2026:DHC:8652

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

Date of decision: 29th SEPTEMBER, 2026

IN THE MATTER OF:

\# **CNR No. DLHC010365972023**

\+ **O.M.P. (COMM) 132/2020**

M/S IRCON INTERNATIONAL LIMITED .....Petitioner

Through: Mr. K. R. Gupta, Advocate.

versus

KANCHANJUNGA CONSTRUCTION CO PV LTD .....Respondent

Through: Mr. Animesh Kumar, Mr. Murari Kumar, Mr. Nishant Kumar, Dr. Sumit Kumar, Ms. Aprajita, Mr. Murari Kumar & Mr. Shiv Shankar, Mr. Yashwardhan Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, (herein referred to as the ***"Act"***) for setting aside of the for an Arbitral Award dated25.08.2013 (herein referred to as the ***"Impugned Award"***) passed by the Learned Sole Arbitrator.

2. Shorn of unnecessary details, facts leading to the filing of the present petition are enumerated below:

a. The Petitioner herein is a government-owned enterprise and a public sector undertaking incorporated under the laws of India, having its Corporate Office at New Delhi. The Respondent, Kanchanjunga Construction Co. Pvt. Ltd. is a private limited construction company organised and existing under the statutory

laws of Nepal, with its registered office in Tinkune, Kathmandu, Nepal.

b. On 30.03.2005, the Government of Nepal, Department of Roads (hereinafter referred to as ***"GON")*** entered into a Contract (Contract No. RNDP/ICB/BC) with the Petitioner for the execution of the Strengthening of East-West Highway (Belbari-Chauharwa) Project in Nepal, covering a total road length of 140 Km, with a strictly mandated completion period of 728 days.

c. Following a competitive bidding process, the Petitioner herein sub-contracted the execution of 50% of the project length to the extend of 70 Km to the Respondent. In furtherance of the same, the parties formally executed a Sub-Contract Agreement on 14.03.2006 vide Agreement No. IRCON/EWH-NEPAL/WORKS/AGREEMENT NO 3 OF 2006.

d. The initial sub-contract value was Nepalese Rupees (NRs.) 14,10,94,109.90, which was subsequently revised and escalated via a Variation Order (VO) dated 19.12.2006 to NRs. 20,15,61,285.25. The works were to commence on 07.03.2006, and the Respondent was contractually obligated to complete the entire stretch of 70 Km within periodof 12 months i.e. on or before 06.03.2007.

e. The sub-contract agreement required the Respondent to execute three primary activities: (a) asphalt concrete overlay on 67 Kms with varying thicknesses; (b) complete reconstruction from subgrade to bituminous layers on 3 Kms; and (c) hard shoulder construction on both sides for the entire 70 Km stretch.

f. Initially under the Contract, the Petitioner was contractually obligated to supply material including bitumen, base course, and

aggregates, free of cost to the Respondent, which accounted for approximately 90% of the raw materials.

g. However, during the first nine months of the contract, the Petitioner failed to fulfil its obligations and no aggregates or base course were timely made available. On this account, the Respondent requested to take over the supply of material which culminated in a Variation Order signed on 19.12.2006, which officially shifted the aggregate supply scope onto the Respondent and led to an adjustment in the contract price accordingly.

h. It is stated that the Respondent experienced critical delays during the working season due to the Petitioner's failure to timeously erect a contractually required 80 TPH Hot Mix Plant (HMP), supplying a lower-capacity 60 TPH unit only in late September 2007.

i. Following the commencement of works, the Terai region of Nepal became highly volatile, experiencing massive civil commotions, strikes, and political blockades (referred to as "Nepal Bandhs")

j. From 02.01.2007, the project site was paralyzed by violent agitations and the Respondent's operations were severely disrupted by systematic extortion of money, forced donations by local armed gangs and political factions, violent abduction of the Respondent's administrative staff and machine operators, who were held captive for 28 days, an armed attempt to kidnap the Respondent's Project Representative, which left him with severe head injuries etc.

k. Confronted with this collapse of security, the Petitioner formally instructed the Respondent to temporarily evacuate its personnel and attempt to supervise the construction works remotely from

Itahari, which was located approximately 100 Kilometres away from the construction site. Due to these events, the original sub-contract timeline of 12 months was ultimately extended by 3.33 years or 1,215 days i.e. up to the date of contract closure on 30.06.2009.

