.

16.21 However, I am constrained to observe that the answer is in negative. The Tribunal did not carry out the required analysis for deciding responsibility for delay. Instead, it adopted a broad assumption that is in itself was inconsistent with the terms of the Contract as discussed earlier.

16.22 Further, it merely proceeded on the basis that the amended Clause 2.1 had placed the responsibility for the subsequent design development largely on CONCOR, without considering the other clauses which continued to make HEIL responsible for the design and performance of the wagons. Since this assumption formed the basis of the Tribunal's decision on Issue No. 14 and affected the findings on liquidated damages and counterclaims, the error goes to the root of the controversy.

16.23 For the reasons discussed above, I find that the Tribunal could not attribute the entire consequence of the design development to CONCOR without first determining the contractual responsibility for the particular causes of delay. However, this does not mean that the Tribunal's finding is to be replaced by a finding that whole 1326 days of delay was attributable to HEIL.

16.24 This Court is conscious of the limits of its jurisdiction under Section 34. It is not for this Court to determine afresh whether a particular design change was technically necessary, whether it amounted to a variation or a correction, whether it was required by CONCOR or RDSO, or what period of delay was attributable to each such change. Nor is this Court required to re-examine the engineering record and substitute its own assessment of the evidence. Those questions would require examination of the evidence and fall outside the limited scope of the present proceedings.

16.25 In view of the above, the finding on Issue No. 14 is set aside to the extent that it rests on the incorrect assumption that the risk arising from the design development was entirely that of CONCOR. This does not mean that all 1,326 days of delay were caused by HEIL, nor does this Court record any finding on the individual design-related disputes. It only means that the Tribunal's complete exoneration of HEIL cannot be sustained on the reasoning adopted, as that reasoning is contrary to the express terms of the Contract, and the related findings must be reconsidered according to the terms of the Contract.

17. <u>ISSUES 15 AND 16-DRAWINGS AND SOURCE OF DESIGN CHANGES:</u>

17.1 Issue No. 15 required the Tribunal to decide whether HEIL had submitted complete and compliant drawings within the time limit given in the Contract. This required consideration of the initial drawings, communications regarding deficiencies in drawbar and twist-lock details, dates of submission and approval of important component drawings, and the parties' different interpretations of the contractual deadline.

17.2 On the other hand, Issue No. 16, required the Tribunal to determine who was responsible for changes made to the designs and drawings during the approval and prototype development process. HEIL argued that several changes were introduced by CONCOR or RDSO, relying on Annexure-C. CONCOR disputed this and contended that the changes were required to bring the drawings and components in compliance with the contractual specifications. Therefore, the two issues were directly connected with the question of responsibility for the resulting delay.

17.3 However, the Tribunal decided the Issue No. 15 and 16 only by referring to its finding on Issue No.14 that the delay was not attributable to HEIL. There is no finding in regard to determination of whether the drawings submitted by HEIL were complete and compliant with required specifications within the fixed time, or what effect any deficiency or delay in their submission had on the contractual schedule. The finding of the Tribunal on Issue No. 15 and 16 is reproduced below-

> *"Insofar as the above issues are concerned, the position is that the above issues already stand covered by decision of issue No. 14, already decided by this Tribunal in the earlier part of this Award. For reasons already stated (not being repeated here for the sake of brevity) while deciding issue No. 14, the above mentioned issues are also decided in favour of the claimant and against the respondent."*

17.4 The issue is not that the Tribunal failed to refer to every document or technical observation. The difficulty is that the Tribunal did not determine the questions which Issues Nos. 15 and 16 required it to determine. There is no finding as to whether the drawings submitted by HEIL complied with the contractual requirements at the relevant stage, or whether the material changes relied upon by HEIL were purchaser-directed changes or were required to bring the drawings and components into conformity with the Contract.

17.5 The Court has considered HEIL's submission that an arbitral award must be read as a whole and that separate reasons need not be given for every issue. That principle is accepted, and the Court has accordingly considered the award as a whole, including the conclusions recorded at pages 128 and 129 as well as the earlier discussion. Even on such a reading, the necessary findings are absent. The award does not determine whether HEIL's drawings met the requirements at the relevant stage or whether the material design changes were the result of purchaser instructions beyond the agreed terms or corrections required from HEIL for compliance with the Contract.

17.6 This cannot be treated as a mere deficiency in drafting or as a harmless omission to separately give findings on each issue. Issues Nos. 15 and 16 required the Tribunal to determine who was responsible for the delay in drawings and the subsequent design changes, which was necessary to determine responsibility for the resulting delay under Issue No. 14. The finding on Issue No. 14 then formed the basis of the Tribunal's decision on Issue No. 1 relating to liquidated damages. Accordingly, Issues Nos. 15 and 16 could not be disposed of merely by referring to Issue No. 14, when the determination under Issue No. 14 itself depended upon identifying the causes of delay in the design and drawing process.

17.7 This Court cannot cure that omission by independently examining the technical documents itself or deciding who was right about the engineering issues. Doing so would mean re-evaluating evidence, which is not allowed under Section 34 of the Act. Therefore, this Court can only examine whether the impugned Award can be sustained when findings material to the determination of liability for delay are not recorded by the Tribunal.

17.8 An Arbitral Tribunal is not required to discuss every document or every submission. However, where extensive evidence has been led on a particular issue, the Tribunal is required to deal with the material aspects of that evidence and record its findings.

17.9 The requirement of reasons in an arbitral award has been considered by the Supreme Court in ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.***[21]**,** and thereafter in ***OPG Power Generation Pvt. Ltd. v. Enexio Power Cooling Solutions India Pvt. Ltd.***[22] The Supreme Court has recognised that an award is not to be interfered with merely because the reasons could have been more elaborate. However, where the reasoning discloses a flaw in the decision-making process or the gaps are such that the basis of the decision cannot be

[21] **(2019) 20 SCC 1**
[22] **(2025) 2 SCC 417**

understood, the award may be interfered with under Section 34. The relevant observations from ***OPG Power (supra)*** are as follows:

"80. We find ourselves in agreement with the view taken in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1, paras 27-43], as extracted above. Therefore, in our view, for the purposes of addressing an application to set aside an arbitral award on the ground of improper or inadequate reasons, or lack of reasons, awards can broadly be placed in three categories:

(1) where no reasons are recorded, or the reasons recorded are unintelligible;

(2) where reasons are improper, that is, they reveal a flaw in the decision-making process; and

(3) where reasons appear inadequate.

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

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under Section 30.

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

83. Awards falling in Category (3) require to be dealt with care. In a challenge to such award, before taking a decision the Court must take into consideration the nature of the issues arising between the parties in the arbitral proceedings and the degree of reasoning required to address them. The Court must thereafter carefully peruse the award, and the documents referred to therein. If reasons are intelligible and adequate on a fair reading of the award and, in appropriate cases, implicit in the documents referred to therein, the award is not to be set aside for inadequacy of reasons. However, if gaps are such that they render the reasoning in support of the award unintelligible, or lacking, the Court exercising power under Section 34 may set aside the award."

