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

RESERVED ON –07.11.2024

% PRONOUNCED ON –30.01.2025

\+ O.M.P. (COMM) 204/2019, I.A. 7309/2019, I.A. 2114/2020, I.A. 5073/2021, I.A. 14531/2023, I.A. 42226/2024

NTPC LIMITED .....Petitioner

Through: Mr. Tushar Mehta, Solicitor General of India with Ms. Bani Dikshit, Mr. Samir Malik,Mr. Varun Kalra,Mr. Krishan Kumar, Advs.

versus

JINDAL ITF LIMITED & ANR. .....Respondents

Through: Mr. Ravi Shankar Prasad, Sr. Adv. with Mr. Nilava Bandyopadhyay ,Mr. Rajdutt Sekhar Singh,Mr. Yash Mittal, Advs. With Mr. Amit Kumar, AR.

\+ OMP (ENF.) (COMM.) 88/2019, I.A. 7312/2019

JINDAL ITF LTD. .....Decree Holder

Through: Mr. Ravi Shankar Prasad, Sr. Adv. with Mr. Nilava Bandyopadhyay ,Mr. Rajdutt Sekhar Singh,Mr. Yash Mittal, Advs. With Mr. Amit Kumar, AR.

versus

NTPC LIMITED .....Judgement Debtor

Through: Mr. Tushar Mehta, Solicitor General of India with Ms. Bani Dikshit, Mr. Samir Malik,Mr. Varun Kalra,Mr. Krishan Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

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J U D G M E N T

DINESH KUMAR SHARMA,J:

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '*the A&C Act*') for setting aside an arbitral award passed by the learned Arbitral Tribunal dated 27.01.2019.

A. FACTUAL MATRIX

2. The Petitioner herein, i.e., NTPC, is a Government of India enterprise/company that generates power and has expertise in areas such as the operation and maintenance of power projects and also sale of power to various state utilities. The company imports coal through various ports, to meet the fuel requirements of its power stations across the country including the Farakka Thermal Power Plant.

3. Respondent no.1/ Claimant, i.e., Jindal ITF Ltd. (*hereinafter called* 'JITF'), is involved in the business of providing services for trans-loading and transportation of cargo through National Waterways. The Respondent no.2, i.e. Inland Waterways Authority of India (*hereinafter called* 'IWAI') is a statutory authority constituted by the Government of India under the IWAI Act, 1985. It was established to undertake the development and regulation of Inland Waterways in the country along with the overall responsibility to develop and maintain National Waterways as well as coordination of Inland Waterways Transport (IWT) with other modes. IWAI/Respondent no.2 herein, was a proforma party in the said arbitration proceedings.

4. Briefly stated facts as per the petition are that the Government of India held a meeting on 06.07.2007, chaired by the Secretary (MOP), bearing in mind the vision to create sustainable modes of transportation of coal through national waterways. Therefore, IWAI/Respondent no.2 approached the NTPC/petitioner for the development of waterways by way of which, for the first time, transportation of coal was proposed to be taken through waterways instead of railways. On 24.09.2008, a Memorandum of Understanding (MOU) was executed between NTPC/Petitioner and IWAI/Respondent no.2. The MOU was executed to explore the possibility of using inland waterways as a supplementary mode of transportation of coal for the Farakka Thermal Power Plant of NTPC. IWAI also appointed IL&FS-IDC as a Project Development Organisation (Consultant). Furthermore, on 12.01.2011, IWAI released a Request for Proposal (RFP) for the selection of an operator for the transportation of coal through waterways. Subsequently, amendments

to the RFP dated 18.02.2011, 11.03.2011, 07.04.2011 and 14.04.2011 were issued, and the coal specification provided in the RFP was withdrawn by the amendment dated 18.02.2011. Pertinently, the RFP also comprised of the draft Tri-Partite Agreement to be entered between the Petitioner and Respondents, the draft Coal Transportation Agreement (CTA) to be entered between Respondent no.1 and the Imported Coal Suppliers (ICS) and the General Layout Plan for the purposes of the construction of the infrastructure by the respondent no.1 at the petitioner's Farakka TPP site.

5. A pre-bid meeting was held on 31.01.2011,and subsequently, vide letter dated 03.04.2011,a letter was issued by IWAI wherein it communicated the constitution of the Bid Evaluation committee comprising all the members from IWAI, NTPC, IL&FS-IDC and experts from Kolkata Port Trust (KoPT), Mormugao Port Trust (MPT) and former Secy. Ministry of Finance. Vide letter dated 15.04.2011, JITF made its bid, and on the recommendation of the IWAI vide communication letter dated 26.07.2011, Respondent no. 1 was selected as a preferred bidder and operator of the 'Project'. Pursuant to the same, a tripartite agreement (TPA) dated 11.08.2011 was entered between petitioner, respondent no.1, and IWAI for the transportation of coal through National Waterways-I to the Farakka TPP of the Petitioner as well as the construction of the Unloading Infrastructure and the Material Handling System (Project)on a Design Build Finance Operate and Transfer (DFBOT) basis and the draft Coal transportation agreement (CTA) was part of the above TPA with initials of all three parties on it.

6. Further, as per the detailed terms and conditions of the TPA, Respondent No. 1 was required to build the necessary infrastructure, namely a Coal Unloading System like jetty, grab, etc.; and a Material handling system like Conveyor Belts(compositely referred to as the Coal Unloading and Material Handling System) for transportation of imported coal from high sea (transfer points) to the Petitioner's Farakka TPP via waterways. The said infrastructure of the Coal Unloading and Material Handling System was to be completed in two phases: first in 15 months from 11.08.2011 and the second phase within 24 months from the date of signing TPA, i.e. 11.08.2011.

7. The completion of the activities in Phase I and II (completion of construction of the Material Handling and Unloading Infrastructure System at Farakka) would also mark the Commercial Operation Date or COD as defined in Article 1.1 of the TPA.

8. As per Article 2.3 of the TPA the operation period of the Coal Hauling System shall commence from the date of the Commercial Operation Date (*hereinafter called COD*) and it shall extend up to 07 years or till termination of the TPA. Therefore, at the end of 07 years or termination of TPA, the infrastructure created and owned by respondent no.1 would vest in the Petitioner at a token of Rs.1. Furthermore, if on account of default of the petitioner the contract could not be performed within the stipulated period, the petitioner will pay the amount as mentioned in the TPA i.e. the normative capital cost of the project assets (Rs. 90 crores) as per clause 14.1 (c) of the TPA. The petitioner had made several short-term contracts/agreements with different ICS to procure the required coal in order to transport the same

through the waterways to respondent no.1.Further, as per CTA, since ICS had a duty to supply the coal and respondent no.1 had a duty of unloading and transporting the coal to the Farakka plant of the petitioner at a rate not less than 12000 Metric Tons (MT)/day which respondent no.1 allegedly failed to fulfil. Therefore, disputes arose between respondent no.1 and ICS and eventually, respondent no.1 invoked separate arbitration proceedings against one of the ICS (M/s Adani Enterprise Ltd.), which was settled mutually out of court.

9. The project was divided into two parts i.e. Phase I and Phase II, which ran parallel to each other, and the timelines for these phases were supposed to be calculated from the date of execution of the TPA i.e. 11.08.2011. Therefore, as per Article 2.2(b),(c),(d) of the TPA, respondent no.1 had undertaken to complete Phase I and Phase II of the Unloading Infrastructure and Material Handling System within 24 months. Pertinently, the construction of Phase I and Phase II were to be completed within 15 months and 24 months, respectively i.e., by 10.11.2012 and 10.08.2013, respectively, but the same were only completed on 30.11.2013 and 15.06.2015, by respondent no.1.Thereafter the COD was achieved on15.06.2015. There was a delay of 385 days in Phase I and a delay of 674 days in Phase II, and, therefore, the COD was extended from its original envisaged date of 10.08.2013 to 15.06.2015. On account of the delay, after the first year of operations from 15.06.2015 to 14.06.2016, respondent no.1 issued a notice invoking arbitration against the petitioner on 15.11.2016.

PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL

10. Vide the order dated 17.01.2017, an arbitral tribunal (*hereinafter referred to as 'AT'*) was formed. Respondent no.1 filed the statement of claim on 04.03.2017 seeking damages/compensation arising out of the TPA, and along with that, Respondent no.1 also filed an application under Section 17 of the A&C Act seeking payment of Rs.158.50 Crores from the petitioner as Minimum Guaranteed Quantity (MGQ) for the first operation period, i.e. the period from 15.06.2015 till 14.06.2016. Further, on 09.03.2017, a Consultation Notice was issued by Petitioner to Respondent No.1as required under Article 12 of the TPA.

11. The Statement of Claim filed by Respondent No. 1 on 04.03.2017 is as follows:

    (i) Declaration that NTPC is responsible and liable for in delay of construction of Material Handling phases I and II, that it is entitled to claim damages towards loss of revenue in the sum of Rs. 417,32,74,285/- and Rs.6,75,26,138/- towards expenses incurred on account of deviation in the tender plan. (approximately 424 crores);
    (ii) Declaration that the Levy of liquidated damages by NTPC of Rs. 4.5 crores is unenforceable.
    (iii) Claim of Rs. 158,50,05,003/- towards Minimum Guaranteed Quantity amount ("MGQ") during the first operation period.
    (iv) Reimbursement of Rs. 42,93,914/- paid to Central Inland Fisheries Research Institute ("CIFRI").
    (v) Claim of Rs. 6,27,00,010/- towards Excess Wharfage.
    (vi) Claim for interest on delayed payment amounting to Rs. 124,76,54,070/-.

12. Thereafter, on 24.07.2017, the petitioner issued a termination notice to respondent no. 1 under Article 13 of the TPA in pursuance of the Consultation Notice dated 09.03.2017. Thereafter on 26.05.2017, the

Statement of Defence/ Counter Claims were filed by Petitioner. The learned AT passed an order on the section 17 application of respondent no.1vide its order dated 15.07.2017, directing the petitioners to make the payment of the MGQ amount as claimed to respondent no.1 against a bank guarantee of the equivalent amount. Subsequently, on 04.09.2017, respondent no.1 filed two more applications under Section 17, therefore seeking payment of Second Year MGQ amount of Rs.197.81 Crore and stay of operation of the termination notice dated 24.07.2017.

13. Thereafter on 05.09.2017 and 16.09.2017, an application under Section 28(3) of the A&C Act was filed on behalf of respondent no.1 seeking amendment of its claims. Respondent no.1 sought the addition of a claim for the Second Year MGQ amount of Rs.197.81 Crore and additional wharfage. Respondent no.1 also sought a claim for damages amounting to Rs.1108.93 Crores for the remaining five operation periods on account of the alleged illegal termination of the TPA.

14. Respondent no.1 had again filed an application under section 17, on 11.08.2017, wherein it sought restraint against the petitioner in encashing the Performance Bank Guarantee dated 08.08.2014. The Arbitral tribunal issued an *ex-parte* direction, restraining the petitioner from invoking the Performance Bank Guarantee, vide its order dated 12.08.2017. Furthermore, vide its common order dated 20.12.2017, the Arbitral Tribunal held that the termination notice is to be stayed till the final adjudication of the dispute and directed the petitioner payment of Rs.197.80 Crore as the Second MGQ amount and allowed the amendment of statement of claims.

15. On 14.02.2018, the petitioner made a payment of Rs.158.50 Crore for the first MGQ and on 20.08.2018, the petitioner made a payment of Rs.198 Crore for the second MGQ. Respondent no.1 had furnished a Bank Guarantee for both MGQs of the equivalent amount. Subsequently,vide letter dated 28.06.2018, the petitioner proposed settlement terms, offering to extend the operational period for an additional seven years subject to mutual withdrawal of claims. This proposal was rejected by respondent No. 1.

16. The learned AT passed the impugned award dated 27.01.2019 and awarded damages amounting to ₹1891 Crores to JITF/Respondent No. 1, including ₹417.32 Crores for pre-COD MGQ shortfalls and ₹1108.93 Crores for alleged wrongful termination of the TPA. The present award has been challenged by the petitioner by way of present petition predominantly on the following grounds:-

    I. The impugned award is bad for the non-joinder of a proper and necessary party, i.e. IWAI.

    II. The damages granted by learned AT for the Pre-COD period are in gross violation of Section 73/74 of the Contract Act, 1872.

    III. The AT granted damages to respondent no.1 even though the TPA provides for a 'No Damages' clause in the Pre-COD period.

    IV. Further, the damages awarded to the respondent no. 1 were calculated by the learned AT from the wrong date.

    V. The learned AT further erred in granting damages of Rs. 1108 crores for alleged wrongful termination of TPA by NTPC

without JITF having to perform the contract nor taking into account the necessary expenditure that would have been incurred for the remaining operation period. This is a patent error. Further, the learned AT has essentially made a determinable contract into a non-determinable contract.

VI. The minimum guaranteed quantity (MGQ) amount under article 7.3 of TPA has been granted for 2 years (Post COD-Operation Phase) amounting to approx. Rs. 356 crore).