l. It is stated that the site was closed for a total of 702 days specifically due to Bandhs and diesel crises. Other reasons included flooding due to the monsoons that submerged the site for 60 days annually, Local festivals accounting for another 30 days annually and consequently, out of the 1,215 days and the Respondent had only 243 workable days. Recognizing these severe disruptions as entirely beyond the Respondent's control, the Petitioner granted multiple extensions of time without imposing any liquidated damages or penalties.

m. As the security situation remained unfeasible, the Respondent was forced to demobilise its equipment and personnel before June 2008. Ultimately, towards the final stages of the Contract, the Petitioner unilaterally withdrew the Respondent's remaining scope and completed the last leg of works.

n. On 17.07.2008, the Petitioner approached the main Employer, i.e. GON to foreclose the main contract on an "as is where is" basis, citing massive idling costs and force majeure. The GON accepted the foreclosure on 06.08.2008. Following this, the sub-contract between the Petitioner and the Respondent was formally closed on 30.06.2009.

o. Following the foreclosure of the Contract, two arbitration proceedings commenced with directly overlapping claims. Under

the Primary Contract between the Petitioner and the GON, the Petitioner referred its disputes with the GON to a three-member UNCITRAL Arbitral Tribunal in Nepal. On 07.05.2013, the three member Tribunal issued an award in favour of the Petitioner for NRs. 161,325,119.00. What is relevant to note is that the Tribunal awarded the Petitioner NRs. 118,075,272.00 as idling compensation for 315 days due to idling of resources of the Petitioner.

p. Consequently, disputes arose under the sub-contract between the Petitioner and the Respondent herein. The Respondent invoked Clause 72 of the GCC and approached the Managing Director of the Petitioner for the appointment of an arbitrator. On 07.03.2012 Shri B.K. Makhija was appointed as the Sole Arbitrator

3. The Respondent submitted 11 claims totalling NRs. 22,73,85,115.67, while the Petitioner raised 4 counterclaims totalling NRs. 15,00,61,966.70

4. On 25.08.201, the Sole Arbitrator issued an award, wherein Claim No. 1 with respect to idling of resources were awarded to the extent of 248 days in favour of the Respondent. The Arbitrator noted that Clause 71.1 which was the Force Majeure clause and Clause 19.3 of the SCC strictly barred claims for damages due to Bandhs or strikes. However, the Arbitrator observed that the Petitioner had utilized the Respondent's idling data to secure its own award from the Government of Nepal. Furthermore, the Petitioner's representative conceded during hearings that the Petitioner would accept KCCPL's claim on the same basis as awarded by the Nepal Tribunal. Grounded in this and the Petitioner's own written admission of 248 Bandh days, the Arbitrator accepted Claim No. 1 in principle and awarded idling compensation for 248 days. Further, the Arbitrator allowed

Claim No. 4 with respect to Price Adjustment and awarded the Respondent, NRs. 3,555,133.60 on the ground that the Variation Order un-balanced the fuel weightage. In addition, the learned arbitrator had also allowed Claim No. 11 with respect to Interest and awarded compound interest @ 10% per annum on Claims 1 and 4 from the date of contract closure (June 30, 2009) to the date of the award (August 25, 2013) and rejected all of the Petitioner's counterclaims.

5. Aggrieved by the award passed by the sole arbitrator, the Petitioner has preferred the present petition challenging the impugned award passed by the Learned Arbitrator.

6. The challenge in the present petition pertains to mainly two claims, i.e. the award of idling/ underutilization cost and (ii) grant of compound interest on claim 1 and claim 5 by the Learned Arbitrator.

7. At this juncture, it is quintessential to state that the impugned award being dealt with by this Court was passed prior to the 2015 amendment to the Act, which means that the scope of interference by this Court would be judged by the yardstick of the Arbitration regime prior to the 2015 amendment.

8. The appointment in the present case was before the 2015 amendment. The extension of judicial intervention by a Court under Section 34 of the Arbitration Act was laid down by the Apex Court in ONGC Ltd. v. Saw Pipes Ltd., **(2003) 5 SCC 705**, wherein the Apex Court has held as under:

> *"**74.** In the result, it is held that:*
>
> *(A) (1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:*



(i) a party was under some incapacity, or

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

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

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

(2) The court may set aside the award:

(i)

(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or



(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

9. The judgment of the Apex Court in ONGC Ltd. (supra) was considered in a number of Judgments and was explained in Hindustan Zinc Ltd. v. Friends Coal Carbonisation, **(2006) 4 SCC 445**, wherein the Apex

Court held that 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.