17.10 It is also settled that interference by this court is also permissible where the Tribunal has not recorded any finding at all on a material and contentious issue. In ***I-Pay Clearing Services (P) Ltd. v. ICICI Bank Ltd.***[23]**,** the Supreme Court recognised that failure to record a finding on a contentious issue may amount to patent illegality. Relying upon ***I-Pay Clearing Services***, this Court in ***Divyam Real Estate (P) Ltd. v. M2K Entertainment (P) Ltd.***[24]**,** held that where the arbitrator has not recorded a clear finding on a contentious issue and the conclusion is in disregard of the evidence on record, the award has to be set aside. The same principle was considered by the Division Bench of this Court in ***Canara Bank v. State Trading Corporation of India Ltd.***[25], where it was held that failure to record a finding on a contentious issue may amount to patent illegality. The relevant observations are as follows:

> *"32. From the foregoing, it is evident that since the arbitral award had not recorded a finding with regard to the contentious issue of interest, it qualifies as a patent illegality. In these circumstances, courts ought not to accede to the request of the party to resume the arbitral proceedings. Hence, in the absence of a "finding" on the issue of interest, the learned Single Judge could not have remitted the proceedings back to the Arbitral Tribunal."*

17.11 In the present case, insofar as Issues Nos. 15 and 16 are concerned, the Tribunal has not recorded any reasons or findings on the questions which those issues required it to decide. The Tribunal merely stated that the issues stood covered by its decision on Issue No.14. This is not a case where the reasons given are merely brief or

[23] (2022) 3 SCC 121
[24] 2024 SCC OnLine Del 3786
[25] (2022) 5 HCC (Del) 638

less elaborate than what may have been desirable. The findings necessary to determine the issues are absent. The Tribunal did not determine the principal factual questions arising under Issues Nos. 15 and 16, although those findings were material to its conclusion on responsibility for delay and Issue No. 1 concerning liquidated damages.

17.12 Even if the Tribunal's finding that CONCOR required an unproven design is accepted, the timelines given in the Contract was still applicable and therefore, the Tribunal was still required to examine whether the work was completed within those timelines and who was responsible for any delay thereafter.

17.13 Accordingly, the Tribunal's decision on Issues Nos. 15 and 16 in favour of HEIL are set aside. The Court has not undertaken the technical examination itself. It has not held that all delays were caused by HEIL or that every technical change was a purchaser-directed variation. Those questions require examination of the contractual documents, technical material and evidence and cannot be decided by this Court in a proceeding under Section 34.

18. ISSUE 26-REGULAR SUPPLIES AFTER PROTOTYPE APPROVAL:

18.1 Issue No. 26 arose at a later stage of the Contract, after the prototype had received final approval for series production on 25.09.1997. The first rake was supplied only on 28.04.1998, and the entire contractual quantity was completed in September 2001. Thus, even if some of the earlier delay in design development and prototype approval was attributable to the purchaser, the Tribunal was still required to examine whether HEIL thereafter maintained the required production and supply schedule.

18.2 The Tribunal, however, again disposed of Issue No.26 by merely relying upon its finding on Issue No.14. It did not examine the post-approval production and delivery schedule, the relevant correspondence or the respective explanations of the parties for the delay during this period. Accordingly, the finding on Issue No.26 suffers from the same fundamental omission and cannot be sustained.

18.3 This Court is not recording any finding that the post-approval delay was attributable to HEIL, nor is it determining the extent of liability, if any. Again, that issue would require consideration of the evidence relating to the period after prototype approval and cannot be determined in the proceedings under Section 34. It was within the authority of the Tribunal who failed to adjudicate it.

19. <u>TIME ESSENCE OF CONTRACT AND ISSUE 1- LIQUIDATED DAMAGES:</u>

19.1 The Tribunal has held that time was not the essence of the Contract. CONCOR challenges this finding, mainly on the basis that the Contract prescribed specific delivery schedules and provided for liquidated damages in the event of delay. Therefore, the issue is whether the Tribunal's finding on this issue has to be interfered or not within the limited scope of Section 34.

19.2 The decisions in ***National Council of Education Research & Training v. Murli Industries Ltd.,***[26] and ***Hind Construction Contractors v. State of Maharashtra***[27] make it clear that this issue cannot be decided merely by looking at one clause of the Contract. The intention of the parties has to be gathered from the Contract as a whole and the surrounding circumstances. In ***Welspun Specialty Solutions Ltd. v. ONGC***[28], the Supreme Court also recognised that provisions permitting extension of time and the conduct of the parties in granting such extensions may support a finding that time was not intended to be of the essence.

> *"**35.** It is now settled that 'whether time is of the essence in a contract', has to be culled out from the reading of the entire contract as well as the surrounding circumstances. Merely having an explicit clause may not be sufficient to make time the essence of the contract. As the contract was spread over a long tenure, the intention of the parties to provide for extensions surely reinforces the fact that timely performance was necessary. The fact that such extensions were granted indicates ONGC's effort to uphold the integrity of the contract instead of repudiating the same.*
>
> ***xxxxxxxxx***
>
> ***42.** This Court cannot interfere with this award, as the award is a plausible view for the following reasons:*
>
> *42.1. The Arbitral Tribunal's interpretation of contractual clauses having extension procedure and imposition of liquidated damages, are good indicators that 'time was not the essence of the contract'."*

19.3 In the present case, the Contract permitted extension of time. CONCOR granted several such extensions, continued to accept performance and did not terminate the Contract. These circumstances were considered by the Tribunal in concluding that time was not of the

[26] **2025 SCC OnLine Del 6414**
[27] **AIR 1979 SC 720**
[28] **(2022) 2 SCC 382**

essence. That conclusion, in the circumstances of the present case, cannot be said to be interpretation which the contract or the conduct of the parties could not support.

19.4 The difficulty, however, arises when the Tribunal carried this finding further to answer question whether CONCOR was entitled to claim compensation for delay. The two questions are separate. A finding that time was not of the essence may preclude termination merely on account of delay but it does not wipe out the other contractual consequences attached to delayed performance.

19.5 It is in this context that Section 55 of the ICA assumes relevance. The provision reads as follows-

> ***"Effect of failure to perform at 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.*
>
> ***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.*
>
> ***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.”***
>
> ***(emphasis supplied)***

19.6 The above provision makes it clear that where a party accepts performance after the agreed time, it may still claim compensation if, at the time of such acceptance, it gives notice of its intention to do so.

19.7 In the present facts, most of the extension letters issued by CONCOR clearly stated that the extensions were granted without giving up its right to claim liquidated damages under Clause 23. The correspondence, therefore, shows that CONCOR intended to allow the Contract to continue while preserving its right to claim compensation for the delay.

19.8 HEIL accepted these extensions and continued to perform the Contract. There is nothing on record from which it can be conclusively inferred that HEIL objected to the conditions attached to the extensions or understood them to mean that CONCOR had accepted the delay without any financial consequences. Therefore, the extensions cannot be treated as a waiver of CONCOR’s right to claim liquidated damages.

19.9 The fact that CONCOR did not terminate the Contract also does not lead to a different conclusion. In a specialised public procurement Contract involving rolling stock required for operations, continuing the Contract may simply have been a practical decision to ensure completion of the work. Mere decision to continue the Contract does not mean that CONCOR gave up its right to claim liquidated damages when the Contract permitted both extension of time and recovery of compensation for delay.

19.10 The reliance placed by learned Counsel for HEIL, as also by the Tribunal, on the distinction between Clauses 22.2 and 22.3 cannot be accepted in the manner in which it has been applied. Clause 22.3 provides for extension of time where the Supplier encounters conditions impeding timely performance. It does not state that an extension granted thereunder would exclude the levy of liquidated damages. More importantly, Clause 23.1 expressly makes the levy of liquidated damages only "subject to Clause 25".