B. <u>SUBMISSIONS ON BEHALF OF PETITIONER</u>

17. Sh. Tushar Mehta, learned Solicitor General, appearing for the petitioner, submitted that the learned AT had erroneously awarded damages to the tune of nearly 1891 Crores along with taxes against the claims of respondent no.1/claimant and had summarily rejected the entire counterclaims of the petitioner. Learned SG submitted that the Award is contrary to the provisions of the TPA dated 11.08.2011 and is also contrary to the established legal principles of law and the award also suffers from Wednesbury Arbitrariness. Learned SG submitted that the proceedings are completely contrary to the established principles as enshrined in section 28(3) of the A&C Act and the tribunal has virtually re-written the terms of the contract. It was submitted that the tribunal had fastened a liability of Rs. 417 Crores despite the existence of a "no damages clause".

18. Learned SG submitted that Article 14.1(c) provides for a maximum of Rs. 90 Crore in the case of termination and the tribunal has wrongly granted Rs. 1108 Crores as damages for termination of the contract by

the petitioner, which is neither "reasonable" nor "genuine pre-estimate" nor proved. JITF has been awarded and NTPC has been penalized to the tune of Rs.1108/- for termination of the contract without JITF having to perform the contract and without taking into consideration the necessary expenditure, which would have been incurred for the remaining operation period.

19. Learned SG submitted that the learned AT did not appreciate the delayed performance by JITF, in consequence of which it is not entitled to any MGQ payment in accordance with the principles enunciated in Section 51-53 of the Indian Contract Act, 1872. Even the interest has been on a monthly compounding rate rather than simple interest as generally calculated which is again contrary to Section 28(3) of the A&C Act.

20. Learned SG submitted that the Compensation of Rs. 417,32,74,285/- under claim 1 has been wrongly awarded to the respondents, without the claimants proving it, making the award perverse. It is submitted that the learned AT has mechanically relied on the figures given by the respondent, in violation of Section 73 of the Indian Contract Act. Learned SG submitted that no adjudication on the quantum of damages was done by learned AT. It was also submitted that there is a lack of adjudication as well as the absence of reasoning as to how and why the figure of Rs.4,24,08,00,423/- as claimed by the claimant is accepted as it is in respect of Claim No.1.

21. Learned SG submitted that adjudication of the quantum of damages is a must for a valid arbitral award, failing which, the award becomes amenable to challenge under Section 34 of the A&C Act. Learned SG

submitted that the tribunal took the figure of Rs.4,17,32,47,285/- claimed by the respondent as the virtual figure of damages without adjudication. Learned SG also submitted that the "project cost" includes broadly three components- (i) The cost incurred for installation of respective phases; (ii) The profit for which the respondent claimant would have been entitled; and (iii) The operational cost/running expenses while transporting coal at the "unloading and material handling system'. This would also include the fuel prices for running the entire system, running barges, running transshippers, cranes, expenses with respect to employees, etc.

22. It is submitted by the learned SG that it is an admitted position that what is being claimed are damages of a hypothetical nature and is being claimed as a loss of profit. Learned SG submitted that admittedly, there were no operational expenses or running costs incurred, so there can be no question of such hypothetical loss of profit.

23. Learned SG further submitted that the learned AT has granted damages in contravention of Article 3.2(b) of TPA, which provides for only extension of COD in case of any delay in the construction period of Phase-I and Phase-II, as there is no damages clause in the TPA, as the clause specifically excludes the claim or grant of any damages for the pre-COD period.

24. Learned SG submitted that the fact that the COD date was shifted from the originally stipulated 10.08.2013 to 15.06.2015 is undisputed. Hence, the respondent got two years, i.e., from 30.11.2013 (date of completion of Phase-I) to 15.06.2015 for transporting 2 MMTP/A of coal as against the original period of 9 months stipulated in the contract

(Phase 2). This thus helped the respondent claimant in earning more profit as against the contractual period of 24 months, 15 months, 9 months and this aspect has not been given any consideration.

25. Learned SG submitted that in Para 83 of the award, the learned AT records that in an "ideal situation" JITF will not be entitled to compensation, but then relates the pre-COD obligations to the post-COD termination of the TPA and granted damages. It is submitted that the learned AT misread Article 3.2 of TPA, as the provision is not about extending the COD period. The COD is a milestone, and the period that starts from the COD date runs upto 7 years is a time duration. This relation drawn between the pre-COD obligations to post-COD termination was beyond the contractual terms. The termination took place after more than two years of achieving the extended COD on 24.07.2017, and therefore, the connection between the two was baseless.

26. Learned SG had relied upon ***Ch. Ramalinga Reddy v. Superintending Engineer and Anr***. *(1999) 9 SCC 610);* ***General Manager v. Sarvesh Chopra*** *2002 (4) SCC 5****;*** **and** ***Union of India v. Chandalavada Gopalkrishna Murthy and Ors.*** *[(2010) 14 SCC 633]*.

27. Learned SG submitted that from para 154 to 163 of the Award, out of the total delay of 674 days in the declaration of COD, the delay of 251 days was held not attributable to NTPC hence, damages for this delay could not have been granted to the respondent. However, the amount claimed for the 251 days was also included, while passing the final award reflecting total non-application of mind. Learned SG invited the attention of the court to the various components of the delay of 674

days and the findings of the tribunal holding the 251-days delay not attributable to NTPC. Learned SG submitted that the learned AT gave no intelligible reasoning for counting the period of 251 days or for holding that the period of delay was not overlapping. It was submitted that the work of Phase I and Phase II was required to be executed simultaneously therefore, the delay would obviously overlap.

28. Learned SG submitted that claim No. 2 of Respondent No. 1 was that the petitioner company breached its obligations to provide MGQ at the High Seas Transfer Point for 1st and 2nd year of the operational period and thus, Respondent no. 1 was entitled to amount of Rs. 1,58,50,05,003/- towards MGQ amount for 1st year operation period and Rs. 197,81,13,512/- towards MGQ amount for 2nd year operation period-in accordance with Article 7.3 of TPA.

29. Learned SG submitted that according to the learned AT principle of reciprocal promise does not support Petitioner's case as petitioner has to first supply 3 MMT of coal per annum and since it failed to supply the coal every year, respondent no. 1 has no obligation to adhere to unloading rate and transportation time as specified in the contract. However, the finding was wrong because as per TPA, 3 MMT is to be supplied over one year period on Fairly Evenly Spread Basis (*'FESB'*). It was also submitted that after supply of coal through 1st Ocean Going Vessesl (*hereinafter 'OGV'*), it was the reciprocal obligation of respondent no. 1 to unload the OGV at the specified rate of 12000MT/day and evacuate the Transshipper by transporting coal to thermal Power Plant through barges within 5 days. The interpretation of the learned AT on reciprocal obligation is irrational and

unreasonable and it is not even a possible interpretation and even the contract required it to be supplied over entire year on fairly evenly spread basis.

30. Learned SG submitted that after the first year of operation, the respondents raised an annual statement dated 23.06.2016 alleging that the quantity made available by the petitioner was 0.746 MMT and learned AT vide impugned award granted the entire 158 crore to the respondent illegally and wrongly.

31. Learned SG submitted that Clause 7.1 of the contract provides that the coal was to be provided on a FESB, and the petitioner was to furnish ICS a quarterly schedule of quantity with a tentative month-wise breakup, proposed to be delivered at the power station. ICS and JITF were to coordinate and distribute the quarterly coal supplied in all the months of a quarter. It was submitted that the learned AT's finding that NTPC failed to provide coal because they did not have coal contracts in place is contrary to the record.

32. Learned SG submitted that the TPA does not stipulate as to when the coal import order is to be placed by NTPC and JITF has almost admitted in para 107 of the award that arrangements NTPC made for supply of coal was not relevant, yet the learned AT imported their own understanding amounting to re-writing of contract and holding NTPC did not have 3 MMT of coal. Learned SG submitted that while there was an ample evidence that JITF on several occasions, requested NTPC to reschedule or divert the OGVs as it was not able to cope with the rate of supply of coal by NTPC.

33. Learned SG submitted that to use the service clause 7.3, there must be a shortfall quantity due to NTPC's fault, while record reflects that the default was not attributable to NTPC. Learned SG submitted that it was on account of non-performance by JITF, as firstly, there were contractual arrangements with the ICS, and secondly, unloading and transportation by respondent no.1 was not @12000 MT per day within 5 days respectively. It was submitted that the average unloading rate was 8300 MT per day and the minimum and maximum time taken for coal transportation was 34 days and 163 days. Thus, it is clear that the respondent failed to perform their reciprocal obligation to unload the coal from the OGV at the specified rate of 12000 MT/day and transport the same within 5 days to Farakka and thus having failed to fulfil their reciprocal obligation, the respondent cannot claim the performance of supply of 3MMT coal from petitioner.

34. Learned SG submitted that in NTPC's Chairman's letter dated 17.05.2017 to IWAI, it is clearly mentioned that they had 5.4 lakh MT of coal already contracted and supplied and with the performance of JITF, NTPC was not sure when the quantity would be delivered to Farakka. Learned SG further submitted that there was not a single email/letter/correspondence in the first operation period that they were waiting for coal from NTPC or ICS. Learned SG submitted that the respondent's own witness affidavit dated 28.03.2018 stated delays which were not attributable to NTPC. Learned SG submitted that the Letter dated 13.07.2016 reflected that at the end of the first operation year, there was a balance coal of 0.8 MMT remaining to be transported. Further, in the first operation period, the MOMs show admission by the

respondent of their delays, however, none of this was considered while attributing all the delays to NTPC.

35. Learned SG submitted that in the first year of operation, NTPC had coal contracts for 1.55 MMT of coal to Farrakka because the Environmental Clearance (EC) was granted for only 1.5 MMT for the subject project, and therefore, it was a statutory obligation for which no separate amendment to TPA was necessary. Thus, the finding that MGQ for the first operation year was to be calculated on 3 MMT and not 1.5 MMT is grossly perverse. Reliance has been placed on ***Bombay Environmental Action Group and Ors. v. The State of Maharashtra and Ors.*** (2005 (6) Bom CR 574).

36. Learned SG submitted that as per learned AT, the Petitioner, being the project proponent was liable to take EC which is totally perverse, as the 'Project' was not the Farakka Power Plant and therefore, there was no question of NTPC being the project proponent in this case, responsible for obtaining EC. It was further submitted that as per Articles 3.1(c) read with Article 7.1(c)(vii), all permits and clearances related to the project were the responsibility of the Respondent No.1. Learned SG submitted that the owner of the transportation project till the end of the 7-year period of operation after COD, was the Respondent No.1only and not NTPC and hence, Respondent No.1 was responsible for obtaining the environmental clearance. NTPC vide letter dated 25.02.2014 and 30.04.2014 reminded the Respondent No.1 that it was responsible for obtaining the EC for Coal Transportation through Inland Waterways. Learned SG submitted that the consent to operate the Project dated 16.09.2016 taken by Respondent No.1 showed that

they were the project proponent and Petitioner's obligations were limited to facilitating such clearances.

37. Learned SG submitted that the Respondents were duty-bound to transport only 1.5 MMTPA of imported coal in view of the conditions imposed by MOEF, as per Article 3.1(c) (ii) of TPA. NTPC, vide letter dated 28.10.2015, informed JITF about the restriction imposed by MOEF and to provide only 1.5 MMT coal during the first operation period to which no objection was raised. MOEF imposed the restriction on transportation of coal through waterways, that is, from 3 MMT to 1.5 MMT. Thus, the calculation of damages on the basis of 3 MMT of coal is perverse.

38. Learned SG submitted that claim 1 of Respondent no 1 for damages for the balance five years on the ground of wrongful termination to JITF for the huge sum of (Rs.11,08,93,05,000/- along with applicable taxes) being "pre-estimated genuine amount of damages", is totally wrong, erroneous and beyond the terms of the contract.

39. Learned SG submitted that the learned AT committed "Patent illegality" and granted a sum of Rs.11,08,93,05,000/- as a "pre-estimated genuine amount of damages" for a period of five years. It was submitted that the contract stipulated 7 years of operation period for Respondent No.1 for transportation of coal. It was the case of NTPC that due to the default of the Respondent No.1/claimant, the TPA was required to be terminated after two years of operation, i.e. on 24.07.2017 and there was no operation for the remaining five years.

40. Learned SG submitted that the award for damages is covered by the provisions of sections 73 and 74 of the Indian Contract Act, 1872.

Section 73 talks about a contingency in which no amount of damages is pre-estimated or pre-fixed in the contract, nor does there exist any stipulation in the contract as to how the damages are to be calculated. Learned SG submitted that in the absence of "pre-estimated" or "pre-fixed" damages under the contract or any stipulation, the contracting party claiming damages, will have to prove the actual damages by leading evidence and the Court/Tribunal, on evaluation and adjudication of such exercise, will have to examine and record the finding quantifying a particular amount.It was also submitted that Section 74 provides provision for "pre-fixed" or "pre-estimated" damages which are known as "liquidated damages". Learned SG submitted that when Section 74 is attracted, there is no necessity of proving damages and the damages would be awarded as per "a sum named in the contract as the amount to be paid in case of breach" or "as per the stipulation by way of a penalty" provided in the contract itself. However such amount cannot exceed the amount mentioned in the contract and has to be reasonable.