10. In McDermott International Inc. v. Burn Standard Co. Ltd., **(2006) 11 SCC 181**, the Apex Court dilated on the expression 'public policy' by relying on its Judgment in Renusagar Power Co. Ltd. v. General Electric Co., **1994 Supp (1) SCC 644**, by holding that an arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. In McDermott (supra) the Apex Court has explained the Judgment rendered in Renusagar (supra) by observing that a narrower meaning to the expression 'public policy' was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. In McDermott (supra) the Apex Court has further explained the said principle by placing reliance on the Judgment of ONGC Ltd. (supra) by adding one more ground to the grounds enumerated in Renusagar (supra) and has held that Awards can be set aside if they are patently arbitrary. In McDermott (supra) the Apex Court further went on to say that patent illegality must go to the root of the matter and that the public policy violation should be so unfair and unreasonable as to shock the conscience of the court or where the arbitrator has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute. The same principle was adopted by the Apex Court in Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., **(2006) 11 SCC 245**, wherein the Apex Court while holding that patent illegality must go to the root of the matter has also held that what would be a public policy would be a matter which would depend upon the nature of transaction and



the nature of statute, the pleadings of the parties and the materials brought on record.

11. In DDA v. R.S. Sharma and Co., **(2008) 13 SCC 80**, the Apex Court, after analysing all the aforementioned decisions, has held as under:

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

12. The Apex Court in Associate Builders v. DDA**, (2015) 3 SCC 49**, has further explained the expression '*fundamental policy of Indian law*' by holding that since awards affect the rights of the citizen or leads to any civil consequences, it is the duty of the Court to adopt 'judicial approach' in the matter. The Apex Court has further held that judicial approach ensures that the authority acts *bona fide* and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration and that the principle of audi alteram partem has been properly followed and that the decision must not be so perverse or irrational that no reasonable persons would have arrived at the same, i.e. the decision must be based on some evidence and should not ignore vital evidence. In the said Judgment, the Apex Court has further explained the principle of '*patent illegality*' by observing as under:

> ***"42.*** *In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:*
>
> ***42.1.*** *(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:*
>
> *"28.Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India—*
>
> *(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"*

> ***42.2.*** *(b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.*
>
> ***42.3.*** *(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*
>
> *"28.Rules applicable to substance of dispute.—(1)-(2)****
>
> *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*
>
> *This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.*
>
> *"*

13. In view of the above parameters, this Court will now proceed to analyse the grounds taken by the Petitioner assailing the validity of the Impugned Award.

14. The first challenge to the Impugned Award is against claim 1 awarded by the Learned Arbitrator with respect to the idling of resources. The Learned Arbitrator, while allowing the claim partially, observed that during the initial period of the contract when there was no socio-political

disturbance, the Respondent did not execute much work and various excuses were provided by the Respondent for these initial delays which were not supported by adequate or proper documentation. The only reason furthered by the Respondent is the delay on account of the Petitioner's delay in installing the Hot Mix Plant. It was observed that the Petitioner proved through correspondences that the Respondent failed to arrange sufficient aggregate supplies early on, and that the Variation Order transferring aggregate supply to the Respondent's scope was issued at the Respondent's own specific request, not on account of failure by the Petitioner.

15. It is recorded by the Learned Arbitrator that despite delays in the completion, the Petitioner ultimately granted extension of time without imposing any liquidated damages.

16. With respect to the determination of the number of idling days, the Respondent claimed idling compensation for 702 days. The Learned Arbitrator observed that the Respondent failed to produce any reliable documentation during the hearings to support this number stating that their records were destroyed in riots.

17. A perusal of the Impugned Award discloses that before the Learned Arbitrator, the Petitioner conceded that the project was affected by 248 bandh days, but argued that under Special Provision Clause 120, 164 days should be deducted, leaving only 84 days. The Learned Arbitrator rejected this deduction, observing that Clause 120 strictly governs extensions of time due to abnormal rainfall and has nothing to do with the stoppages on account of bandhs. He added that this conclusion was strengthened by the fact that the Petitioner had granted extensions for periods much longer than 248 days without liquidated damages. Hence, in the absence of primary records from the Respondent, the Learned Arbitrator relied on the Petitioner's own written

admissions and calculations to formally assess the number of compensable idle days at 248 days.