19.11 However, the Tribunal proceeded on the footing that once an extension was granted under Clause 22.3, liquidated damages could not be imposed under Clause 23.1. According to this Court, there is nothing in Clause 22.3 which says so. The Tribunal has thus added a condition to the Contract which the parties themselves did not provide. In doing so, the Tribunal overlooked the letters where CONCOR expressly reserved their rights to impose liquidated damages and the act of HEIL in continuing with the project.

19.12 The Supreme Court in ***Consolidated Construction Consortium Ltd. v. Software Technology Parks of India***[29]**,** specifically dealt with the argument that extension of time and levy of liquidated damages cannot go hand in hand. In that case also extensions were granted on several occasions while expressly reserving the employer's right to

[29] **(2025) 7 SCC 757**

levy liquidated damages. The Supreme Court set aside the view of the learned Single Judge that mere grant of extension ruled out the possibility of levy of liquidated damages:

> *"39. What the arbitrator noted in this case is that on a number of occasions, the appellant had sought for time. On each occasion the respondent was compelled to allow the appellant to carry on with the work beyond the extended time period by granting further extension, reserving its right to levy liquidated damages. It has come on record that in the review meeting held on 18-12-2006, the respondent had put the appellant to notice that grant of extension of time for completion of the contract work would be without prejudice to the right of the respondent to recover liquidated damages. Though the first extended time-limit was till 28-2-2007, further time had to be granted by the respondent on a number of occasions thereafter till 30-6-2007, on each occasion reserving the right to levy liquidated damages.*
>
> *xxxxx*
>
> *50. The learned Single Judge also observed that Clause 26 of the contract agreement could not be read in isolation without reference to Clause 27. The fact that the appellant was allowed to carry on the contract work and to subsequently complete the same cannot be denied. Once there is extension of time, there cannot be a narrow interpretation to Clause 26. Purpose of extension of time was only for completion of work. Extension of time and levy of liquidated damages cannot go hand in hand. The contention of the respondent would have been acceptable had there been no extension in time or the work remained incomplete even after the extended period. In such an event, the respondent would have been justified to levy and recover liquidated damages. Once the appellant had completed the work during the extended period of time, claim of liquidated damages by the respondent could not be accepted. Therefore, the arbitral award dated 10-5-2010 was set aside.*
>
> *51. We are afraid the learned Single Judge had clearly gone beyond the grounds provided in Section 34 of the 1996 Act to set aside the arbitral award. The learned Single Judge exceeded the jurisdiction under Section 34 of the 1996 Act. There was no justification for setting aside the arbitral award by taking a different view. The view taken by the Arbitral Tribunal is certainly a possible and plausible view. A different interpretation of Clause 26 other than the one taken by the Arbitral Tribunal is possible but that will not bring the challenge to the arbitral award within the*

four corners of Section 34. In any view of the matter, mere setting aside of the arbitral award did not confer any benefit to the appellant. In the circumstances, the Division Bench [Software Technology Parks of India v. Consolidated Construction Consortium Ltd., 2019 SCC OnLine Mad 39306] was justified in reversing the order [Consolidated Construction Consortium Ltd. v. Software Technology Parks of India, 2019 SCC OnLine Mad 1633] of the learned Single Judge under Section 37 of the 1996 Act."

19.13 A similar approach was adopted by this Court in ***GAIL (India) Ltd. v. Punj Lloyd Ltd.*[30]*,*** where the correspondence between the parties showed that the employer had continued to monitor the delay and had consistently reserved its right to levy liquidated damages. The Court treated such correspondence as relevant in determining whether the right to levy liquidated damages had been preserved.

19.14 However, the above decisions are not sufficient to establish CONCOR's entitlement to liquidated damages in the present case. They only make it clear that grant of an extension where the right to levy damages is expressly reserved, does not amount to a waiver of that right. But that is not the end of the issue in the present case.

19.15 Before CONCOR can recover liquidated damages, it must first be established that the delay for which damages are claimed was attributable to HEIL. That finding is presently missing, as the Tribunal's earlier finding on responsibility for delay has already been set aside. Until that question is answered, CONCOR's reservation of its right to claim liquidated damages cannot make the claim recoverable.

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[30] **2017 SCC OnLine Del 8301**

19.16 Therefore, Clause 23 did not give CONCOR an automatic right to keep the liquidated damages. The clause had to be read along with Sections 73 and 74 of the ICA. The Supreme Court in ***ONGC Ltd. (supra)*** and ***Kailash Nath Associates v. Delhi Development Authority***[31] held that merely because a particular amount is mentioned in the Contract as liquidated damages, that entire amount does not automatically become payable. The Court still has to examine whether the amount represents reasonable compensation for the loss caused by the breach. In ***Construction & Design Services v. DDA***[32], the Supreme Court explained the manner in which such stipulated amounts are to be considered and relevant observations are as follows-

> *"15. Once it is held that even in absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when highest limit is stipulated instead of a fixed sum, in absence of evidence of loss, part of it can be held to be reasonable, compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on party committing breach, as already observed."*

19.17 In view of the above, it appears that a liquidated damages clause may be valid where it represents a genuine estimate of possible loss, especially when actual loss is difficult to calculate. However, merely mentioning an amount in the Contract does not automatically make it payable. The entitlement to compensation still depends upon the

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[31] **(2015) 4 SCC 136**
[32] **(2015) 14 SCC 263**

breach established, the losses arising from it and the amount of reasonable compensation payable in the circumstances.

19.18 According, CONCOR's claim for liquidated damages could not be sustained merely because Clause 23 prescribed a fixed percentage or maximum amount. However, HEIL could not claim a complete refund merely because the Contract continued or because time was held not to be of the essence. The entitlement to liquidated damages had to follow from a determination of responsibility for the relevant periods of delay and the application of Clause 23 read with Sections 73 and 74 of the ICA.

19.19 The Tribunal should have determined the delay for which HEIL could be held responsible. This required an examination of the different stages of the Contract and the causes of delay at each stage, including whether any period was attributable to CONCOR, excused under the Contract or covered by *force majeure*. These findings were necessary before the Tribunal could determine whether the liquidated damages claimed under Clause 23 were payable and, if so, to what extent.

19.20 The difficulty is that the Tribunal did not undertake that exercise. It directed refund of the entire amount of liquidated damages on the basis of its incorrect assumption regarding responsibility for the design issues, without recording the necessary findings as to the actual causes and periods of delay. Accordingly, the direction for complete refund was made without first determining the contractual responsibility for the relevant periods of delay.

19.21 This goes beyond a mere error in appreciation of evidence. The present case is also not one where this Court is merely preferring a different view of the evidence or the Contract. The Tribunal proceeded on an interpretation of amended Clause 2.1 which, for the reasons already discussed, was contrary to its express terms and did not give effect to the requirement of two years' successful use of the relevant design features.

19.22 This premise was then carried forward while determining responsibility for delay and thereafter for Issue No.1. To that extent, the reasoning of the impugned Award suffers from perversity, as the conclusion on liquidated damages is not supported by the findings necessary to sustain it under the Contract and amounts to patent illegality appearing on the face of the award.