41. Learned SG submitted that Article 14.1 of TPA, there is a pre estimated compensation for breach of contract by either party. Article 14(b) is for the termination due to the operator's event of default, in which case the Petitioner shall forfeit the performance security submitted by the operator. Article 14.1(c) is for the termination due to Petitioner's default. In the impugned award, the learned AT has concluded that the breach was not on the part of the operator but on the part of Petitioner. Learned SG submitted that the learned AT was bound to award the compensation as per specific clause 14.1(c) and not as per Article 7.3,

which is applicable for the shortfall in supply quantity during the operation period only. Article 1.4 of TPA states that between two articles of this agreement, the provision of specific articles relevant to the issue under consideration shall prevail. Thus, Article 14 will prevail and not Article 7.3 of TPA and the AT by awarding compensation for breach under Article 7.3 has travelled beyond its jurisdiction and its findings are patently illegal.

42. Learned SG submitted that if the operator seeks damages due to an alleged wrong termination, it will have to establish, by leading cogent documentary and oral evidence, the exact amount of damages it seeks under Section 73 of the Contract Act which has not been done in the present case.

43. Reliance has been placed upon ***Fateh Chand v. Balkishan Das***, *1963 AIR 1405, 1964 SCR (1) 515;* ***Maula Bux v. Union Of India***, *1970 SCR (1) 928;* ***Oil &Natural Gas Corporation Ltd. v. SAW Pipes Ltd***, *AIR 2003 SC 2629;* ***Kailash Nath Associates v. Delhi Development Authority and Anr.*** *((2015) 4 SCC 136).*

44. Learned SG submitted that the clause incorporating liquidated damages in favour of Petitioner is clause 8.8. It was further submitted that there is a separate chapter in TPA under the heading "Compensation for Breach of Agreement" which is contained in Article 14 of the TPA. Learned SG submitted that these provisions do not contain any pre-estimated liquidated damages for the operator/ Respondent No.1/claimant nor is there any stipulated method of calculation. Learned SG submitted that thus, the Respondent No.1 could have sought damages only under Section 73 of the Contract Act and no

evidence is led by the Respondent No.1/claimant for computing damages under Section 73 of the Contract Act.

45. Learned SG submitted that the learned AT travelled beyond the terms of TPA and awarded damages based on Clause 7.3 of TPA, which only contemplates provision, necessarily pre-supposing the actual operation of the contract and is merely a “minimum guarantee clause” only during the actual operation of the contract.

46. Learned SG submitted that Clause 7.3 comes to an end with the termination of the contract. The learned AT has construed clause 7.3 as a liquidated damages clause and presumed its survival even post termination of the contract and has mechanically awarded the sum of Rs.11,08,93,05,000/- as “pre-estimated genuine amount of damages” relying upon clause 7.3 and treating the case under Section 74 of the Contract Act which is patently illegal. Learned SG submitted that Events of Defaults under the TPA (Clause 12.2) have to be "underlying" i.e. those defaults which are central, fundamental and go to the root of the matter. The underlying events of defaults by the respondent were- poor performance in unloading the coal and huge delay in transportation of the same. Once a consultation notice dated 09.03.2017 was sent highlighting the underlying events of defaults, it follows naturally that any further failure of the Respondent no.1 to unload coal from a specific vessel subsequent to the issuance of the Consultation Notice would not warrant an issuance of a "fresh" Consultation Notice. By the same token, any mention of such a failure would not constitute a mention of a "new and different issue". Learned SG submitted that the finding of the learned AT that the termination

notice dated 24.07.2017 is invalid, is contrary to the provisions of TPA and illegal. Learned SG submitted that the grounds adduced by the tribunal are (i) Petitioner failed to follow the termination procedure provided under Article 13 of TPA, (ii) that new and different issues were raised in the termination notice regarding performance relating to coal handling of two vessels and (iii) that concurrence of IWAI was not taken, are contrary to the terms of TPA.

47. Learned SG submitted that the learned AT failed to distinguish the difference between the underlying event of defaults and the individual instances of default. The overall delay and default which permitted Petitioner to terminate the contract was never rectified. The consultation notice was never withdrawn or waived of by Petitioner and in fact, prior to the issuance of the termination notice, Petitioner had once again highlighted the underlying defaults of the respondent vide its letter dated 23.06.2017 and 06.07.2017. Thus, the procedure provided in TPA was duly followed by the petitioner while issuing the termination notice. The acceptance of MV Vishwa Preeti and extension of CTA by JITF/ Respondent No.1 is in pursuance of Article 12.5, which puts an obligation that the parties shall continue to perform their respective obligations under this agreement. Learned SG submitted that it cannot be presumed that it was towards remedy of underlying default defects by JITF/ Respondent No.1, as brought out by NTPC/Petitioner in the consultation notice.

48. Learned SG submitted that there is no explicit or implicit requirement or condition in the TPA that the termination of the contract by either party needs the consultation of IWAI, and such ground is outside the

contours of TPA Learned SG submitted that the award dated 27.01.2019 is inherently perverse and patently illegal. In addition, there is a violation of public policy as envisaged in Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, as the terms of the TPA have been indiscriminately re-written and perverse findings have been recorded in the award. Learned SG submitted that the documents and evidence placed before the learned AT have been sidestepped, and damages awarded are neither proved nor "reasonable" nor "genuine pre-estimate" and are liable to be set aside.

49. Reliance has been placed upon ***PSA Sical Terminals Private Limited v. Board of Trustees of VO Chidambaram Port Trust Tuticorin and Ors.****: (2021) SCC OnLine SC 508;* ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*** *(2019) 20 SCC 1;* ***Union of India v. Jindal Rail Infrastructure Limited****, O.M.P. (COMM) 227/2019;* ***BCCI v. Deccan Chronicles Holdings Ltd.,*** *2021 SCC OnLine Bom 834;* ***NHAI v. M. Hakeem &Anr.*** *SLP (C) No. 13020 of 2020.*

C) SUBMISSIONS ON BEHALF OF THE RESPONDENTS

50. Sh. Ravi Shankar Prasad, learned senior counsel for Respondent No.1, submitted that the award dated 27.01.2019 is a unanimous award pronounced by the learned AT and is a well-reasoned award and does not suffer from any illegality or perversity. Learned senior counsel submitted that it is neither unfair nor in conflict with the public policy of India and does not warrant any interference of this Court under Section 34 of the A&C Act.

51. Learned senior counsel submitted that after the amendment to Section 34 of the A&C Act, the scope of judicial interference is very limited and narrow, re-appreciation of evidence is not permissible under Section 34. Reliance has been placed upon ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI 2019*** (15) SCC 131; ***PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin*** 2021 SCC Online SC 508).

52. Learned senior counsel submitted that in ***Ssangyong Engineering*** (supra), the Supreme Court *inter alia* held that the proposed 2015 amendments in the 1996 Act are based on the presumption that the terms, such as, "fundamental policy of Indian Law" or conflict with "most basic notions of morality and justice" would not be widely construed. It was submitted that an arbitral award may not be interfered with if the view taken by the Arbitrator is a plausible view ***Associate Builders v. DDA*** (2015) 3 SCC 49. Learned senior counsel submitted that Section 28(3) of the Act has also been amended to bring it in line with this judgment. It was submitted that the construction of the terms of the contract is for the arbitrator to decide unless such a construction is not a plausible one ***HRD Corporation v. GAIL (India) Limited*** (2018) 12 SCC 471.

53. Learned senior counsel submitted that proviso to Section 34 (2A) of the A&C Act says that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. Reliance has been placed upon ***OPG Power Generation Ltd. v. Enexio Power Cooling solutions India Pvt. Ltd. and Anr.*** (2024) SCC Online SC 2600. It was submitted that the Supreme Court *inter*

alia held that by insertion of sub section (2A) in Section 34 an additional ground for annulment of domestic learned AT, has been provided. However, this power of the Court has been circumscribed by the proviso.

54. Learned senior counsel submitted that in ***OPG Power Generation*** (supra), the Court *inter alia* held that Section 34 of the A&C Act cannot be equated with the normal appellate jurisdiction, and, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their disputes adjudicated by an alternative forum as provided under the law. Learned senior counsel submitted that the petitioner is not allowed to take new pleas not agitated before the arbitrator. Learned senior counsel submitted that learned AT has categorically returned its findings on all vital aspects of the matter agitated by NTPC. It was submitted that the learned AT in Para 30(i) and 30(ii) of the award has categorically rejected the NTPC's argument mandatorily reading of clauses of MOU into clauses of TPA.

55. Learned senior counsel submitted that the obligation as to the Environment Clearance has been dealt by learned AT in para 30(iv) of the award and it was *inter alia* held that NTPC was the project proponent in view of the admissions made by NTPC in its rejoinder to the reply filed by JITF and also in consideration of the law of the land. NTPC in view of their own admission in pleading is *estopped* from raising this plea again before this Court and further NTPC has failed to show how the findings of the learned AT are perverse. The learned AT in para 30(v) of the award has *inter alia* held that NTPC's stand is without merit and contrary to the true interpretation of Article 7.3 of

TPA, and NTPC cannot wriggle out of his own obligations under the TPA by raising unreliable pleas and contentions.

56. Ld. senior counsel submitted that learned AT in para 33 of the award recorded representation of NTPC and Inland Waterways Authority of India (IWAI), wherein NTPC and IWAI *reassured the bidders that with respect to the operator, NTPC is undertaking a minimum guaranteed coal obligation as provided in Clause 7.3 and in event of the failure to deliver coal, breach the minimum guaranteed coal obligation, NTPC will make the payment in accordance with Clause 7.3.* Learned senior counsel submitted that the NTPC has failed to demonstrate that how the interpretation of the learned AT is perverse.

57. It was submitted that learned AT has returned its findings dealing with NTPC's failure to make available the imported coal and *inter alia* held that " *...The TPA is very clear and unambiguous in this regard as the project is only related to NTPC's Farakka Plant and NTPC was to make available imported coal at the transfer point. Article 7.1 (a)(iii) and 7.3 of the TPA, it is NTPCs' obligation to ensure delivery of imported coal (through ICS) at Transfer Point on Fairly Evenly Spread (FES) basis. Therefore, as per TPA, NTPC has to positively make available imported coal at the transfer point for its use at its Farakka Plant...".*

58. It was submitted that in Para 128 of the Award, the learned AT has categorically *inter alia* held that *"NTPC during the entire Arbitration proceedings, failed to show any evidence that it has actually placed order for imported coals for a particular year to be transported through inland waterways for its Farakka plant for 3 MMT. Despite*

repeated questions from the Tribunal, NTPC has not come up with any clear answer. The documents filed by NTPC like contract for supply of coal (from 2013 to 2017, NTPC entered into contracts for only 3.115 MMT of imported coal through waterways) also does not reflect that at any given year during the operation period, it has placed orders for supply of 3 MMT imported coal. In Minutes of Meeting dated 13.10.2016 between IWAI, NTPC and JITF, the NTPC admitted that it did not give 3MMTPA to JITF". It was submitted that the NTPC has failed to show any perversity to these categorical findings of the learned AT and the learned AT has rightly concluded that NTPC has breached its obligations to provide coal as per the terms of the TPA.

59. Learned senior counsel submitted that the learned AT categorically returned its findings in the Award that Article 14(c) of the TPA is not attracted in light of wrongful and illegal termination of the TPA by NTPC itself and this finding of the learned AT is a plausible one.

60. Learned senior counsel submitted that the learned AT has considered the issue based on the available pleadings and evidence held that "...*It is NTPC's case is that due to non performance of JITF, NTPC was required to re-allocate the coal and JITF even could not transport the imported coal made available to it. The chart relied by NTPC (regarding allocation of coal) to show non-performance of JITF cannot be relied by the Tribunal as the chart as available two different annexure, are self contradictory.... Based on the evidence available on record, JITF transported the quantity which was made available to it. The stand of NTPC that the coal was to be delivered within 5 days of arrival of coal at the transshipper, is against the evidence on record.*

The obligation of JITF as per Article 4. (a) (v) of the CTA as appended to TPA was that it will take reasonable efforts to deliver the coal unloaded from the OGV within 5 days of such unloading. That means, a barge, after unloading of coal from OGV should make reasonable effort to reach Farakka within 5 days of such unloading. Therefore, in the TPA or the CTA, there was no requirement that the transportation has to be completed within 5 days."

61. Learned senior counsel submitted that the chart relied on by NTPC during the arguments has already been discarded by the learned AT due to its inherent lacuna. Thus, NTPC is *estopped* from re-agitating without showing any perversity to the finding of the learned AT.