18. The arbitrator noted that the sub-contract lacked any Special Risk or adverse physical obstruction clauses similar to that in the PrimaryContract between the Petitioner and the GON. The only applicable clause was the standard Force Majeure clause, which barred both parties from claiming damages for non-performance or delay. Hence on the basis of the COC, the claim of the Respondent was not sustainable.

19. Despite this contractual bar, the Learned Arbitrator proceeded on the basis of equity and held that the Respondent's argument deserved consideration as its claim was not for extra payment on account of time extensions, but rather to cover the cost of idle resources that they were contractually forced to maintain at the site under the Petitioner's instructions, when no work could be performed. The arbitrator observed that this required consideration because both the Primary contract between the Petitioner and GON and the Sub-Contract were being executed under identical, highly volatile regional circumstances.

20. The Learned Arbitrator observed that the Petitioner's conduct during the project aligned with the Respondent's logic. During the execution of the project, the Petitioner had actively directed the Respondent to submit its idling details, and the Petitioner had subsequently used those very details to secure its own Arbitral Award for idle resources from the GON. On a specific query raised by the Learned Arbitrator, the Petitioner's representative formally admitted that the Petitioner will have no issue in accepting the claim of the Respondent on the same basis as awarded to them by the Arbitral Tribunal and accepted by GON under the Primary Contract, provided the Respondent could produce the required documentation.



21. Relying on the equity of the situation and the Petitioner's own admission, the Learned Arbitrator accepted Claim No. 1 in principle for 248 days. He directed the Petitioner to calculate the final payable amount using the documentation already in its possession and any additional papers the Respondent could provide.

22. With respect to this claim, there are three primary arguments taken by the Petitioner.

23. Firstly, it is the submitted by the Learned Counsel for the Petitioner that the claim is barred by Clause 19.3 of the SCC as this clause explicitly stipulates that any extension of time granted on account of Bandhs in Nepal is an extension of time only, and no claim for any form of extra payment shall accrue by reason of such extension being granted.

24. Secondly, it is submitted by the Learned Counsel for the Petitioner that the Learned Arbitrator himself recorded a categorical finding in the Impugned award that *"strictly on the basis of COC [Conditions of Contract], the claim of KCCPL is not sustainable".* In terms of this finding returned by the Learned Arbitrator, it is submitted by the learned Counsel for the Petitioner that as per the unamended Section 28(3) of the Act, the Arbitral Tribunal must strictly decide in accordance with the terms of the contract. By departing from the contract to award compensation to the Respondent on extraneous, equitable considerations, the Learned Arbitrator acted in clear violation of this statutory mandate.

25. Reliance has been placed on ONGC v. Saw Pipes Ltd., **(2003) 5 SCC 705**, to submit that the learned Arbitrator had no power to act in breach of substantive law or the contract, and any award made outside the contractual terms is, on the face of it, patently illegal.

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26. Thirdly, it is submitted by the learned Counsel for the Petitioner that the Learned Arbitrator had partially justified the award by pointing to the Petitioner's conduct during execution, such as requesting the Respondent's idling log books, using those details to secure its own award from GON and making a conditional admission during hearings. However, it is submitted by the Learned Counsel for the Petitioner that the terms of a written contract cannot be varied or changed by the conduct of a party's officers. Reliance has been placed on Tamil Nadu Electricity Board v. N. Raju Reddiar, **(1996) 4 SCC 551**, to assert that when a written contract contains all its terms, any subsequent conduct or concession by officers that detracts from those written terms is legally inadmissible and not binding on the company.

27. This Court has perused the submissions made by the Petitioner and the findings of the Learned Arbitrator.

28. The specific contention of the Petitioner is that the Contract contemplated for extension of time on account of Bandhs in Nepal but did not provide for any monetary compensation or claims towards idling cost. It is therefore contended that the learned Arbitrator, while allowing the claim, the Learned Arbitrator has acted contrary to the mandate of the unamended Section 28(3) of the Act, as per which, the Learned Arbitrator is strictly bound by the terms of the Contract while adjudicating the disputes between the parties, and cannot take into consideration extraneous factors, if the relief is not specifically provided for in the contract between the parties.