19.23 However, this Court cannot determine the correct quantum of liquidated damages itself. Such a determination would require examining who was responsible for the delay at different stages, the contractual timelines applicable to those stages, the effect of the *force majeure* events, whether there were concurrent or multiple causes of delay, and whether the compensation claimed was reasonable. These are factual matters which would require a fresh examination of the evidence and cannot be undertaken by this Court as an original adjudicatory forum under Section 34.

19.24 Since the decision on Issue No.1 (liquidated damages) was based on the incorrect reasoning under Issue No.14 and depended on unresolved questions under Issues Nos.15, 16 and 26, the finding on Issue No.1, together with the consequential award of interest, is set aside. This does not mean that CONCOR was automatically entitled to keep the entire amount deducted as liquidated damages. It only means that the Tribunal's direction for a complete refund cannot be sustained as it has been based on reasoning which has been found to be legally unsustainable.

19.25 Accordingly, this Court records no final determination on the amount, if any, payable towards liquidated damages. That question remains open and parties are at liberty to avail appropriate remedy, if any, in accordance with law.

19.26 It is made clear that this Court has not interfered with the Tribunal's limited finding that time was not the essence of the Contract.

20. ISSUE 18-FORCE MAJEURE:

20.1 Issue No.18 concerns the *force majeure* events relied upon by HEIL in explaining the delay in performance of the Contract. HEIL relied upon the lock-out and labour unrest at its Tiljala and Santragachi factories and the non-availability of vessels from Romania. The Tribunal considered these events and accepted them as circumstances falling within Clause 25 of the Contract.

20.2 The Tribunal also considered the notices issued by HEIL and the correspondence between the parties and held that the requirements of Clause 25 had been sufficiently complied with. On that basis, the Tribunal treated the periods affected by these events as excused delays and took the same into account while deciding the question of liquidated damages.

20.3 This Court does not find any infirmity in the conclusion reached by the Tribunal. The occurrence of industrial disruption, factory problems and shipping difficulties involved an appreciation of the evidence, which was within the Tribunal's domain. The question remains is what effect those events could have on the delay and on the claim for liquidated damages.

20.4 The Tribunal relied on the above events to order a complete refund of the liquidated damages. However, the Tribunal failed to notice that the *force majeure* events relied upon by HEIL occurred at different stages of the Contract. Some of them arose after substantial delays had already occurred in the submission of drawings, prototype development and delivery of the first rake.

20.5 For a proper analysis, the Tribunal should have considered each event in relation to the period during which delay occurred and the particular obligation which it affected. This required consideration of the requirements of Clause 25, the duration of each event, the milestones or supplies affected and the position of the parties immediately before the event occurred.

20.6 The presence of multiple causes of delay does not remove a party's responsibility for the delay already caused by it. Depending upon the Contract and the evidence, a subsequent *force majeure* event may excuse or reduce responsibility for the period actually affected by it. Mere occurrence cannot wipe out consequences for a delay which had already taken place before that event.

20.7 This Court does not undertake any independent calculation of delay periods or determine the number of days attributable to *force majeure*. Doing so would require deciding the merits of the dispute, which is not the role of the Court under Section 34.

20.8 In view of this Court, the Tribunal's *force majeure* findings could not justify a refund of the entire liquidated damages amount once the underlying findings on Issue Nos.14, 15, 16 and 26 are found unsustainable.

20.9 The Court has not disturbed the factual findings that the industrial unrest and shipping difficulties occurred, nor has it interfered with the Tribunal's finding that the notice requirements under Clause 25 were sufficiently complied with in the circumstances. Those findings involved appreciation of evidence and were within the Tribunal's authority whose conclusion is plausible in view of this Court.

20.10 The legal effect of those events, however, had to be confined to the periods and contractual obligations actually affected by them. If the events relied upon by HEIL occurred after substantial delays had already taken place in the submission of drawings, development of the prototype and delivery of the first rake, it had to be determined how far those events contributed to the overall delay. They may, depending on the evidence, excuse or reduce HEIL's responsibility for the period actually affected by them. But without determining their actual effect on the delay, they cannot justify a refund of liquidated damages for the entire period of delay.

20.11 Accordingly, the finding on Issue No. 18 is not disturbed to the extent it records the occurrence of the *force majeure* events and compliance with Clause 25. However, those findings cannot be constituted as a complete defence to the claim for liquidated damages, when the decision on Issue No. 1 was itself based on an incorrect analysis of responsibility for delay.

21. <u>EFFECT OF NON-PRODUCTION OF RECORDS:</u>

21.1 CONCOR filed an application on 05.04.2004 seeking documents relating to the use of the interest-free advance, purchase of important components, placement of orders, and details of letters of credit. On 07.04.2004, the Tribunal directed HEIL to produce these documents. Later, on 03.05.2004, the Tribunal noted that the documents had not been produced and left the parties to argue about the impact of such non-production at the appropriate stage.

21.2 These documents were not irrelevant or unrelated to the dispute. They were directly connected with HEIL's explanation for the delay that the delay was caused by external factors and not by any failure to arrange resources, procure materials or plan performance properly. The documents could have helped determine when critical materials such as steel and other components, were ordered, whether procurement began within the required contractual timeline, and whether the advance payment was used in accordance with the agreed schedule.

21.3 An arbitral tribunal is the primary judge for deciding what effect should be given to a party's failure to produce documents. It could have concluded that the documents were unnecessary or that their absence would not affect the outcome. However, where documents are specifically requested, their production is directed by the Tribunal and the question of their effect is left open, the impugned Award should indicate whether that issue was considered before reaching a conclusion on delay.

21.4 The impugned Award does not show any such consideration. There is no finding as to whether the non-production affected HEIL's explanation regarding procurement, availability of materials or mobilisation. Normally, an award cannot be set aside simply because every piece of evidence is not separately discussed. However, in this case, the omission becomes important because the missing documents were directly related to the question of who was responsible for the delays in drawings, procurement, and production.

21.5 This Court does not assume that HEIL misused the advance payment or that procurement was in fact delayed by HEIL. Nor does the Court draw any automatic adverse inference from the non-production of the documents. The limited finding by this Court under Section 34 is that the Tribunal completely absolved HEIL of delay responsibility without showing that it had considered the effect of non-production of documents that were specifically requested and ordered to be produced.

21.6 This is a procedural issue and not a conclusion against HEIL. The Tribunal had directed production of the documents, recorded that they had not been produced and left the parties to address the consequences at the appropriate stage. Having done so, the Tribunal ought to have indicated in the final award whether the issue was considered and what effect, if any, the non-production had on HEIL's explanation for the delay.

21.7 This omission alone does not affect every part of the award. Its importance is that it supports the conclusion that the Tribunal did not examine the question of delay responsibility on the basis of the complete material placed before it.

22. <u>ISSUES 12, 13 AND 19 TO 24-CONCOR'S COUNTERCLAIMS:</u>

22.1 The Tribunal rejected Issues 12, 13 and 19 to 24 mainly on the ground that HEIL was not responsible for the delay. CONCOR's counterclaims included claims for loss of traffic revenue, World Bank interest payments, guarantee charges, exchange-rate losses, and commitment charges.

22.2 The entitlement to these claims involved questions separate from the general finding on delay. It was necessary to consider whether the particular loss was recoverable under the Contract, whether it was caused by the alleged breach, whether it was proved by the material on record, whether it overlapped with any other contractual remedy, and whether any contractual limitation applied.