62. Learned senior counsel submitted that JITF's witness Professor Sanjay Sharma in his expert report substantiated that the total moisture in the coal and size of coal provided to the JITF was much above the Product Specification as provided in the RFP. It was also proved that the product was an outlier with respect to the specification as per the Schedule E and its handling reduced the efficiency of JITF's material handling system. Learned AT categorically stated that no allegation was put to Professor Sharma (CW-2) relating to his expert views. Effect of non cross examination is that the statement of the witness is not disputed. Reliance has been placed upon ***Muddasani Venkata Narsaiah (D) Th. Lrs. v. MuddasaniSarojna*** (2016) 12 SCC 288.

63. In respect of reciprocal promise aspect raised by the petitioner, ld. senior counsel submitted that the learned AT while dealing with NTPC's alleged case of reciprocal promise has held that "..... *as per section 52 of the Contract Act, 1872, where the order in which*

reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order. In the present contract, in view of line of obligations of the parties, NTPC's obligation to make available imported coal at transfer point is first in order and without any rider. NTPC's argument is against the provision of Section 52 of the Act.".

64. Learned senior counsel on factual matrix submitted that on 24.09.2008, an MOU was executed between NTPC and IWAI to explore the possibility of using inland waterways as a viable supplementary mode of transportation of coal for Farakka Thermal Power Plant of NTPC. Consequently, on 12.01.2011, IWAI issued a Notice Inviting Tender (NIT) and Request for Proposal (RFP) for and on behalf of NTPC, to identify and recommend an operator for unloading coal from the ocean-going vessels (OGVs) at the transfer point and transport the same through National Waterway-1 (NW-1) and deliver the coal at the stock yard of Farakka TPP. On 11.08.2011, JITF was declared as the preferred bidder and TPA was entered between NTPC, IWAI and JITF. It was submitted that this was the project of first of its kind for utilization of NW-1, and it was an Avante Garde project and of national importance.

65. Learned senior counsel submitted that terms of the TPA, JITF was liable to construct the infrastructures, including material handling system, unloading infrastructure at its cost on the land provided by NTPC and also arrange the Transshipment Infrastructure including Barges at its own cost. Ld. senior counsel submitted that it is an

admitted position that in this regard the total capital cost of deployment on the part of JITF was around INR 625 Crores.

66. Learned senior counsel submitted that as observed in Para 31 and 32 of the award, the entire cost was to be deployed by the Operator i.e. JITF. while IWAI will get inland waterways developed free of cost, generate revenue and at the end of 7 years get a fully developed unloading infrastructure and material handling system including conveyor belts for movement of coal at its Farakka TPP at Rs.1.

67. Learned senior counsel submitted that the operator JITF would recover the capital cost, finance cost as well as the operation cost deployed/incurred (including to be deployed/incurred) from the revenue to be earned from the transportation of coal, and if the coal is not made available the same would be recovered as per provisions of Article 7.3 of the TPA.

68. Learned senior counsel submitted that in para 32 of the award, it has also been noted by the learned AT that *"the Operator's revenue from the operation was always at the mercy of NTPC as NTPC was to make available coal at the Transfer Point to JITF (through its Imported Coal Supplier)".*

69. Learned senior counsel submitted that the TPA was drafted by NTPC and the provisions of the Minimum Guaranteed Quantity (MGQ) contemplated under Article 7.3 of the TPA were on their own volition to assure the Operator that NTPC will utilize the project for 7 years from Commercial Operation Date ("COD") and in that way it will recover its investments along with reasonable profit. It was submitted that NTPC in the pre-bidding, reassured the bidders (including JITF)

about its obligation towards MGQ and in case of non-fulfilment of MGQ provision by NTPC, Article 7.3 will be triggered to compensate the Operator. Article 7.3 was the corner stone of agreement between the parties and was inserted towards the commercial trust.

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

71. Learned senior counsel submitted that as per Article 7.1 (a)(i) and ii) of TPA NTPC, during the pre-COD stage was liable to utilize the project for transportation of 2 MMTPA of imported Coal and for the post-COD stage, the MGQ was 3MMTPA of imported Coal. But NTPC failed to perform its obligations provided under Article 7.1(a)(i) and (ii) of TPA. Learned senior counsel submitted that there is no document that has been placed on record by NTPC to prove that NTPC ever floated a tender or ordered or arranged for 3 MMTPA imported coal at the transfer point on any year on FESB basis (post COD). The last tender on record put by NTPC was of February 2015, and in that also only 0.21 MMTPA coal seems to be provisioned for the Farakka plant.

72. Learned senior counsel submitted that NTPC, despite its own fault wrongly terminated the TPA on 24.07.2017. It has been noted by the learned AT in Para 147, "*It is clear from the Annual Statement of the NTPC that NTPC itself has stopped the importing of the coal at least from the financial year 2016-17.*

73. Learned senior counsel invited the attention of the Court that the learned AT in para 170 drew attention to the letter dated 17.05.2017 of the Chairman and MD of NTPC where it was stated that NTPC has stopped all actions for procurement of coal, and the learned Tribunal rightly came to the conclusion that the termination of the TPA were not for the fault of JITF but based on mala fide reasons.

74. Learned senior counsel submitted that evidently, NTPC stopped the procurement intentionally for its own monetary benefit (NTPC's own Annual Statement for the year 2016-17 notes that during 2016-17 NTPC imported 1.09 MMT of coal and by reducing coal import by 85%, NTPC has saved more than INR 8000 Crores in that financial year) and wrongfully terminated the TPA. Learned AT on deducing the termination to be illegal and allowing the claim of JITF towards remaining years of MGQ also granted an opportunity to NTPC to utilize the project for the remaining period of 7 years, but NTPC on its own accord did not avail the opportunity.

75. Learned senior counsel submitted that the payment mechanism under the TPA and Coal Transportation Agreement (CTA) was such that JITF would get the return on its investment only through the payments made by NTPC's Imported Coal Supplier (ICS) (for transportation of the actual quantity delivered at Farakka TPP) and the MGQ Amount payable by NTPC (in case of Shortfall Quantity). Article 7.3 of TPA that provides MGQ of 3 MMTPA was not subject to any conditions precedent or conditions subsequent, save the COD. In case coal is not made available by NTPC for transport and transshipment, it has become a liquidated damages case.

76. Learned senior counsel submitted that as per TPA, COD means the date JITF receives the completion certificate. JITF achieved COD on 15.06.2015 and NTPC after due diligence issued the Completion Certificate on 19.08.2015 w.e.f. 15.06.2015. The Completion Certificate was issued by NTPC without any demur. The certificate meant that JITF had successfully established all the material handling system and unloading infrastructure. NTPC ought to be *estopped* from arguing that JITF was not having the requisite infrastructure to transport imported coal at this belated stage. It was submitted that if NTPC certified the COD, then JITF is entitled to get the MGQ amount for the entire period i.e., 7 years from the date of COD.

77. Learned senior counsel submitted that the learned AT has rightly rejected the testimony of the petitioner's witnesses and has found JITF's witnesses reliable, most probable, and unimpeachable in the facts and circumstances. The credibility of the expert witness (C-2) of JITF could not be punctured by NTPC.

78. In respect of Claim No. 1, ld. senior counsel submitted that the first part of JITF's claim was related to NTPC's failure to perform its obligation under Article 7.1 (a)(i) of the TPA. In this regard, JITF claimed a sum of Rs. 417,32,74,285/- for quantity of coal not provided by NTPC during the period of Phase I. The Second part of the Claim was for an amount of Rs. 6,75,26,138/- for the costs and expenses incurred by JITF due to delays committed by NTPC including deviation from the tender plan.

79. In respect of Claim No. 1, Ld. senior counsel submitted that NTPC delayed in handing over the land and right of way (128 days) delayed

in providing land reference points/coordinates (101 days), delayed in approval for removal of the old pump house (133 days) delayed in removing the live and underground electrical cables and pipelines (116 days).

80. Learned senior counsel submitted that NTPC is wrong in its argument that the tribunal despite finding certain delays that were not attributable to NTPC, did not make any proportionate deduction from the claim amount. It was submitted that in fact, for the second part of the Claim No. 1, which is arising out of delay events, the learned AT based on its findings on delay, has reduced the claim of JITF and out of the total claim of Rs. 6,75,26,138/- it awarded an amount of Rs.1,83,22,995/- only. Hence it can be seen that NTPC's arguments are contrary to records and are liable to be rejected at threshold.

81. Learned senior counsel further submitted that NTPC is wrong in its arguments that Phase1 and Phase II were to be conducted simultaneously. TPA separately provides and defines Phase I and Phase II. Even during the construction, NTPC never asked JITF to begin the construction simultaneously. Learned Tribunal could not have gone beyond the terms of TPA and therefore, could not agree with the stand of NTPC. This issue has been dealt by the learned AT in detail in its Award and it is not open for re-appreciation by court under Section 34 of the Arbitration and Conciliation Act, 1996. NTPC did not agitate before the learned AT that claim for damages of JITF is contrary to Article 3.2(b) of the TPA.

82. Learned senior counsel further submitted that if a plea is available, it has to be raised by the party at an appropriate stage in accordance with

law and the party would be precluded from raising such plea at a later stage to ensure that no prejudice is caused to the other party and it does not go against the natural principles of justice. Therefore, objection of NTPC (which was not raised by NTPC before the learned AT) that Article 3.2(b) of the TPA states that in case of delay in Phase I/II activities, the only recourse available to the parties is the extension of COD without any penalty or claim for damages of JITF is contrary to Article 3.2(b) of the TPA (Pg, 121, JITF CC), is devoid of any merits and does not warrant indulgence of this Hon'ble Court.

83. Learned senior counsel further submitted that it was in fact JITF that placed reliance on Article 3.2(b) and Article 7.1(a)(i) to substantiate the first part of Claim No. 1. Learned AT in Para 83 of Award (Pg. 428, JITF CC), based on evidence held that JITF was ready with transhipper from 20.02.2013 and it was an obligation of NTPC to provide 2 MMTPA of imported Coal with effect from 19.02.2013 (in case NTPC did not delay the construction phase). Learned senior counsel submitted that during Phase 1, NTPC failed to provide 2 MMTPA of imported Coal as per Article 7.1(a)(i) of the TPA. It was submitted that learned AT has correctly interpreted Article 3.2(b) of the TPA, and NTPC has failed to show as to how such an interpretation is perverse. The extension of COD (as contemplated in Article 3.2(b) of the TPA) consequently extends the time period of Phase1 and therefore, NTPC's obligation to provide 2 MMTPA of imported coal during Phase 1 will also get extended suitably. Therefore, in view of the admitted fact that NTPC failed to provide 2 MMTPA of imported coal during the Phase 1

period (i.e., for the period from 19.02.2013 to 14.06.2015), JITF is entitled to the first part of Claim No. 1.

84. In respect of the Computation of Claim No.l towards the Pre-COD period, learned senior counsel submitted that JITF provided the details of the computation of its claim for the Pre-COD period in the Statement of Claim. The Evidence Affidavit of JITF's witness i.e., CW-1 before the Arbitral Proceedings, provided the details of the calculations of the damages computed by the said witness along with the finance team of JITF. Learned senior counsel submitted that such computations were not controverted by NTPC and learned AT, at Para 22 of the award rightly held that CW-1's disposition has not been challenged by NTPC on any aspect. Learned senior counsel submitted that uncontroverted evidence cannot be challenged subsequently therefore, in view of the uncontroverted evidence of JITF, which has been relied upon by the learned AT, no fault can be found with the findings returned by the learned AT and the learned AT has rightly awarded damages to JITF for the pre-COD period.

85. Learned senior counsel submitted that it has rightly been held by the tribunal that it was NTPC's obligation under Article 7. 1 (a)(i) of the TPA to provide JITF under 2 MMTPA of imported coal for the period commencing from 19.02.2013 to 14.06.2015, totalling to 46,37,302 MT, against which NTPC provided only 8,42,829 MT to JITF. Learned senior counsel submitted that JITF'S Witness (CW-1) computed the first part of the claim only for the balance quantity of coal (i.e, the difference between 46,37,302 MI and 8,42,829 MT multiplying the same with the rate as provided in the TPA). CW-1 in Para 49 of his

Evidence Affidavit relied on the Chart, which provided the details of the computation qua this claim and the said chart remained unchallenged during the entire Arbitral proceedings including cross-examination of CW-1.

86. Learned senior counsel submitted that learned AT has correctly held that as per provisions of TPA, JITF is entitled to an amount of Rs. 417,32,74,285/-, and the computation remained uncontroverted during the Arbitral proceedings.

87. In respect of Claim No. 3 and 3A learned senior counsel submitted that NTPC breached its obligation to provide imported coal at the Transfer Point for the First and Second Year of the Operation Period and JITF is entitled to Rs. 158,50,05,003/- towards MGQ amount for the First Year Operation Period and Rs. 197,81,13,512/- towards MGQ Amount for Second Year Operation Period.

88. It has been submitted that Claim No. 3 and 3A of JITF is arising out of NTPC's failure to provide MGQ in the First and Second year of Operation and consequently, JITF's entitlement for MGQ Amount for these two years. Learned AT has provided its detailed finding regarding this Claim in Para 87 - 151 of the Award. Learned senior counsel submitted that NTPC's arguments are beyond the scope of Section 34 of the A&C Act and means re-appreciation of evidence, which is impermissible.