29. Since the Impugned Award was rendered prior to the coming into force of the 2015 amendment to the Act, it is apposite at this stage to bifurcate the distinction between the unamended and the amended scope of Section 28(3) of the Act. The same is reproduced hereunder:

PRE-AMENDMENT	***POST-AMENDMENT***
*In all cases, the **arbitral tribunal shall decide in accordance with the terms of the contract** and shall take into account the usages of the trade applicable to the transaction.*	*While deciding and making an award, **the arbitral tribunal shall, in all cases, take into account the terms of the contract** and trade usages applicable to the transaction.*

30. This distinction is material in the facts of the present case. A perusal of both the sections clearly reflects that the scope prior to the amendment was confined to the scrutiny strictly as per the terms of the contract. This scope was relaxed post 2015 amendment wherein, the term *"shall decide"* has been replaced by *"take into account".*

31. In the opinion of this Court, this cannot, on any account, mean that, even under the unamended Section 28(3), the terms of a contract could not be construed taking into account the conduct, representations and admissions of the parties.

32. A perusal of the Impugned Award indicates that the Learned Arbitrator has proceeded on the premise that the Petitioner's representative had expressly represented that the Petitioner would have no objection in accepting the Respondent's claim on the same basis on which the Petitioner itself had been awarded the corresponding amount by the tribunal in its dispute with the Government of Nepal (GON), subject to the Respondent producing the requisite supporting documentation. In fact, the Learned Arbitrator noted that the Petitioner had itself asserted and pursued a claim for idling costs against the GON in the arbitration arising out of the Main Contract and had relied upon the very documentation furnished by the Respondent for establishing the consequences of the Nepal Bandhs. Having itself relied upon such material for securing an award of idling costs from

the GON, the Petitioner represented before the Learned Arbitrator that it would not deny the Respondent a corresponding amount, provided the requisite documentation was produced.

33. In these circumstances, the Learned Arbitrator was justified in treating the aforesaid representation as an admission made by the Petitioner in the course of the arbitral proceedings. Significantly, the making of this representation is not disputed by the Petitioner. The Petitioner's objection is mainly that such an admission or conduct cannot be permitted to operate contrary to the express terms of the Contract.

34. This submission, in the facts of the present case, cannot be accepted. This Court is of the opinion that the principle that an arbitral tribunal must give effect to the terms of the Contract cannot be converted into a licence for a party to resile from an admission made voluntarily by it during the course of the arbitral proceedings, particularly where such representation was founded upon its own conduct under the Main Contract and upon the very claim which it had itself successfully pursued against the GON.

35. What is even more relevant to note is that the Petitioner had itself suffered the consequences of the Nepal Bandhs, had itself pursued a claim for idling costs before the tribunal constituted in the Main Contract proceedings, and had relied upon the Respondent's documentation in substantiating that claim.

36. This being the case, this Court is of the opinion that the Learned Arbitrator has proceeded to award cost of idling based on an assurance/ verbal undertaking given by the Petitioner.

37. While terms of the Contract are to be given full effect, the same cannot be a defence in a case where there is waiver by conduct. As the Petitioner had succeeded in its claim for idling cost with the GON under the



main Contact, it cannot now shy away from adhering to a verbal undertaking made during the course of proceedings before the Learned Arbitrator.

38. Hence, in the opinion of this Court, no interference is warranted as far as Claim no. 1 is concerned.

39. The next challenge to the impugned award deals with claim 11 with respect to award of Compound Interest the Learned Arbitrator awarded 10% compound interest on Claim No. 1 and Claim No. 5 from the date of closure of contract on 30.06.2009 to the date of the award i.e. 25.08.2013. While awarding the same, the Learned Arbitrator has observed that although the contract does not contain an express provision with respect to interest, but neither was there any stipulation in the Contract which excluded the payment of interest. Proceeding on this premise, the Learned Arbitrator has granted Compound Interest on Claim 1 and Claim 5.

40. It is submitted by the Learned Counsel for the Petitioner that Compound Interest can only be awarded if there is a specific contractual clause permitting it. In the absence of a contractual agreement with respect to award of compound interest, the Arbitral tribunal have no general discretion to award ‘interest upon interest’. It is submitted that under Section 3 of the Interest Act, 1978, pre-reference interest can only be allowed if the claimant had served a formal written notice demanding interest from a specific date. As the Respondent never served such a notice, the award of pre-reference interest is legally unsustainable.