22.3 The problem with the impugned Award is that the Tribunal did not separately examine these issues. The counterclaims were rejected substantially because the Tribunal had already concluded under Issue No. 14 that the delay was not attributable to HEIL. Once that underlying finding cannot be sustained, the rejection of the counterclaims cannot be sustained on the same basis when the Tribunal did not examine the independent questions relating to the individual claims.

22.4 This does not mean that CONCOR succeeds in any of its counterclaims. The Court has neither awarded any amount nor held that any particular loss was suffered or was recoverable from HEIL. The Court has only found that the basis on which the Tribunal rejected these counterclaims cannot be sustained.

22.5 Accordingly, the decisions on Issues Nos. 12, 13 and 19 to 24 are set aside to the extent that they rest on the finding that the delay was not attributable to HEIL. The parties are at liberty to avail their remedy in accordance with law.

23. <u>ISSUE 2-ESCALATION FOR THE FIRST RAKE:</u>

23.1 Issue No.2 was related to HEIL's claim for escalation in respect of the first rake. At the outset, it is to be noted that this claim is not directly affected by the issues of delay responsibility or liquidated damages. Therefore, the claim for first-rake escalation must be examined separately because it depends on its own evidence, interpretation of the Contract, and calculation.

23.2 HEIL initially submitted its escalation bill in April 1998. The same was returned by CONCOR on the ground that the parameters for calculation had subsequently been amended. Again, HEIL submitted a revised bill dated 30.08.2000 for Rs.53,35,084/-, based on the revised parameters furnished by CONCOR.

23.3 The revised claim included a basic escalation amount of Rs.49,39,893/-, sales tax of Rs.3,95,191.44 and a total claimed amount of Rs.53,35,084.44. HEIL relied upon labour cost indices, exchange-rate details certified by a nationalised bank and Metal Bulletin data for September 1995 and December 1997.

23.4 CONCOR opposed the claim on three main grounds. First, it was contended that the date of adjustment adopted by HEIL was contrary to Clause 12.1. Second, it was contended that no escalation could be allowed beyond the original delivery date unless specifically provided for in the extension letters. Third, it was contended that no escalation could be allowed for any period of delay attributable to HEIL.

23.5 The Tribunal considered Clauses 12.1 and 12.2(b) together and held that the escalation clause permits adjustment of increase in costs during the original contractual delivery period, but did not permit escalation for the period of delay attributable to the supplier. In reaching this conclusion, the Tribunal also relied upon ***Container Corporation of India Ltd. v. Texmaco Ltd., O.M.P. 24/2010***, where a similar clause was interpreted in the same way.

23.6 In my view, no interference is warranted with this finding. Clause 12.2(b) provides that no price increase shall be allowed beyond the original delivery dates unless specifically stated in the extension letter. The finding at page 90 of the impugned Award records that "*the claimant, as is evident from the material on record, has claimed escalation only upto original delivery period*". If the claim was confined to the original delivery period, the requirement of a specific communication in the extension letter did not arise.

23.7 The objections regarding the relevant dates, indices and calculation also essentially require examination of the material and evidence on record. The Tribunal considered the relevant date and the supporting material and found the claim to be in line with the terms of the Contract. Such questions of fact fall within the domain of the Arbitral Tribunal and cannot be re-examined by this Court under Section 34 merely because another view may be possible or merely some factual error is committed by the Tribunal.

23.8 Under Section 34 of the Act, this Court also cannot replace the Tribunal's interpretation of the Contract simply because another interpretation is plausible to this Court. The Tribunal considered the relevant clauses, the material placed before it and the earlier decision where the same clause was interpreted. Its interpretation of Clauses 12.1 and 12.2(b) is a possible interpretation of the Contract and does not disclose an error of the nature which would warrant interference under Section 34.

23.9 The objection regarding HEIL's responsibility for delay also does not affect the first-rake escalation claim. The Tribunal had confined the escalation to the original delivery period and had not awarded escalation for the delayed period.

23.10 The Tribunal also did not accept the claim mechanically. It examined the supporting material and calculations and deducted the freight component of Rs.2,00,000/- and the sales tax amount from the claim, and awarded only the basic escalation amount that it found justified. Therefore, the decision was not based on a lack of evidence or in failure to consider the relevant clauses as extensively argued by the learned Senior Counsel for the CONCOR. There is nothing that shocks the conscience of this Court so as to warrant interference and authorities relied upon are also of no avail.

23.11 CONCOR's contention that the Tribunal travelled beyond the pleadings also does not warrant interference. The Tribunal was dealing with the escalation claim and the objections raised by

CONCOR to its entitlement and calculation. No new claim or relief outside the dispute was granted.

23.12 Accordingly, the award of Rs.47,39,893/- for first-rake escalation is upheld. The Tribunal's award of simple interest at 9% per annum on this amount is also valid and does not violate Section 31(7) of the Act, or any clause of the Contract. Therefore, the interest on this issue is also upheld.

24. ISSUES 8 AND 17-CONDITIONAL PRICE REDUCTION:

24.1 Issues Nos. 8 and 17 relate to the payment arrangement between the parties. Issue No. 8 is about the conditional price reduction offered by HEIL, while Issue No. 17 concerns with the effect of the World Bank financing arrangement on the payment obligations of CONCOR. The Tribunal considered the original contractual terms as well as the subsequent correspondence relied upon by the parties.

24.2 HEIL provided for a reduction of Rs.50,000/- per five-wagon set, subject to the condition that 65% of the payment would be released against proof of dispatch. The Notification of Award accepted the above offer along with these commercial terms. Clause 16.3 of the General Conditions further provided for payment within sixty days of submission of the invoice and the required documents, while Clause 11(b) of the Special Conditions dealt with the stages of payment for domestic goods.

24.3 CONCOR's case before the Tribunal was that the payment arrangement was altered after the parties entered into the Contract. Reliance was placed on the letter dated 02.07.1999 and HEIL's reply dated 07.07.1999. According to CONCOR, under this arrangement CONCOR had to make payment and HEIL had to bear interest at 10% for the period from payment till reimbursement by the World Bank.

24.4 The Tribunal considered this contention. It examined the above relied letters, and thereafter considered Clause 19 of the Agreement, which laid down the manner in which any variation or modification of the Agreement was to be made. The Tribunal held that the letters dated 02.07.1999 and 07.07.1999 did not constitute an amendment or novation of the Agreement and that the original payment terms agreed initially were still operating.

24.5 In my reading of the impugned Award, there is no error in the reasoning of the Tribunal. The Tribunal did not ignore the letters of 02.07.1999 and 07.07.1999. It has also considered the alleged arrangement and rejected the contention that those letters had altered the Agreement by relying on Clause 19. Thus, the Tribunal did not proceed on the basis that the letters did not exist or the subsequent arrangement was never agreed upon.

24.6 The contention that the Tribunal made out a new case by relying upon Clause 19 also cannot be accepted. Clause 19 was part of the Contract itself. Once CONCOR relied upon the letters of 02.07.1999 and 07.07.1999 as having changed the agreed payment terms, the question whether such change was in accordance with

Clause 19 necessarily arose before the Tribunal and it was entitled to examine the alleged arrangement in accordance with that clause. In the end, the Tribunal gave primacy to clause of the Contract that was agreed with the parties and I cannot find any fault in such approach.

24.7 I have also considered the plea of estoppel based on the subsequent conduct of the parties. The subsequent payments were a relevant circumstance but they cannot override the terms on which the original payment condition was agreed. The Tribunal considered the correspondence and the manner in which the parties acted subsequently and rejected that contention.