89. Learned senior counsel submitted that from 2013 to 2017 NTPC entered into contracts only for 3.115 MMT of imported coal through waterways, whereas in the first two years of operation, it was NTPC's obligation to provide 6 MMTPA of imported Coal at the transfer point.

The last Tender issued by NTPC was in February 2015, and no tender was issued after COD, i.e. after 15.06.2015.

90. Learned senior counsel submitted that no document has been placed on record by NTPC to show that NTPC ever floated a tender or ordered or arranged 3 MMT imported coal at a transfer point at any year on an FES basis as also observed by the learned AT in Para 148 of the award. The last tender which is on record put by NTPC is February 2015 and in that also only 0.21 MMT coal seems to be provisioned for the Farakka plant. Furthermore, in their own letter dated 17.05.2017 of NTPC Chairman to IWAI, NTPC has taken a categorical stand that NTPC is not importing coal anymore. Also, NTPC in its Annual Statement admitted that it had stopped importing coal from Financial Year 2016-17.

91. Learned senior counsel submitted that it was established beyond a reasonable doubt before the learned AT that NTPC not only failed to comply with its MGQ obligation for the First and Second Year of Operation but also demonstrated its wilful intention of not importing coal for transportation through waterways.

92. Learned senior counsel submitted that even in January 2019, after the award of the tribunal, when the option was given to NTPC to demand JITF to carry imported coal as per TPA for the balance of 7 years, NTPC did not endeavour to ask JITF for a single time to transport coal which further reflects the wilful default by NTPC in its obligation. JITF kept the assets intact for the remaining period of the TPA as its cost and expense pursuant to the award, but NTPC did not avail the facility of JITF.

93. Learned senior counsel submitted that JITF filed two Applications before the learned AT under section 17 of the A&C Act, for interim release of the MGQ Amounts of First and Second Year Operation Period. Learned AT vide Order dated 15.07.2017 allowed the interim release of First Year MGQ amount (subject to providing BG to NTPC), which Order of learned AT was duly upheld by this Hon'ble Court vide Order dated 25.10.2017 and by the Hon'ble Supreme Court vide Order dated 09.01.2018. Regarding the Second Year MGQ Amount, the learned AT allowed the interim release (subject to providing BG to NTPC) vide its Order dated 20.12.2017 and was duly upheld by this Hon'ble Court vide Order dated 10.04.2018 and by the Hon'ble Supreme Court vide Order dated 02.07.2018.

94. Learned senior counsel submitted that NTPC did not challenge the learned AT's award qua the Second Year Operation Period and invited attention to the learned AT's findings in Para 132 of the Award that as NTPC has failed to follow the mandate of Article 7.3 of the TPA in respect of raising objections to JITF's Annual Statement qua the Second Year Operation Period MGQ Amount, NTPC in view of Article 7.3 of the TPA itself has "*waived its right to raise any dispute qua the 2nd year MGQ amount".*

95. It was submitted that JITF computed the amounts of First and Second Year MGQ Amount strictly as per provisions of Article 7.3 of the TPA and the same remained uncontroverted and therefore, there exists no ground to interfere with the findings and Award of the learned AT with regard to Claim No. 3 and 3A.

96. Learned senior counsel submitted that Petitioner's Consultation Notice, Termination Notice and Requisition Notice are illegal, invalid, *non-est* and of no effect whatsoever, as has rightly been held by learned AT.

97. Learned senior counsel submitted that Claim No. 5A of JITF is regarding the illegal termination of TPA by NTPC and consequently JITF's entitlement for the MGQ Amount for the remaining 5 years Operation period. It was submitted that the learned AT has rendered two main reasoning for arriving at the conclusion that the termination by TPA is illegal which are (i) that NTPC has failed to adhere to the mandatory provisions of Article 12 while terminating the TPA (including raising new issues for which no Consultation Notice was given) and (ii) the time chronology and conduct of NTPC establish it beyond doubt that NTPC terminated the TPA with mala fide intention.

98. Learned senior counsel invited the attention to Para 173 of the Award, which is as follows: *"The termination by NTPC, taken from any angle seems to be with mala fide reasons and not for the alleged defaults of JITF. However, at the same time, one thing is clear that NTPC has no intention to restore the contract as it seems that at the relevant time, NTPC is relying on domestic coal, which is cheaper than imported coal and that's why cost effective to NTPC. Even if this tribunal stayed the termination Notice vide its interim order, however, NTPC has never taken any step to transfer of coal through waterways by JITF. Therefore, it is to be inferred that the termination of TPA by NTPC is bad in law."*

99. Learned senior counsel submitted that NTPC failed to show how the findings of the learned AT regarding termination were perverse. It was

further submitted that JITF is entitled to recover from NTPC the damages as provided in Article 7.3 of the TPA as damages on account of illegal termination of TPA. Learned senior counsel submitted that learned AT returned the reasoning, which are plausible one, to support that Article 7.3 of the TPA represents genuine pre-estimated damages.

100. Learned senior counsel submitted that as per 7.3 of the TPA, the parties mutually agreed on genuine pre-estimated damages, i.e. liquidated damages which the defaulting party is liable to pay. Further, the learned AT also noted the formula provided in article 7.3 of the TPA which provides for a reduction of 32.5%.

101. Learned senior counsel submitted that the learned AT categorically returned its findings in the Award that Article 14(c) of the TPA is not attracted in light of wrongful and illegal termination of the TPA by NTPC itself and this finding of the learned AT is a plausible one. Article 14(c) of the TPA is applicable only in a case where JITF terminates the TPA. This clause has no applicability, if the TPA is terminated by NTPC.

102. Learned senior counsel submitted that Supreme Court in the case of ***Oil and Natural Gas Corporation Limited v. SAW Pipes Limited,*** 2003 5 SCC 705 has *inter alia* held '*if the compensation named in the contract for such breach of contract is a genuine pre-estimate of loss, which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual suffered by him'.*

103. Learned senior counsel submitted that in view of the above, the argument of NTPC relying on ***Batliboi Environmental Engineers***

Limited V. Hindustan Petroleum Corporation Limited & Another, *(2024) 2 SCC 375* is misplaced.

104. Learned senior counsel submitted that the Tribunal after considering all the materials on record was of the opinion that JITF's case was based on more probable and reliable facts and proper interpretation of the clauses of the TPA and supported by cogent evidence and based on the settled principles of law. Thus, it is submitted that the present petition is liable to be dismissed.

D) FINDINGS AND ANALYSIS

105. Section 34 of the A&C Act has to be read in conjunction with UNICITRAL Model Law and the legislative intent behind the A&C Act. Section 5 and Section 34 of the A&C Act make it clear that judicial inference to the arbitral award has to be very limited and the Court while entertaining the petition under Section 34 of the A&C Act is required to act strictly in accordance within the confines of Section 34 refraining from appreciation or re-appreciation of the matters of the fact as laws.

106. In ***Ssangyong Engineering And & Construction Co. Ltd. vs National Highways Authority of India (NHAI)*** AIR 2019 SC 5041, the Apex Court clearly prescribed the limited area for judicial interference taking into account the amendments brought to the 2015 amendment Act. In ***Ssangyong Engineering*** *(Supra)*, it was inter-alia held that:

> ***34.*** *What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of*

Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].

***35.** It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*

***36.** Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 :*

(2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

37. *Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.*

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

39. *To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.*

40. *The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).*

41. *What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."*

107. The jurisdiction to be exercised under Section 34 of the A&C Act has also been discussed in a catena of the cases, which re-iterate minimum judicial interference with arbitral awards. However, this could not mean that the Court would mechanically uphold the award of the learned Arbitral Tribunal without examining the same on the anvil of the settled judicial principles and principles of natural justice. The legislature may have circumscribed the jurisdiction of the Court, but

still, it has bestowed a duty upon the Court to examine the same, maybe within a limited sphere. Every order of an adjudicatory body has to pass the test of objectivity and this test has to be passed by an award also though within the limited scope of jurisdiction. Learned AT is an adjudicating body and is certainly bound to act within the realm of the law and contract entered into between the parties. The law itself provides that in case the award suffers from "patent illegality", the Court can certainly interfere to avoid the miscarriage of justice. However, such patent illegality must go to the root of the matter. Though, every error of law committed by the Tribunal may not fall within the expression of "Patent Illegality", yet the Court can interfere when the arbitrator takes a view which is not even a possible view or interprets a clause in the contract in such a manner that no fair-minded reasonable person would interpret. The award can be interfered with if the arbitrator commits an error of the jurisdiction while travelling outside the scope of the contract or if the conclusions of the arbitrator are based on no evidence or have been arrived at by ignoring vital evidence. Such an award will be perverse and can be set aside on the grounds of patent illegality.

108. The Court while examining the award has also to see if the award shocks the conscience of the Court and if an award shocks the conscience of the Court and may adversely affect the administration of justice, the Court would be failing in its duty if it does not interfere. If the award is against the specific terms of the contract, it can be interfered with on the grounds that it is patently illegal and opposed to public policy. Reliance can be placed upon ***Oil & Natural Gas***

Corporation Ltd* v. *Saw Pipes Ltd. 2003 5 SCC 705. If an award is so unfair and unreasonable that it shocks the conscience of the Court, the Court would be within its right to exercise its jurisdiction. Reliance can be placed upon ***Mcdermott International Inc vs Burn Standard Co. Ltd. & Ors.*** 2006 11 SCC 181.

109. Recently, in ***OPG Power Generation Private Limited vs. Enexio Power Cooling Solutions India Private Limited and Another*** 2024 SCC OnLine SC 2600, the Apex Court dealt with the concept of "patent illegality" and inter alia held as under:

> *"60. Sub-section (2-A) of Section 34 of the 1996 Act, which was inserted by 2015 Amendment, provides that an arbitral award not arising out of international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is visited by patent illegality appearing on the face of the award. The proviso to subsection (2-A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. In Saw Pipes (supra), while dealing with the phrase 'public policy of India' as used in Section 34, this court took the view that the concept of public policy connotes some matter which concerns public good and public interest. If the award, on the face of it, patently violates statutory provisions, it cannot be said to be in public interest. Thus, an award could also be set aside if it is patently illegal. It was, however, clarified that 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 public policy.*
>
> ***61.** In Associate Builders (supra), this Court held that an award would be patently illegal, if it is contrary to:*
> *(a) substantive provisions of law of India;*
> *(b) provisions of the 1996 Act; and*
> *(c) terms of the contract*

The Court clarified that if an award is contrary to the substantive provisions of law of India, in effect, it is in contravention of Section 28(1)(a)[51] of the 1996 Act. Similarly, violating terms of the contract, in effect, is in contravention of Section 28(3) of the 1996 Act."

110. The Apex Court in ***OPG Power Generation Private Limited*** (supra) also discussed "perversity" as a ground of challenge and inter alia held as under:

"63. Perversity as a ground for setting aside an arbitral award was recognized in Western Geco (supra). Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.

64. In Associate Builders (supra) certain tests were laid down to determine whether a decision of an arbitral tribunal could be considered perverse. In this context, it was observed that where : (i) a finding is based on no evidence; or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse. However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.

65. In Ssangyong (supra), which dealt with the legal position post 2015 amendment in Section 34 of the 1996

Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence in as much as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.

66. The tests laid down in Associate Builders (supra) to determine perversity were followed in Ssyanyong (supra) and later approved by a three-Judge Bench of this Court in Patel Engineering Limited v. North Eastern Electric Power Corporation Limited.

67. In a recent three-Judge Bench decision of this Court in Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd., the ground of patent illegality/perversity was delineated in the following terms:

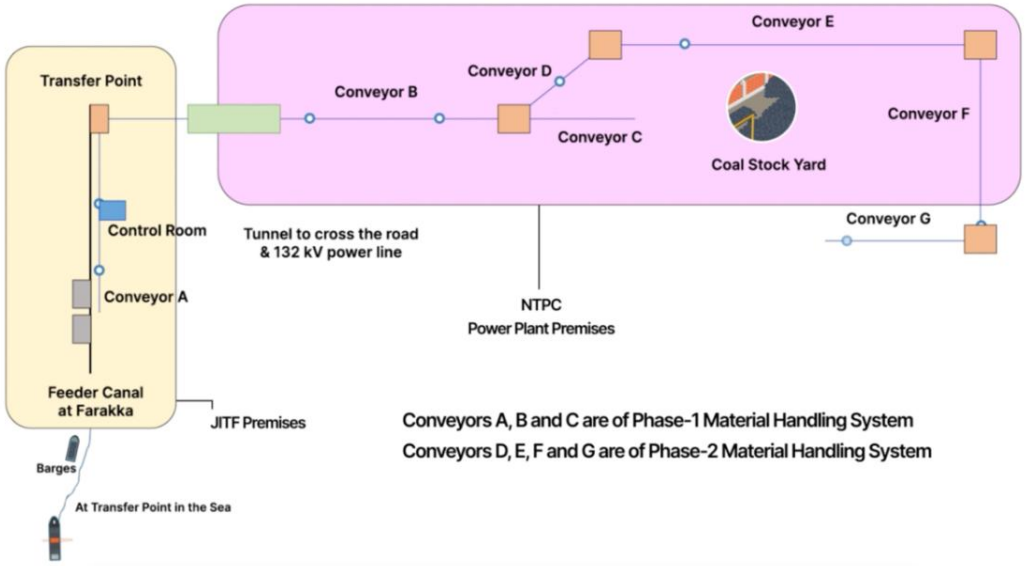
"40. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; Or, that the view of the arbitrator is not even a possible view. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of patent illegality. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice."