41. In addition, it is the specific contention of the learned counsel for the Petitioner that there is no provision in the Act, specifically Section 31 for granting compound interest. It is contended that even if the Learned Arbitrator possessed the power to award interest, such power could only be to the extend of granting simple interest and not compound interest.

42. In view of the aforesaid submissions, the question which arises for consideration before this Court is whether, in the absence of a contractual prohibition against interest, an arbitral tribunal exercising jurisdiction under Section 31(7) of the Act possesses the power to award compound interest for the period between the accrual of the cause of action and the date of the award.

43. At the outset, it is apposite to delineate the power of the Arbitral Tribunal to award interest. The Arbitral tribunal under Section 31(7) is bestowed with the power to award interest. For the sake of reference, the same is reproduced hereunder:

> ***"31(7)*** *(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.*
>
> *[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.*
>
> *Explanation.—The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]"*

44. As the Learned Arbitrator has awarded 10% compound interest for the *pendente lite* period i.e. from the date of cause of action till the date of the award, this Court is primarily concerned with Section 31(7)(a) of the Act.



45. Sub clause (a) of Section 31(7) begins with the proviso *"unless otherwise agreed between the parties*". This is to say, that unless parties by contract have excluded the entitlement of either of the parties to grant of interest, the Arbitral Tribunal has the discretion to award the same on the principal amount.

46. It is the case of the Petitioner that Interest could not have been granted by the Learned Arbitrator as there was no clause in the Contract between the parties for grant of interest. This submission of the Learned Counsel for the Petitioner cannot be accepted by this Court. While it is true that there was no clause in the Contact entitling either parties to award of interest, the expression *"unless otherwise agreed by the parties"* does not contemplate that an express contractual provision conferring a right to interest must necessarily exist before the tribunal can exercise its statutory power. In fact, where the Contract is silent, the statutory discretion under Section 31(7)(a) remains available to the arbitral tribunal. Thus, there is a material distinction between a Contract which prohibits or excludes interest and a Contract which is merely silent as to interest. Silence cannot, by itself, be elevated to an express contractual prohibition. If the parties intended to exclude the statutory power of the tribunal to award interest, they were at liberty to so stipulate. In the absence of such exclusion, the jurisdiction conferred by Section 31(7)(a) remains available to the tribunal.

47. The aforesaid interpretation of the section is in consonance with the judgement of the Apex Court in Delhi Airport Metro Express (P) Ltd. v. DMRC**, (2022) 9 SCC 286**, wherein it has observed as under:

> ***"17.*** *It could thus be seen that the part which deals with the power of the Arbitral Tribunal to award interest, would operate if it is not otherwise agreed by the parties. If there is an agreement between the parties to the*

contrary, the Arbitral Tribunal would lose its discretion to award interest and will have to be guided by the agreement between the parties. The provision is clear that the Arbitral Tribunal is not bound to award interest. It has a discretion to award the interest or not to award. It further has a discretion to award interest at such rate as it deems reasonable. It further has a discretion to award interest on the whole or any part of the money. It is also not necessary for the Arbitral Tribunal to award interest for the entire period between the date on which the cause of action arose and the date on which the award is made. It can grant interest for the entire period or any part thereof or no interest at all.

18. *We find that in the present case, the words "unless otherwise agreed by the parties" would assume significance. The said words fell for consideration before this Court in N.S. Nayak & Sons v. State of Goa [N.S. Nayak & Sons v. State of Goa, (2003) 6 SCC 56] . This Court in the said case had an occasion to consider the scope of the phrase "unless otherwise agreed by the parties" in various provisions of the 1996 Act. This Court observed thus : (SCC p. 63, para 14)*

"14. ... The phrase 'unless otherwise agreed by the parties' used in various sections, namely, 17, 21, 23(3), 24(1), 25, 26, 29, 31, 85(2)(a), etc. indicates that it is open to the parties to agree otherwise. During the arbitral proceedings, right is given to the parties to decide their own procedure. So if there is an agreement between the parties with regard to the procedure to be followed by the arbitrator, the arbitrator is required to follow the said procedure. Reason being, the arbitrator is appointed on the basis of the contract between the parties and is required to act as per the contract. However, this would not mean that in appeal parties can contend that the appellate procedure should be as per their agreement."