24.8 Accordingly, the Tribunal's finding cannot be said to be based on ignoring the July 1999 letters or adopting an interpretation wholly contrary to the Agreement. So long as the view taken is a possible and plausible interpretation of the Contract, this Court cannot substitute its own view for that of the Tribunal.

24.9 Therefore, the award of Rs.1,72,50,000/- towards restoration of the conditional price reduction, along with the interest awarded on that amount, is upheld.

24.10 For Issue No. 17, CONCOR's contended that the project was financed through the World Bank and that its obligation to make payment to HEIL was dependent upon receipt of reimbursement from the World Bank.

24.11 The Tribunal found that the Agreement was between CONCOR and HEIL and that the World Bank was not a party to it. It also found no provision making CONCOR's payment obligation conditional upon reimbursement from the World Bank. The July 1999 letters, relied upon by CONCOR, may explain the arrangement regarding reimbursement and the 10% interest, but it does not make receipt of World Bank funds a condition precedent to payment.

24.12 No provision of the Contract has been shown which explicitly makes CONCOR's obligation to pay HEIL conditional upon receipt of funds from the World Bank. Therefore, the finding on Issue No. 17 does not disclose any ground for interference under Section 34 and is upheld.

25. <u>HEIL'S CROSS-CHALLENGE TO REJECTION OF ESCALATION ITEM 2 TO 12:</u>

25.1 HEIL has challenged the rejection of the escalation claims at Serial Nos. 2 to 12 of Annexure-F mainly on the ground that Clause 12 of the Special Conditions gives a contractual right to price adjustment which is not dependent upon submission of a separate escalation invoice. Reliance has also been placed on ***McDermott International Inc. (supra)*** to contend that a claim may be raised through correspondence or in meetings and that the absence of a formal bill does not defeat the claim.

25.2 The Tribunal rejected the escalation claims for serial numbers 2 to 12 of Annexure-F for several reasons and not merely because separate escalation invoices had not been submitted. It found that even if Clause 16(2) of the General Conditions requiring submission of an invoice is not applicable, HEIL was still required to satisfy the conditions of Clause 12(2) of the Special Conditions for invoking the price adjustment formula. The Tribunal specifically referred to the requirement of furnishing the relevant labour and material indices and other particulars necessary for applying the formula.

25.3 The Tribunal found that HEIL had not furnished the material necessary to undertake that exercise for Items 2 to 12. It also noticed that the Statement of Claim contained no particulars of these claims apart from their inclusion in Annexure-F. This was a matter of evidence and application of the terms of the Contract which the Tribunal was entitled to consider.

25.4 The Tribunal also drew a comparison with Item No.1. In respect of that claim, HEIL had submitted an invoice and the details required under Clause 12(2). The Tribunal treated this conduct as significant because it showed that, where HEIL itself sought the benefit of the escalation formula, it had in fact furnished the requisite information.

25.5 The Tribunal also found an issue with the adjustment date. Clause 12.1 required the adjustment date to be one month prior to the date of shipment. The Tribunal noticed that the same date, 11.03.2002, had been used for all claims from Serial Nos. 2 to 12, even though the rakes were supplied on different dates. Therefore, the Tribunal found that the claims did not follow the requirement of Clause 12.1. I find no infirmity in this reasoning. The Tribunal considered the relevant clauses and the evidence on record before rejecting the claims. The interpretation adopted by the Tribunal in no way can be said to be a view which no reasonable person could have arrived at.

25.6 HEIL's reliance on ***McDermott International Inc. (supra).*** does not help its case. That decision only explains that a claim does not fail merely because a formal invoice has not been issued. It does not dispense with the requirement of establishing the necessary requirements as per the Contract and other factual basis for quantification of an escalation claim.

25.7 Under Section 34, the Court cannot fill in the missing details by assuming shipment dates, choosing adjustment dates, selecting applicable indices, or recalculating the escalation formula for each rejected claim. Doing so would mean that the Court is deciding the claims afresh, which is beyond the limited scope of review under Section 34. Nor can the Court grant these rejected claims by treating the present proceedings as an appeal. Therefore, the rejection of the escalation claims for serial numbers 2 to 12 is upheld, and OMP (COMM) NO. 50/2016 filed by HEIL is dismissed.

26. <u>ISSUES NOT OTHERWISE CHALLENGED AND THEIR STATUS:</u>

26.1 For completeness, the Court records the position of the remaining issues dealt with in the impugned Award. Issue No.3

related to the alleged additional cost due to a change in spring material. The Tribunal rejected this claim on contractual and evidentiary grounds. Since neither party has challenged this finding, it remains unchanged.

26.2 Issues Nos. 4 and 5 were withdrawn by HEIL before the Tribunal and were therefore, not adjudicated on the merits. Issue No. 7, relating to additional wheel sets and bearings, was also not decided on the merits. The Tribunal itself recorded that HEIL itself treated the supply as outside the original Contract and left HEIL free to pursue any remedy available in law. These positions have not been challenged and therefore require no further consideration.

26.3 Issue No. 6 concerned HEIL's claim for workers' idling costs, which the Tribunal rejected for want of sufficient evidence. Issue No. 9, relating to increased freight, was withdrawn by HEIL. Issues Nos. 10 and 11, concerning differential interest on margin money and bank-guarantee commission respectively, were rejected by the Tribunal. None of these findings has been challenged in the present proceedings, and therefore, they remain undisturbed.

26.4 Issue No. 25 concerned whether certain claims were dehors the Contract. Claims Nos. 4, 5 and 9 had already been given up by HEIL. For Claims Nos. 2, 3, 6, 7 and 8, the Tribunal held that they were within the terms of the Contract. Since these claims have already been considered above, if required, no separate finding is required on Issue No. 25.

26.5 Issue No.27 regarding interest will apply only to the amounts that remain payable after this judgment. Since the award of refund of liquidated damages has been set aside, the interest awarded on that amount will also not survive. The interest awarded on the first-rake escalation and the restoration of the conditional price reduction will, therefore continue, while the interest relating to the refund of liquidated damages cannot survive once the underlying amount is no longer payable. As regards Issue No. 27A, under which costs were awarded in favour of HEIL, the award of costs is within the discretion of the Tribunal. Further, HEIL had succeeded in some of its claims even after the modifications made to the award as discussed above, and therefore, there is no reason to interfere with the Tribunal's decision on costs.

26.6 Issue No.28, which contains the final relief, will operate in the modified form resulting from this judgment.

27. <u>SECTION 34(4): REMISSION POWER OF THIS COURT</u>

27.1 Section 34(4) of the Act empowers the Court, where appropriate, to adjourn the proceedings under Section 34 and afford the Arbitral Tribunal an opportunity to resume the arbitral proceedings or take such other action as may eliminate the grounds for setting aside the award. The provision is intended to address defects which can be remedied by the Arbitral Tribunal without requiring the Court to enter into the merits of the dispute.

27.2 In ***Kinnari Mullick v. Ghanshyam Das Damani*[33]*,*** the Supreme Court explained the limited nature of the power under Section 34(4). The Constitution Bench in ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd.*[34]*,*** has also clarified that a request under Section 34(4) need not necessarily be in writing and that the Court may, in an appropriate case, exercise the power if there is a request by a party.

27.3 In this case, neither party made a request for the matter to be taken back to the Tribunal for reconsideration. More importantly, the defects identified above are not confined to an omission to clarify an otherwise concluded finding. They concern the absence of findings on material questions which formed the basis of the award.