111. Thus, it can be summed up as that the arbitral award, cannot interfered in a casual and cavalier manner. The award can only be interfered only on the limited ground mentioned in Section 34 of the A&C Act. The award can be set aside if the Court finds it to be so perverse and perversity goes to the root of the matter, and there is no possibility of an alternative interpretation that may be sustained by the Court. Even at the cost of brevity, it can be said that the Court while hearing the petition under Section 34 of the A&C Act cannot exercise the Appellate Jurisdiction. In regard to the scope of suitable interference with the interpretation/construction of a contract recorded in Arbitral award, it was inter-alia held in ***OPG Power Generation Private Limited*** (supra) as under:

> *"72. An arbitral tribunal must decide in accordance with the terms of the contract. In a case where an arbitral tribunal passes an award against the terms of the contract, the award would be patently illegal. However, an arbitral tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere. But where, on a full reading of the contract, the view of the arbitral tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference."*

112. In view of the law as discussed, let us examine the impugned award within the limited scope of jurisdiction as provided under Section 34 of the A&C Act. Before proceeding further, it is also advantageous to refer to the relevant provisions under TPA. The project envisaged two

phases i.e. Phase-I and Phase-II which has been demonstrated in the following chart filed by the petitioner:



113. Clause 2.2.(C)(I) and 2.2.(C)(II) of the TPA are reproduced as under:

> ***(I)*** *Phase I would include the construction and operation of Conveyor Belt system comprising Conveyor Belt A, Conveyor Belt B and Conveyor Belt C through junction house JH-1 and JH-2. Operator shall provide and implement the Unloading Infrastructure and Material Handling System Phase-I, that would be in operation for approximately nine (9) months ('Material Handling System-Phase-I period") for unloading transportation and delivery of minimum 2 MMTPA of coal inside the coal stack yard and thereafter utilized in Coal hauling plan upon completion of Phase-II of Material handling System for unloading, transportation and delivery of 3 MMTPA coal inside the coal stack yard. Operator shall ensure that operation through Phase-I shall commence not later than fifteen (15) months from the date of execution of this Agreement.*
>
> ***(II)****Phase-II would include construction and operation of Conveyor Belt D, Conveyor Belt E Conveyor Belt F and Conveyor Belt G through Junction houses JH-3, JH-4, JH-5*

& JH-6. Operator shall ensure that operation, through this mode shall commence not later Twenty Four (24) months from the date of execution of this Agreement.

Clause 2.2(d) is reproduced as under:

"2.2.(d) Undertake all measures required to implement the Coal hauling plan, pursuant to the terms of this Agreement, which shall include:

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

A. Phase I: Within 15 months
B. Phase II: Within 24 months

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

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

A. Phase 1: 2MMTPA
B. Phase II: 3 MMTPA"

Clause 3.2(b) are reproduced as under:

"3.2(b) In the event: (a) IWAUNTPC do not procure fulfillment of any or all the Conditions Precedent set forth in Articles 3.1 (a) and 3.1(b) within the period specified in respect thereof, and (b) the delay has not occurred as a

result of breach of this Agreement by the Operator or due to Force Majeure, "IWAI/NTPC", shall compensate the Operator by suitably extending the COD for the Project and commencement of transportation through Material Handling System Phase-I without any penalty, as applicable."

Clause 7.1(a) (i) &(ii)which reads as under;

"7.1(a) Obligation of NTPC

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

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

Clause 7.1(a) (iii) reads as under:

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

Clause-7.1 (c) also provides the obligation of the operator which reads as under:

"7.1 (c) Obligation of Operator
(i) Fulfill entire. Project Requirements and Scope of Work as stipulated in Article2.2;

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

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

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

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

Wt1h regard to operation of Transhipment Infrastructure in the area West of Sandheads in the vicinity of Lat. 21°00' to 21°33' and Long. 87°10' notified by KoPT as waters under their limits of port, it may be noted that in case the operator has to pay charges in excess of the concessional charges (as detailed in letter attached as Annexure-V of the Addendum issued on 1fJlh Feb 2011) to State Government, Government agencies or any other Port Trust, such additional charges shall be reimbursed to the Operator

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

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

plying certificate from appropriate authority as per their respective plying area.
(viii) Develop Standard Opera/mg Procedures (SOP) for operation and maintenance of Project Assets in discussion with NTPC;
(ix) take adequate preventive measures to comply with safety and security standards of NTPC as well as local Statutory Authority at own cost and expense."

Clause 7.3 provides as under:

"NTPC's Minimum Guaranteed Coal Obligation-
NTPC hereby assures and represents the Operator that shall during each year of the Operation period, utilize the project for transportation of a minimum quantity of 3MMT per annum of coal (such quantity being referred to as Minimum Guaranteed Quantity, MGQ), and further that shall pay the Operator for the transportation of the 90% of Minimum Guaranteed Quantity, the actual coal quantity made available by NTPC for the Project in a year is less than 90% a Minimum Guaranteed Quantity in accordance with the provisions of this Article. For avoidance of doubt, the provision of Minimum Guaranteed Quantity shall not be in effect during Material handling System-Phase-I period.
Within three (3) weeks of the end of each period of twelvemonths of operations of the Project, the Operator shall submit to NTPC a statement ("Annual Statement") providing:
(a) Computation of the total quantity of coal supplied to Farakka TPP using the Project in the preceding twelve month period
(b) "Shortfall Quantity" because of NTPC's default. (Difference between the quantity actually made available by NTPC for Project during the respective 12 month period and 90% of MGQ)

(c) Computation of "Excess Quantity" (Difference between the quantity actually made available by NTPC for Project. during the respective 12 month period and MGQ)

(d) Computation of the "MGQ Amount" payable to operator, in case of Shortfall Quantity. It shall be calculated by multiplying the Shortfall Quantity with the 75% of Project Rate applicable on the last day of the period of the Annual Statement in which respective Shortfall quantity is reported.

The Annual Statement would be submitted to NTPC together with the supporting documentation and calculations. The MGQ Amount will be paid to Operator directly by NTPC. The MGQ Amount will be payable on submission of a Bank Guarantee of equivalent value by the Operator in the format to be provided by NTPC. NTPC shall, within a period of thirty (30) days, make payment of the MGQ Amount as specified in the Annual Statement Provided however, NTPC is allowed to adjust MGQ Amount already paid I payable in any year under this provision of the agreement against the excess quantity of coal provided above MGQ (3MMTPA) in any subsequent I earlier years of operations during the tenure of this agreement.

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

The Bank Guarantee shall be returned by NTPC after the settlement of last Annual Statement at the end of the Term of Agreement. Provided however, in the event that NTPC raises an objection to the determination of the MGQ Amount as specified in the Annual Statement it shall, within a period of three weeks from the submission of the Annual Statement:

(a) notify the Operator of its dispute to the MGQ Amount,

(b) within a period of one week from such dispute notice, submit a written submission of its dispute to Operator providing the specific grounds and calculations and documents relating to the. dispute being raised and

(c) make the payment of the entire MGQ Amount to the Operator, under the condition that if the dispute is resolved in favour of NTPC, then the Operator would refund the said amount together with interest applicable at the then prevailing SBI base rate plus 6.75% (six and three quarters percent).

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

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

114. Article 8.8 deals with the delay in Construction Completion and Liquidated Damages therein and reads as under:

"8.8 Delay in Construction Completion and Liquidated Damages therein Subject to any of the provisions of this Agreement providing for extension of time for performance or excuse from performance, as the case may be, of any of

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

115. Article 12 of TPA provides "**Events of Defaults**", Article 13 of TPA provides **"Termination/expiry of the agreement"**, Article 13.5 visualizes the consequences of termination, and Article 14 provides **compensation for breach of the agreement**. Article 14.1(c) provides for termination due to NTPC default which reads as under;

"14.1(c) Termination due to NTPC Default;
In the event this Agreement is terminated due to NTPC Event of Default then NTPC shall buyback the Unloading Infrastructure and Material Handling System at (1) Debt Due plus (2) 100% (one hundred percent) Equity.
Provided, however, for the purposes of this Agreement Debt Due and Equity shall not exceed the value as determined on a normative capital cost of [Rs.90 Crores] that is financed on Debt to Equity ratio of 70:30 and assuming that-the repayment over 7 (seven) years period after COD."

116. Article 14.1(c) has to be read alongwith Article 12.1(b) which provides NTPC's events of default. In regard to claim No.1, learned AT inter alia held that the petitioner/NTPC is responsible and liable to the delays and deviations from (tender), in construction, and completion of the

material handling system of Phase-I and Phase-II of JTIF and is entitled to an amount of Rs.4,24,08,00,423/-.

117. Learned Arbitral Tribunal, inter alia, held that NTPC contributed more towards the delay and noted that the claim No.1 of respondent/claimant had two parts i.e. (i) for an amount of Rs.4173274285/- for quantity of the coal not provided by the NTPC during the period of Phase-I, (ii) Rs.67526138/- for the cost and expenses incurred by the JITF due to deviation in tender plan. In regard to the first part of the claim, the respondent/claimant relied on Article 3.2(B) and 7.1 A(1).Learned AT recorded the following finding in this regard as under:

> *"83. It is JITF's case that JITF's Transshipper was ready and available at Transfer Point from 20.02.2013. It was the obligation of NTPC as per Article 7 .1 (a)(i) of the TPA to provide 2 MMTPA of coal during the period commencing from 19.02.2013 (the date on which '"JITF could have completed the construction of Phase I if there was no delay on the part of NTPC) to 14.06.2015 (the date till declaration of COD by NTPC). The Tribunal is of the view that as per the provisions of TPA, it is an obligation of NTPC to provide 2 MMTPA of coal during Material Handling System-Phase-I Period. The Article 3.2(b) provides for compensation for delays committed by NTPC by extending suitably the period of COD. In an ideal situation, JITF would be entitled to compensation by suitably extending the period of COD, however, in the present case, due to illegal termination (as explained below), the said option is not available. Therefore, the Tribunal is required to rely on to the provisions of the Contract Act, 1872, which provides for compensation in cases of breach. As NTPC due to its own act has breached the terms of the Contract, NTPC is liable to restore the damages suffered by JITF for the wrongs committed by NTPC. By applying the provisions of the*

Contract Act, this Tribunal is of the view that JITF is entitled to the Claim of Rs.417,32,74,285/-."

118. In respect of the second part of the claim, the learned AT has recorded the finding as below;

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

119. In regard to the first part of the claim No.1, the finding of the learned AT would indicate that the learned AT has granted the claim in totality as asked for by the respondent/claimant. It is shockingly surprising to see that though the learned AT notes that Article 3.2 (b) provides for compensation for delays committed by the NTPC by extending suitably the period of COD in an ideal situation and JITF would be entitled to compensation by suitably extending the period of COD, however, on account of illegal termination, the said option is not available. This finding of the learned AT certainly amounts to the patent illegality and amounts to perversity which shocks the conscience of the Court. It can also be noted that the learned AT simply relied on the chart furnished by the respondent/claimant and did not discharge its obligation of adjudicating the claim. Non-adjudication of the claim amounts to the award being totally non-speaking and has opened itself to the challenge by the petitioner.

120. In ***Ch. Ramalinga Reddy Vs. Superintending Engineer and Anr.*** 1999 9 SCC 610 wherein it was inter alia held as under:

> *"17. Claim 8 was for "payment of extra rates for work done beyond agreement time at schedule of rate prevailing at the time of execution". The arbitrator awarded the sum of Rs 39,540. Clause 59 of the A.P. Standard Specifications, which applied to the contract between the parties, stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined. The claim falls outside the defined exceptions. When extensions of time were granted to the appellant to complete the work, the respondents made it clear that no claim for compensation would lie. On both counts, therefore, Claim 8 was impermissible and the High Court was right in so holding. Learned counsel for the appellant drew our attention to the judgment of this Court in P.M. Paul v. Union of India [1989 Supp (1) SCC 368 : (1989) 1 SCR 115] . The disputes that were there referred to the arbitrator were: who was responsible for the delay in completion of the building contracted for, what were the repercussions of such delay and how the consequences of the responsibility were to be apportioned. After discussing the evidence and the submissions of the parties, the arbitrator found that there was escalation and that it was, therefore, reasonable to allow compensation on account of losses under the first claim, which was "on account of losses caused due to increase in prices of materials and cost of labour and transport during the extended period of contract ...". In this context, this Court said that once it was found that the arbitrator had jurisdiction to hold that there was delay in the execution of the contract due to the conduct of the respondent, the respondent was liable for the consequences of the delay, namely, increase in prices. There*

was in P.M. Paul case [1989 Supp (1) SCC 368 : (1989) 1 SCR 115] no clause in the contract which provided that the respondent would not be liable to pay compensation on account of delay in the work from any cause nor was it stipulated, when extension of time was granted to the appellant to complete the work, that no claim for compensation would lie.