19. *This Court in Sree Kamatchi Amman Constructions v. Railways [Sree Kamatchi Amman Constructions v. Railways, (2010) 8 SCC 767 : (2010) 3 SCC (Civ) 575] had an occasion to directly consider the aforesaid phrase as employed by the legislature in sub-section (7) of Section 31 of the 1996 Act. R.V. Raveendran, J. in the said case observed thus : (SCC p. 774, para 19)*

"19. Section 31(7) of the new Act by using the words 'unless otherwise agreed by the parties' categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to the date of award. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of award."

(emphasis in original)

20. *If clause (a) of sub-section (7) of Section 31 of the 1996 Act is given a plain and literal meaning, the legislative intent would be clear that the discretion with regard to grant of interest would be available to the Arbitral Tribunal only when there is no agreement to the contrary between the parties. The phrase "unless otherwise agreed by the parties" clearly emphasises that when the parties have agreed with regard to any of the aspects covered under clause (a) of sub-section (7) of Section 31 of the 1996 Act, the Arbitral Tribunal would cease to have any discretion with regard to the aspects mentioned in the said provision. Only in the absence of such an agreement, the Arbitral Tribunal would have a discretion to exercise its powers under clause (a) of sub-section (7) of Section 31 of the 1996 Act. The discretion is wide enough. It may grant or may not grant interest. It may grant interest for the entire period or any part thereof. It may also grant interest on the whole or any part of the money."*

48. Consequently, the Learned Arbitrator cannot be faulted merely for having proceeded on the basis that the absence of an interest clause did not, by itself, constitute a prohibition against the grant of interest. The relevant enquiry is whether the parties had agreed otherwise so as to exclude or regulate the statutory power under Section 31(7)(a). The same has not been demonstrated.

49. The second limb of the argument of the Learned Counsel for the Petitioner was thatif interest, at all could be granted, it could have only been done at the rate of simple interest and not compound interest.

50. The Learned Counsel for the Petitioner has placed reliance on the judgement of State of Haryana v. S.L. Arora & Co., **(2010) 3 SCC 690** to substantiate its argument that compound interest cannot be granted by an arbitrator in absence of a contractual stipulation.

51. The Court has perused the judgement of S.L. Arora & Co. (supra). While reliance has been placed by the Petitioner on this judgement, however, the same has been overruled by the subsequent judgement of the Apex Court in Hyder Consulting (UK) Ltd. v. State of Orissa, **(2015) 2 SCC 189**. Relevant paragraphs of the said judgment are reproduced hereunder:

PARA 15-21

> ***"15.*** *In such a situation one is reminded of the decision in Ganga Prasad Verma v. State of Bihar [1995 Supp (1) SCC 192 : 1995 SCC (L&S) 383 : (1995) 29 ATC 154] , wherein this Court held that : (SCC p. 195, para 5)*
>
> *"5. Where the language of the Act is clear and explicit, the court must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."*
>
> *Similarly, in Keshavji Ravji & Co. v. CIT [(1990) 2 SCC 231 : 1990 SCC (Tax) 268] , a three-Judge Bench of this*

Court explained the rule of literal interpretation as under : (SCC p. 242, para 11)

"11. ... If the intendment is not in the words used it is nowhere else. The need for interpretation arises when the words used in the statute are, on their own terms, ambivalent and do not manifest the intention of the legislature."

16. *We may also refer to the decision of the Privy Council in Pakala Narayana Swami v. King Emperor [(1938-39) 66 IA 66 : (1939) 49 LW 349 : AIR 1939 PC 47] , wherein Lord Atkin observed that : (IA p. 78)*

"... when the meaning of words is plain, it is not the duty of courts to busy themselves with supposed intentions."

This view was upheld recently by this Court in T.N. SEB v. Central Electricity Regulatory Commission [(2007) 7 SCC 636] .

17. *In fact the settled view on this subject has been to admit results of construction even if they be strange or surprising [London Brick Co. Ltd. v. Robinson, 1943 AC 341 : (1943) 1 All ER 23, p. 26 (HL)] , unreasonable or unjust or oppressive [IRC v. Hinchy, 1960 AC 748 : (1960) 2 WLR 448 : (1960) 1 All ER 505, pp. 508 & 512 (HL)] . The Privy Council in King Emperor v. Benoari Lal Sarma [(1944-45) 72 IA 57 : (1945) 58 LW 64 : AIR 1945 PC 48] , (AIR p. 53), emphasised : (IA p. 71)*

"... Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used."