27.4 This distinction is important. In **I-*Pay Clearing Services Pvt. Ltd. (supra),*** the Supreme Court considered the scope of Section 34(4) where the award did not contain a finding on a material issue. The Court held that Section 34(4) may be used where there is inadequate reasoning or a gap in the reasoning supporting a finding already recorded. However, where there is no finding on a contentious issue at all, the defect cannot be cured by asking the Tribunal to supply reasons or fill the gap. In such a case, the Court may set aside the award rather than remit the matter under Section 34(4). The relevant observations read as follows-

> *"**39.** Further, Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to Arbitral Tribunal to give an opportunity to resume the proceedings or not. The words "where it is appropriate" itself indicate that it is*

[33] (2018) 11 SCC 328
[34] (2025) 7 SCC 1

the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of the Act and the reply thereto.

***40.** Merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award.*

***41.** Under the guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. Under the guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award.*

***42.** A harmonious reading of Sections 31, 34(1), 34(2-A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award. But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings."*

27.5 The defects in the present case go beyond a mere gap in reasoning. The Tribunal would have to reconsider the effect of the amended Clause 2.1, determine responsibility for the disputed design changes, examine whether the drawings were complete and compliant within the stipulated time, consider the period of production and supply after prototype approval, assess the effect of the non-production of procurement records, determine the periods of *force majeure* and their effect on the delay, and thereafter reconsider the question of liquidated damages.

27.6 These are not matters which can be cured by adding reasons to findings already recorded. The Supreme Court in ***Gayatri Balasamy (supra)*** has also clarified that the power under Section 34(4) is discretionary and is intended to address defects which can properly be cured within the arbitral proceedings. It is not meant to be used where the Court would, in substance, be sending the matter back for a fresh adjudication of issues which were not decided or which require a fresh appreciation of the evidence.

> *"56. As elucidated above, if a fog of uncertainty obscures the exercise of modification powers, the courts must not modify the award. Instead, they should avail their remedial power and remand the award to the Tribunal under Section 34(4). Under the sub-section, either party—whether the one challenging the award under Section 34 or the one defending against such a challenge—may request the Court to adjourn the proceedings for a specified period. If the court deems it appropriate, it may grant such an adjournment, allowing the Arbitral Tribunal to resume proceedings or take necessary corrective measures to eliminate the grounds for setting aside the award. Thus, Section 34(4) provides a second opportunity for a party to seek recourse through arbitral channel.*
>
> ***57. However, the power of remand permits the Court only to send the award to the Tribunal for reconsideration of specific aspects. It is not an open-ended process; rather, it is a limited power, confined to limited circumstances and issues identified by the Court. Upon remand, the Arbitral Tribunal may proceed in a manner warranted by the situation — including recording additional evidence, affording a party an opportunity to present its case if previously denied, or taking any other corrective measures necessary to cure the defect. In contrast, the exercise of modification powers does not allow for such flexibility. Courts must act with certainty when modifying an award — like a sculptor working with a chisel, needing precision and exactitude.***

Therefore, the argument that remand powers make modification unnecessary is misconceived. They are distinct powers and are to be exercised differently.

58. Section 34(4), derived from the Model Law, is discretionary in nature. This is evident from the use of the word "may" in the provision. The Court may invoke this power when it identifies a defect in the award that could lead to its setting aside. In such cases, the Court may seek to prevent this outcome by granting the Arbitral Tribunal an opportunity to rectify the defect.

59. While it is not appropriate to establish rigid parameters or a straitjacket formula for the exercise of this power, it is clear that Section 34(4) does not authorise the Arbitral Tribunal to rewrite the award on merits or to set it aside. Rather, it serves as a curative mechanism available to the Tribunal when permitted by the Court. The primary objective is to preserve the award if the identified defect can be cured, thereby avoiding the need to set aside the award. Accordingly, a court may not grant a remand when the defect in the award is inherently irreparable. A key consideration is the proportionality between the harm caused by the defect and the means available to remedy it.

60. While exercising this power, the Court must also remain mindful that the Arbitral Tribunal has already rendered its decision. If the award suffers from serious acts of omission, commission, substantial injustice, or patent illegality, the same may not be remedied through an order of remand. Clearly, there cannot be a lack of confidence in the Tribunals' ability to come to a fair and balanced decision when an order of remit is passed.

61. Thus, an order of remand should not be passed when such order would place the Arbitral Tribunal in an invidious or embarrassing position. Additionally, remand may be inappropriate when it does not serve the interests of the parties, particularly in time-sensitive matters or where it would lead to undue costs and inefficiencies. Once an order of remand is granted, the Arbitral Tribunal has the authority to vary, correct, review, add to, or modify the award. Notably, under Section 34(4), the Tribunal's powers, though confined, remain nonetheless substantial. This stands in contrast to the Court's narrow role under the rest of Section 34.

62. This Court in Kinnari Mullick v. Ghanshyam Das Damani [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , referred to and laid down the preconditions for exercising the power of remand under Section 34(4). It held that the Court cannot exercise the power of remand *suo motu in the absence of a written request by one of the parties. Secondly, once an application under Section 34(1) has been decided and the award set aside, the Court becomes functus officio and cannot thereafter remand the matter to the Arbitral Tribunal. Consequently, the power under Section 34(4) cannot be invoked after the Court has disposed of the Section 34(1) application.*

63. We are unable to accept the view taken in Kinnari Mullick [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , which insists that an application or request under Section 34(4) must be made by a party in writing. The request may be oral. Nevertheless, there should be a request which is recorded by the Court. We are also unable to agree that the request must be exercised before the application under Section 34(1) is decided. Section 37 (Annexure A) permits an appeal against any order setting aside or refusing to set aside an arbitral award under Section 34. To this extent, the appellate jurisdiction under Section 37 is coterminous with, and as broad as, the jurisdiction of the Court deciding objections under Section 34. Hence, the contention that the Tribunal becomes functus officio after the award is set aside is misplaced. The Section 37 Court still possesses the power of remand stipulated in Section 34(4). Of course, the appellate court, while exercising power under Section 37, should be mindful when the award has been upheld by the Section 34 Court. But the Section 37 Court still possesses the jurisdiction to remand the matter to the Arbitral Tribunal.

64. Our reasoning does not breach the principle of party autonomy. [Rather, it acknowledges that the parties opting for arbitration also consent to be governed by the applicable statute governing arbitration — in this case, the 1996 Act. Further, principle of party autonomy should not be extended to an extreme to urge that the party misunderstood the law and consequently the consent is invalid. While it is true that a mistake of law may vitiate consent in certain contexts, the interpretation here restricts the Court's role to that of limited judicial scrutiny in terms of the 1996 Act.] Neither does it confer appellate powers on the courts. Instead, it adheres strictly to the parameters stipulated in Sections 34 and 37 of the 1996 Act. The power of the appellate court in civil proceedings under Order 41 of the Code, is as broad as that of a trial court, both in terms of facts and law. Contrastingly, the Court's authority under Sections 34 and 37 of the 1996 Act is limited by the silhouette of Section 34.

65. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] , this Court emphasised that the issuance of a reasoned award is not a mere formality under the 1996 Act. For an award to *be termed "reasoned", it must meet three essential yardsticks: it must be proper, intelligible, and adequate. The purpose behind Section 34(4) is clear: it allows for an award to become enforceable after granting the Tribunal an opportunity to cure any defects. This power is exercisable when the Arbitral Tribunal has failed to give any reasoning or the award exhibits gaps in reasoning and these defects can be cured, thereby preventing unnecessary challenges. The underlying intent is to provide an effective, expeditious forum for addressing curable defects, which Section 34(4) facilitates.*

66. In I-Pay Clearing Services (P) Ltd. v. ICICI Bank Ltd. [I-Pay Clearing Services (P) Ltd. v. ICICI Bank Ltd., (2022) 3 SCC 121 : (2022) 2 SCC (Civ) 49] , this Court clarified that Section 34(4) does not grant the authority to review or reconsider previous findings or conclusions. ***As discussed earlier in this judgment, the scope of the power under Section 34(4) is not to be restricted to a rigid, straitjacket formula. Rather, it depends on the specific facts and circumstances of each case. Being a discretionary power, it is to be exercised by the Court judiciously, keeping in mind the grounds raised in the application under Section 34(1). The Court should be prima facie satisfied that the wrong and illegality in the award are curable. While doing so, the Court need not record the final finding on the contentious issue at hand; however, not every request for such relief is warranted. The discretion must be exercised with caution, and only when it is evident that an adjournment will allow the Arbitral Tribunal to resolve the issues and remove the grounds for setting aside the award. However, Section 34(4) is an enabling provision — it does not compel the Tribunal to take corrective action, leaving it free to either amend or refuse to amend the award."***

(emphasis supplied)

27.7 In the present case, it is clear that the defects cannot be cured merely by supplying additional reasons to the findings already recorded. They require a fresh examination of the contractual obligations, disputed facts and evidence on which the Tribunal's conclusions were based. Section 34(4) cannot be used to give the Tribunal an opportunity to reconsider the merits of the dispute after the findings forming the basis of the award have themselves been found unsustainable.

27.8 The long history of the arbitration also cannot be ignored, though it is not by itself the basis for the decision. The arbitration commenced in 2002. Two earlier arbitrators withdrew on account of health reasons, the present Tribunal took over in 2010, and the award was ultimately rendered in 2015. At this stage, directing a complete reconsideration of the merits would effectively require the dispute to be reopened after more than two decades of arbitral proceedings. This is a factor which also weighs against invoking Section 34(4) in the present case.

27.9 Accordingly, I do not find it appropriate to invoke Section 34(4) in the present case.

28. <u>ISSUE-WISE DISPOSITION, SEVERABILITY AND OPERATIVE ORDER:</u>

28.1 Issue No.1 is set aside. Therefore, the direction requiring CONCOR to refund Rs.18,88,43,273/- towards liquidated damages, together with the interest on it does not survive. This Court has not held that CONCOR is entitled to retain the entire amount. The parties shall be at liberty to avail their remedy, if any, in accordance with law.

28.2 Issue No.2 is upheld in entirety, including the award of Rs.47,39,893/- towards escalation for the first rake and the rejection of the escalation claims at Serial Nos.2 to 12 of Annexure-F. No further amount is payable under this issue.

28.3 Issue No.3 remains undisturbed. The rejection of the claim towards additional spring material cost has not been challenged.

28.4 Issues Nos.4 and 5 remain undisturbed as the claims were expressly given up before the Tribunal.

28.5 Issue No.6 remains undisturbed. The rejection of the claim towards alleged idling of workers has not been challenged.

28.6 Issue No.7 remains undisturbed in the terms of the impugned Award. This Court has not examined the merits of the claim

28.7 Issue No.8 and 17 are upheld. CONCOR shall pay HEIL Rs.1,72,50,000/- towards the amount deducted as conditional price reduction in respect of 345 sets.

28.8 Issue No.9 remains undisturbed, as a claim not pressed before the learned Arbitral Tribunal.

28.9 Issues Nos.10 and 11 remain undisturbed. The rejection of those claims has not been challenged before this Court.

28.10 Issues Nos.12, 13 and 19 to 24, relating to CONCOR's counterclaims, are set aside only to the extent that their rejection rests on the finding that delay was not attributable to HEIL. This Court does not determine the entitlement, causation or quantum of any counterclaim.

28.11 Issue No.14 is set aside. The finding that the delay was wholly not attributable to HEIL was based on an erroneous interpretation of the amended Clause 2.1 read with the other terms of the Contract governing responsibility for design and performance.

28.12 Issues Nos.15 and 16 are set aside because the Tribunal did not render the necessary findings on whether HEIL submitted complete and timely drawings and whether the material design changes were purchaser-directed variations or supplier obligations arising from as per agreed conditions.

28.13 Issue No.18 survives to the extent that the Tribunal's factual findings regarding the occurrence of the alleged *force majeure* events are not disturbed. However, in view of this Court, those findings cannot be the basis to sustain the complete refund of liquidated damages for the entire period of delay.

28.14 Issue No.25 has no independent monetary consequence. It shall operate in line with the findings recorded in this judgment and the surviving individual claims.

28.15 The findings on Issue No.26 are set aside. The question of whether HEIL maintained regular supplies after final prototype approval was a distinct factual issue which was not independently adjudicated by the Tribunal.

28.16 Issue No.27 concerning interest survives only in respect of the principal amounts above.

28.17 Issue No.27A, relating to costs, is upheld as HEIL has succeeded on some of its claims even after the modifications made by this judgment.

28.18 Issue No.28, which contains the final relief granted in the award, will apply in the modified form after considering the parts of the impugned Award that have been set aside or upheld by this judgment.

28.19 This Court finds that the portions of the impugned Award which are set aside can be separated from those which are sustained. The refund of liquidated damages and rejection of CONCOR's counterclaims rested on the finding regarding responsibility for delay, whereas the first-rake escalation and conditional price reduction were mainly decided on the basis of separate clauses and after appreciation of material on record. Therefore, these findings can stand independently.

28.20 As recognised in ***Gayatri Balasamy*** **(supra).**, a Court can preserve parts of an arbitral award that can stand independently, as long as doing so does not require the Court to decide the merits again. Accordingly, the Court has retained the parts of the award that are independently valid and set aside only those parts affected by the grounds given under Section 34.

28.21 Accordingly, OMP (COMM) No. 11/2016 filed by CONCOR is partly allowed. The impugned Award is set aside to the extent that it directs CONCOR to refund of Rs.18,88,43,273/- towards liquidated damages under Issue No. 1. The interest awarded on that amount is also set aside.

28.22 The rejection of CONCOR's counterclaims under Issues Nos. 12, 13 and 19 to 24 is set aside to the limited extent stated above. No amount is awarded on those counterclaims, and no finding is recorded on their merits, entitlement or quantum.

28.23 The award of Rs.47,39,893/- towards first-rake escalation, together with simple interest at 9% per annum as directed by the Tribunal, is upheld.

28.24 The award directing payment of Rs.1,72,50,000/- towards the conditional price reduction, together with simple interest at 9% per annum as directed by the Tribunal, is also upheld.

28.25 OMP (COMM) No. 50/2016 filed by HEIL is dismissed. No fresh calculation, modification or remission is directed in respect of those claims.

28.26 The petitions and all pending applications therein stand disposed of in the aforesaid terms.

28.27 The Registry shall place a copy of this judgment in both the petitions.

OM PRAKASH SHUKLA, J

AUGUST 19, 2026/at/pa