18. The judgment in Sudarsan Trading Co. v. Govt. of Kerala [(1989) 2 SCC 38 : (1989) 1 SCR 665] does not assist the appellant, if fully read. It was there observed that there are two different and distinct grounds involved in many cases concerning the setting aside of arbitration awards. One is that there is error apparent on the face of the award and the other is that the arbitrator exceeded his jurisdiction. In the latter case the court can look into the arbitration agreement but in the former it cannot. An award may be set aside on the ground that the arbitrator had exceeded his jurisdiction in making it. In the case before us, the arbitrator was required to decide the claims referred to him having regard to the contract between the parties. His jurisdiction, therefore, was limited by the terms of the contract. Where the contract plainly barred the appellant from making any claim, it was impermissible to make an award in respect thereof and the Court was entitled to intervene.

19. Learned counsel for the appellant also relied upon the judgment in Jajodia (Overseas) (P) Ltd. v. Industrial Development Corpn. of Orissa Ltd. [(1993) 2 SCC 106] and upon the observations made therein that the court should be very circumspect about setting aside an award reached by an arbitrator, for parties had agreed that disputes that may arise or had arisen between them should be resolved not by a court of law but by arbitration. We agree, but circumspection does not mean that the court will not

intervene when the arbitrator has made an award in respect of a claim which is, by the terms of contract between parties, plainly barred."

121. Similarly, in ***General Manager Northern Railway and Anr.* v. *Sarvesh Chopra*** (2002) 4 SCC 45, it was *inter alia* held as under:

> *"13. A Division Bench decision of the High Court of Andhra Pradesh in State of A.P. v. Associated Engineering Enterprises, Hyderabad [AIR 1990 AP 294 : (1989) 2 An LT 372] is of relevance. Jeevan Reddy, J. (as His Lordship then was), speaking for the Division Bench, held that where clause 59 of the standard terms and conditions of the contract provided that neither party to the contract shall claim compensation "on account of delays or hindrances to the work from any cause whatever", an award given by an arbitrator ignoring such express terms of the contract was bad. We find ourselves in agreement with the view so taken.*
>
> ***14.*** *In Hudson's Building and Engineering Contracts (11th Edn., pp. 1098-99) there is reference to "no-damage" clauses, an American expression, used for describing a type of clause which classically grants extensions of time for completion, for variously defined "delays" including some for which, as breaches of contract on his part, the owner would prima facie be contractually responsible, but then proceeds to provide that the extension of time so granted is to be the only right or remedy of the contractor and, whether expressly or by implication, these damages or compensation are not to be recoverable therefore. These "no-damage" clauses appear to have been primarily designed to protect the owner from late start or coordination claims due to other contractor delays, which would otherwise arise. Such clauses originated in the federal government contracts but are now adopted by private owners and expanded to cover wider categories of*

breaches of contract by the owners in situations which it would be difficult to regard as other than oppressive and unreasonable. American jurisprudence developed so as to avoid the effect of such clauses and permitted the contractor to claim in four situations, namely, (i) where the delay is of a different kind from that contemplated by the clause, including extreme delay, (ii) where the delay amounts to abandonment, (iii) where the delay is a result of positive acts of interference by the owner, and (iv) bad faith. The first of the said four exceptions has received considerable support from judicial pronouncements in England and the Commonwealth. Not dissimilar principles have enabled some Commonwealth courts to avoid the effect of "no-damage" clauses. (See Hudson, ibid.)."

122. Reliance can also be placed upon ***Union of India v. Chadalwada Gopala Krishna Murthy and Anr***. 2010 14 SCC 633. There is also substance in the argument raised by the Learned Solicitor General that the learned AT took the figure of Rs. 4,17,32,47,285/- claimed by the respondent/claimant as a correct figure of damages without adjudication. It was submitted that the learned AT awarded the claim even though no coal was transported i.e. the coal was allegedly not provided by NTPC.

123. Learned SG has invited the attention of the Court to the fifth column which is a "Project Rate" stipulated in Schedule C of the TPA. Learned SG submitted that the project rate includes broadly three components; (i) the cost incurred for installation of respective phases (ii) the profits for which the respondent /claimant could have been entitled and (iii) the operational cost/running expenses while transporting coal at

"unloading and material handling system" and this would include the fuel price for running the entire system, running barges, running transshippers, cranes and expenses with respect to the employees etc.

124. It is an admitted fact that the learned AT awarded this claim taking into account the obligations of the NTPC as per Article 7.1 (a) (i) of the TPA to provide the 2 MMTPA of Coal during the period commencing from 19.02.2013 (the date of which JITF could have completed the construction of Phase –I, if there was no delay on the part of the NTPC) to 14.06.2015 (the date till declaration of COD by the NTPC). It was noted that since it was an obligation of NTPC to provide 2 MMTPA of coal during the material handling system and therefore placing reliance upon the provisions of Contract Act, 1872 held NTPC is liable to restore the damages suffered by the JITF for the wrongs committed by NTPC. Admittedly, the award claim has been granted for the activity which has not taken place and no operational expenses or running costs were incurred, which outrightly shocks the conscience of the Court and makes the finding patently illegal.

125. Mr. Ravi Shankar Prasad, learned senior counsel for the respondent has submitted that the learned Tribunal has written the findings on the best available documentary and oral evidence and has rightly held that the petitioner has contributed more towards the delay. Learned senior counsel for the respondent submitted that it was an obligation of the NTPC to provide 2 MMTPA of Coal during the material handling system Phase –I and the petitioner is, therefore, liable to restore the damages suffered by respondent No.1 for the wrongs committed by the petitioner and the respondent No.1 has rightly been found entitled to

the claim. Similarly, in part II of the claim-I, learned senior counsel has submitted that the claim has been awarded on the basis of the material available on the record.

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

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

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

category of patent illegality, and shocks the conscience of the Court and is liable to be set aside.

128. The learned Arbitral Tribunal, while dealing with Claim 3 and 3A, regarding the alleged breach of obligation by NTPC to provide MGQ at the transfer point for the first and second year of the operation period, primarily took into account Clause 7.3 of the TP Act and *inter alia*, was of the view that NTPC was obliged to make payment of the MGQ amount as specified in the annual statement within 30 days. The NTPC could only notify the dispute and submit written submissions, however, it was required to make the payment of the entire MGQ amount to the JITF subject to the condition that if the dispute was resolved in favour of the NTPC, then JITF would refund the said amount together with applicable interest at then prevailing SBI base rate plus 6.7%. It also took into account the contractual provision that NTPC would be barred from raising any dispute until NTPC makes the payment of the MGQ amount. It was noted that in the annual statement, the actual coal quantity made available to JITF by NTPC for the project in the first year of operation period commencing from 15.06.2015 till 14.06.2016 was declared to be 0.746 MMT i.e. less than guaranteed 90% of 3 MMT of coal per annum. The learned Tribunal noted that MGQ amount calculated as per TPA showed that JITF is entitled to receive Rs.158,50,05,003/- (Rupees One Hundred Fifty Eight Crores Fifty Lakhs and three only), and took into account the detailed calculation filed alongwith the SOC. The MGQ amount was not paid which lead to the filing of an application under Section 17 of the Arbitration and Conciliation Act, 1996. The plea taken by NTPC in SOD was that in

case there is a shortfall in the quantity of coal made available to JITF not due to any default of NTPC, then Article 7.3 cannot be invoked and the question of calculating the Shortfall Quantity for the purpose of Article 7.3 does not arise. It was pleaded that for the purpose of triggering Article 7.3, it was pertinent to analyze the shortfall quantity as calculated by JITF, and, thereafter, reasons for such shortfall quantity has to be appreciated. It was pleaded that the shortfall, if any, was on account of reasons attributable to JITF. It was pleaded that the shortfall was on account of the directions of the Ministry of Environment and Forests and Climate Control, which was not factored by JITF while calculating the shortfall quantity. The NTPC pleaded that the MGQ stood revised when the environmental clearance came only by permitting the transportation of 1.5 MMTPA instead of 3 MMTPA. It was also pleaded that the performance of JITF could never achieve the parameter level as envisaged in TPA, and therefore, on account of other factors also, NTPC was not responsible. The NTPC pleaded that NTPC was always ready and willing to provide more than the revised quantity of MGQ and had entered into contracts with the imported coal suppliers for a tie-up to 1.55 MMTPA of coal as against the required allocation of 1.50 MMTPA for one year between 15.06.2015 and 14.06.2016, and therefore, there was no "shortfall quantity". It is undisputed that the quantity of coal actually transported to Farakka TPP was 0.775 MMT between 15.06.2015 to 14.06.2016.

129. The plea of the JITF was that the environmental clearance was the responsibility of NTPC, and it was on account of the default of NTPC. It was further submitted that the environmental clearance was required

for the main project, i.e. setting up of the Thermal Power Plant itself and not the project envisaged under the TPA. The JITF took a plea that NTPC never imported coal to the extent of 3 MMT in a year. It was submitted that, in fact, the policy of importing coal and transporting the same through national waterways had not found favour with NTPC and therefore, the import of coal from foreign countries was reduced, which resulted in considerable savings to NTPC. Learned AT, *inter alia*, held that the reduction in the quantity of coal that could be imported was on account of the default of NTPC. It was noted that initial environmental clearance was granted for the transportation of coal from the mines at a distance of about 80 km. through the MGR system etc., which obviously means that the carriage of coal was by train or maybe by road transport. It was noted that the instant project conceived under TPA was executed on 11.08.2011 was for the carriage of blended coal through national waterways and therefore, its impact on the environment had to be considered afresh. The learned Arbitral Tribunal noted that since NTPC was the project proponent, therefore, it was its duty to get the revised clearance. It was noted that an application to MoEF was made only on 22.05.2012 seeking permission for the use of blended coal and transportation of imported coal through National Highway I (NW-1) to Farakka Thermal Power Plant. Initially, an extension was granted for one year. NTPC made a request for a grant of extension of 31.07.2014, which was extended till 30.07.2015. Admittedly, a presentation by the NTPC and JITF alongwith the Central Inland Fisheries Research Institute (CIFR), was made before the Appraisal Committee on 26.06.2015 to grant lifetime permission for

transportation of imported coal through NW-1 to NTPC FSTPP. However, the Committee granted permission for transportation of a maximum of 1.5 MTPA coal through NW-1 for another one year i.e. till 30.07.2016 and also sought certain additional information. The learned Tribunal recorded that MoEF was not satisfied with the progress made by NTPC, and therefore, the reduction in the quantity of coal to be imported was imposed with a view to expedite the submission of the report, and there was no question of any change of law or any force majeure event and the fault was entirely of NTPC.

130. Learned AT noted that NTPC should have obtained the environmental clearance before it commenced the execution of the project under the TPA. It was recorded that the guarantee provided by NTPC under Article 7.3 was not subject to any conditions precedent or conditions subsequent, save COD. It was noted that the actual quantity made available to JITF by NTPC at Transfer Point for the Project in the First Year Operation Period was 0.746 MMT, and in the Second Year Operation Period was 0.292 MMT, which was transported and delivered.

131. With regard to the First Year Operation Period, the findings of the learned AT are recorded as under:

> *"120. Based on the literal interpretation of the Article 7.3 of the TPA, NTPC did not provide any written submission of its dispute as per the TPA, or grounds or calculations or documents relating to any alleged allocation or revision, on the basis of which NTPC disputes the MGQ Amount for the First Year Operation Period.*
> *121. NTPC, failed to obtain the prior Environmental Clearance from MoEF. As per the EC already available*

with NTPC, it could obtain coal from coal mines within 80 kms radius and was required to obtain environmental clearance for any deviation.

122. NTPC was the Project Proponent. It is the obligation of the Project Proponent to obtain prior Environmental Clearance as per the EIA Notification dated 14 September 2006 read with Gazette Notification of the GOI dated 6 April 2011. Clearance was required for the usage of blended coal and transportation of imported coal through inland waterways was an amendment to NTPC's existing environmental clearance of 2007. NTPC applied and requested the MoEF & CC for amendment in its existing environmental clearance for usage of blended coal and transportation of imported coal through NW-1.

123. 1t was NTPC's own case before MOEF&CC, at the time of applying for amendment in its existing environmental clearance, that the Unloading Infrastructure on Farakka Feeder Canal near Farakka STPP does not qualify as Port/ Harbour/ Backwater, it is not meant for dredging and movement of coal through national waterways have not been included in any of the EIA Manuals brought out by MOEF &CC. Therefore, it does not require prior environmental clearance as per EIA Notification, 2006.

124.Permission for use of blended coal and transportation of imported coal through NW-1 was given on 19-20 September 2013 subject to NTPC submitting a Study on river ecology, flora, and fauna to assess the impact of coal transportation through NW-1.