18. *In Nasiruddin v. Sita Ram Agarwal [(2003) 2 SCC 577] , SCC para 37, a three-Judge Bench of this Court, made it clear that the Court's jurisdiction cannot be invoked to interpret a statute so as to add or subtract*

words or read something into a provision which is not there.

19. *In fact, Maxwell on the Interpretation of Statutes, states:*

"Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. 'The decision in this case', said Lord Morris of Borth-y-Gest in a revenue case, 'calls for a full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision.' [Shop and Store Developments Ltd. v. IRC, (1967) 1 AC 472 at p. 493 : (1967) 2 WLR 35 : (1967) 1 All ER 42 (HL), per Lord Morris of Borth-y-Gest. But see IRC v. Bates, (1965) 1 WLR 1133 : (1965) 3 All ER 64 (CA), per Lord Denning M.R., affirmed in Bates v. IRC, 1968 AC 483 : (1967) 2 WLR 60 : (1967) 1 All ER 84 (HL); Luke v. IRC, 1963 AC 557 : (1963) 2 WLR 559 : (1963) 1 All ER 655 (HL), per Lord Reid.] Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. [Cartledge v. E. Jopling & Sons Ltd., 1963 AC 758 : (1963) 2 WLR 210 : (1963) 1 All ER 341 (HL). Cf. Miller v. Salomons, (1852) 7 Ex 475 : 155 ER 1036, per Pollock C.B.; British Farmers Pure Linseed Cake Co., In re, (1878) LR 7 Ch D 533 : (1878) 48 LJ Ch 56 (CA), per Jessel M.R.; Magor and St. Mellons RDC v. Newport Corpn., 1952 AC 189 : (1951) 2 All ER 839 (HL)] The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and expedient : [Gwynne v. Burnell, (1840) 7 Cl & Fin 572 : 7 ER 1188 (HL) per Coleridge, J.] words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they

should not be embraced or excluded. [Whitehead v. James Stott & Co., (1949) 1 KB 358 : (1949) 1 All ER 245 (CA); Galashiels Gas Co. Ltd. v. O'Donnell, 1949 AC 275 : (1949) 1 All ER 319 (HL)] "

20. *Tindal, C.J. in Sussex Peerage case [(1844) 11 Cl & Fin 85, p. 143 : (1843-60) All ER Rep 55 : 8 ER 1034 (HL)] , summarised this principle as follows : (ER p. 1057)*

"... If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

This cardinal principle of construction was first stated by the United States Supreme Court in its landmark decision of Caminetti v. United States [61 L Ed 442 : 242 US 470 (1917)] , US p. 485, whereby Day, J. observed : (L Ed p. 453)

"Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise...."

21. In the result, I am of the view that S.L. Arora case [State of Haryana v. S.L. Arora and Co., (2010) 3 SCC 690 : (2010) 1 SCC (Civ) 823] is wrongly decided in that it holds that a sum directed to be paid by an Arbitral Tribunal and the reference to the award on the substantive claim does not refer to interest pendente lite awarded on the "sum directed to be paid upon award" and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the award, meaning a sum

inclusive of principal sum adjudged and the interest, and this has been done by Parliament in plain language." (emphasis supplied)

52. A perusal of the judgement of Hyder Consulting (UK) Ltd, (*supra*), indicates that the Learned Arbitrator has the power to grant compound interest for the pre-award as well as the post award period.

53. Further, Section 31(7)(a) of the Act states *"at such rate as it deems reasonable*". In fact, the provision does not contain any statutory classification between "simple" and "compound" There is no classification of interest provided in the statute. In such a case, interest may be at a simple or a compounded rate, whatever the Learned Arbitrator deems reasonable.

54. In the present case, the Learned Arbitrator has exercised the discretion conferred by Section 31(7)(a), has awarded interest at 10% per annum for a defined period, and there is no demonstrated contractual prohibition against the grant of such interest. The award of compound interest, considered in the light of the law laid down in Hyder Consulting (UK) Ltd, (*supra*) cannot therefore be said to be without jurisdiction.

55. In light of the same, no interference is warranted with respect to Claim No. 11.

56. Accordingly, the present petition is dismissed, with pending applications, if any.

SUBRAMONIUM PRASAD, J

SEPTEMBER 29, 2026
VG/S. Zakir/Rahul