125.The restriction of 1.5 MMTPA had been imposed by MoEF & CC due to unavailability of information/ study required to assess likely impacts of coal transportation through NW-1, which NTPC was directed to be undertaken. Therefore, the restriction was result of the fault attributable to NTPC.

126.Parties never agreed to any modifications to the coal quantity. There was no change in law. MoEF & CC's permission to transport 1.5 MTPA of Coal does not amount

to change in law or force majeure. MoEF & CC subsequently granted permission for 3 MMTPA.

127.In any case this Project for 3 MMTPA of coal commenced upon NTPC's issuing the Completion Certificate, which admittedly was done subsequent to the 38th Meeting of the Reconstituted EAC on EIA held on 25-26.06.2015 whereby MOEF & CC gave permission to transport1.5 MTPA. Even subsequent thereto it was NTPC's position (as reflected from its letter of 17.10.2015) that it requires daily around 8000 MT of imported coal at Farakka TPP (which comes to approximately 3MTMPA).

128. NTPC during the entire Arbitration proceedings, failed to show any evidence that it has actually placed order for imported coals for a particular year to be transported through inland waterways for its Farakka plant for 3 MMT. Despite repeated questions from the Tribunal, NTPC has not come up with any clear answer. The documents filed by NTPC like contract for supply of coal (from 2013 to 2017, NTPC entered into contracts for only 3.115 MMT of imported coal through waterways) also does not reflect that at any given year during the operation period, it has placed orders for supply of 3 MMT imported coal. In Minutes of Meeting dated 13.10.2016 between IWAI, NTPC and JITF, the NTPC admitted that it did not give 3 MMTPA to JITF.

129.However, as per TPA, it was the obligation of NTPC to provide the coal at the transfer point and which admittedly, NTPC has failed to do. Admittedly, JITF delivered the entire quantity of coal i.e. 0.746 MMT that was made available to it at Transfer Point in the First Year Operation Period.

130.Further, from the documents filed by NTPC, it is clear that the total allocation for waterways for this project (i.e. from October 2013 to June2017) was 2.33 MMT."

132. With respect to the Second Year Operation Period, the learned Tribunal, *inter alia*, held as under:

"132. NTPC neither disputed the Annual Statement nor the MGQ Amount as per the procedure under the TPA. Rather,

the letter of 06.07.2017 written by NTPC in response to JITF's Annual Statement for 2nd year, clearly mentioned that the same is not under Article 7.3. Therefore, in terms of TPA, NTPC has waived its right to raise any dispute qua the 2nd year MGQ amount.

133. Admittedly, JITF delivered the entire quantity of imported coal i.e.0.292 MMT provided to it at the Transfer Point in the Second Year Operation Period.

134.NTPC was not ready or willing to provide JITF the MGQ for the Second Year Operation Period:

a. Last tender was issued by NTPC was in February 2015, i.e., before commencement of Second Year Operation Period;

b. NTPC's own Annual Statement for the year 2016-2017states that, "during 2016-2017 Company imported 1.09 MMT of coal and that more than Rs. 8000 Crore was saved by reducing coal import by 85%.

135.Further, the argument of NTPC that adequate quantity of imported coal was available with NTPC at the coal mines in Indonesia for providing to JITF, is unsubstantiated by any evidence or cogent material as NTPC's obligation under Article 7 .1 (a) (iii) of the TPA was to provide the imported coal at Transfer Point that too on fairly evenly spread basis and merely allocate the same.

136. NTPC failed to provide any evidence to support its alleged allocation for3 MMTPA.

137.NTPC's failure to obtain Environmental Clearance from MOEF & CC and consequences thereof are attributable to NTPC only. In any case, the MoEF & CC on 03.02.2017 granted extension of permission up to31.03.2018 and increased the quantity of coal transportation from 1.5MMTPA to 3 MMTPA, however, NTPC did not provide the required quantity to JITF.

138. The Re-constituted EAC on EIA granted extension to NTPC for transportation of coal till 30.07.2016 and directed NTPC to submit/present findings of the study. However, NTPC made application for extension of EC only

on 25.07.2016, i.e. 5 days prior to the expiry of the existing EC.

139. Therefore, NTPC cannot be permitted to be benefitted by its own wrong and NTPC's invocation of Force Majeure Event on 04.08.2016 due to non-availability of Environmental Clearance beyond 30.07.2016 is not acceptable.

140.NTPC's contention that the alleged Force Majeure event existed up to07.10.2016 is not correct as NTPC on 21.09.2016 informed JITF to resume operations. MOEF granted the said extension up to 31.01.2017on 29-30.08.2016. Accordingly, CTO was obtained on 16 September2016 by JITF from WBPCB.

141.Due to adverse weather conditions at Sandheads JITF was compelled to declare Force Majeure on 14.06.2017 due to a force majeure event which took place on 11.06.2017. No vessel was nominated by NTPC or its ICS or scheduled for Transfer Point for the interim period from 11June 201 7 to 14 June 2017 (i.e. last four days of the Second Year Operation Period). Therefore, the Tribunal do not agree with the contention of NTPC that the operation period of the second year had not completed.

142.Further, Professor Sanjay Sharma, CW-2 in his expert report was able to substantiate that the total moisture in the coal and size of coal provided to the JITF was much above the Product Specification. CW-2has also proved that the coal comprised of silicates which along with high surface moisture makes the coal sticky resulting in reduction of efficiency of the JITF's Material Handling System. Further that the product was an outlier with respect to the specification as per the Schedule E and its handling reduced the efficiency of the JITF's Material Handling System.

143.The main trigger point for Article 7.3, i.e., the failure of NTPC to provide coal at the transfer point, is satisfied in the present case, as it has failed to show any evidence that it actually provided coal to the tune of3 MMT at the transfer point and in absence of any evidence in that regard, Article 7.3 triggers and JITF is eligible to get the MGQ amount.

144.JITF's claim for MGQ amount can be divided into three phases, i.e., 1st year MGQ amount, 2nd year MGQ amount and MGQ amount for the remaining period, i.e., 3-7 year.

145. For triggering of MGQ under Article 7.3 of the TPA, the only precondition was providing of COD by NTPC. The COD was achieved on 15.06.2015, which was duly certified by the NTPC. The certification of COD by NTPC means that all the material handling system and unloading infrastructure had successfully been established by JITF. The provision of COD is provided in the TPA itself. Apart from COD certificate from NTPC, there is no other precondition for triggering of 7-year MGQ period and accordingly the MGQ amount was dependent only on the achieving of COD by JITF. If NTPC has certified the COD, then JITF is entitled to get the MGQ/MGQ amount for the entire MGQ period, i.e., 7 years from the date of COD.

146.This Tribunal vide two interim orders in terms of Article 7.3 of the TPA, directed NTOC to release the amount of 1st and 2nd year MGQ subject to JITF providing BG in term of Article 7.3 itself.

147. In light of the above discussion, Tribunal agrees that substantial expenses were undertaken by JITF for establishment of material and unloading infrastructure, barges, trans-shipper, daughter vessel, salaries, interest, operational cost, etc. In the technical bid itself JITF has indicated that all these will cost nearly Rs.625 Crores. The question was also asked during the pre-bid meeting that if the desired quantity of coal is not provided then the whole money deployed by the contractor will be lost, as this is first kind of project and whole transportation facility and infrastructure created cannot be used for some other purposes. It was answered by the NTPC that in that case NTPC will be paying the MGQ almost as per clause 7.3 of the TPA. Apart from initial investment, JITF has also argued that there were huge operational expenses for carrying out the work on the site. In the present case, JITF has prayed for only the pre-estimated MGQ amount, which has been guaranteed by NTPC. It is clear from the Annual

Statement of the NTPC that NTPC itself has stopped the importing of the coal from the financial year 2016-17.

148. NTPC has also not been able to show that in any particular year NTPC has even floated a tender to procure 3MMT imported coal for its Farakka plant to be transported by JITF through waterways. The specific question was asked toRW3, who has evaded the question by saying that it is part of the record. However, no such document has been placed on record by NTPC which shows that NTPC ever floated a tender or ordered or arranged for 3MMT imported coal at transfer point on any year on FES basis. The last tender which is on record put by NTPC is February 2015 and in that also only 0.21 MMT coal seems to be provisioned for Farakka plant. Furthermore, in the own letter of NTPC Chairman to IWAI, NTPC has taken a categorical stand that NTPC is not importing coal anymore.

149. In the light of various judicial pronouncements of the Hon'ble Supreme Court [Shriram Rupam vs. Madangopal Gowardhan reported in The Calcutta Weekly Notes Vol, V.III Page No. 25; ONGC Ltd. vs. Saw Pipes Limited reported in (2003)5 SCC 705; BSNL Limited vs. Reliance Communication Limited reported in (2011)1 SCC 394and Construction and Design Services vs. DDA reported in(2015)14 SCC 263], if the compensation is pre-estimated, only the breach of contract need to be proved. The case in hand apart from pre-estimation, NTPC has guaranteed the payment of the pre-estimated compensation. Therefore, JITF is entitled for the MGQ amount for 7 years as guaranteed in the TPA itself and therefore, the BGs provided by JITF for the 1st and 2nd year MGQ amount is to be discharged.

150. Therefore, the Tribunal holds that JITF is entitled to get the MGQ amount for the 1st and 2 11d year of operation along with the applicable rates. Accordingly, the interim order(s) in this regard stands confirmed and NTPC is directed to return the Bank Guarantees to JITF within a period of 15 days from date of the Award. NTPC is also

directed to reimburse JITF' the applicable taxes in this regard."

133. In brief, the entire finding of the learned AT is based on the premise that it was the responsibility of NTPC to obtain the environmental clearance certificate and that the reduction in the quantity of coal by the EC will not affect the TPA or the liability of NTPC to provide the MGQ. Learned AT has taken a literal and strict interpretation of Article 7.3 and has simply awarded the amount on the basis of the shortfall quantity. It may be stated that as far as the factual matrix is concerned, i.e. the amount of coal transported by JITF during the two periods is not disputed. It is also pertinent to mention here that while returning the finding on the second part of MGQ, the learned AT, in haste, decided that the JITF's claim for MGQ was divided into three phases, i.e. First-year MGQ amount, Second Year MGQ amount and MGQ amount for the remaining period, i.e. 3 to 7 years and in paragraph 45, *inter alia*, held that the JITF is entitled to get the MGQ/MGQ amount for the entire MGQ period, i.e. 7 years from the date of COD.

134. The Court is conscious of the fact that while examining an award under Section 34 of the A&C Act, the Court has to exercise its discretion with extreme circumspection. However, the Court has to see whether the learned AT has discharged its duty of adjudication within the basic principles of natural justice or whether it is committing patently illegality. Even for the sake of argument, if it is taken hypothetically that the NTPC did not proceed in time to get the environmental clearance certificate, still, the fact of the matter is that the quantity was reduced from 3 MMT to 1.5 MMT w.e.f. 30.07.2015. Admittedly, the

First Year Operation Period is from 15.06.2015 to 14.06.2016 and the Second Year Operation Period is from 15.06.2016 to 14.06.2017. Any adjudicatory process cannot be turned into a battle of wits. The purpose and duty is to secure the ends of justice.

135. In ***Nabha Power Limited vs. Punjab State Power Corporation Ltd., 2018 11 SCC 508,*** the Apex Court, inter alia, held as under:-

> ***48.*** *Lastly, in Satya Jain v. Anis Ahmed Rushdie [Satya Jain v. Anis Ahmed Rushdie, (2013) 8 SCC 131 : (2013) 3 SCC (Civ) 738] , Ranjan Gogoi, J., elucidated the well-established principles of the classic test of business efficacy to achieve the result of consequences intended by the parties acting as prudent businessmen. It was opined as under: (SCC pp. 143-44, paras 33-35)*
>
> *"33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] . This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied—the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] sums up the position: (PD p. 68)*
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> *'... In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to*

emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.'

34. Though in an entirely different context, this Court in United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera [United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera, (2008) 10 SCC 404] had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. Certain observations in this regard expressed by courts in some foreign jurisdictions were noticed by this Court in para 51 of the Report. As the same may have application to the present case it would be useful to notice the said observations: (SCC p. 434)

'51. ... "... 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!" ' Shirlaw v. Southern Foundries (1926) Ltd. [Shirlaw v. Southern Foundries (1926) Ltd., (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)] , KB p. 227."

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"... An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves." Trollope and Colls Ltd. v. North West Metropolitan Regl. Hospital Board [Trollope and Colls Ltd. v. North West Metropolitan

Regl. Hospital Board, (1973) 1 WLR 601 : (1973) 2 All ER 260 (HL)] , WLR p. 609 C-D : All ER p. 268a-b.'

(emphasis in original)

35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement. ..."

Our view

49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] test of giving "business efficacy" to the transaction, as must have been intended at all events by both business parties. The development of law saw the "five condition test" for an implied condition to be read into the contract including the "business efficacy" test. It also sought to incorporate "the Officious Bystander Test" [Shirlaw v. Southern Foundries (1926) Ltd. [Shirlaw v. Southern Foundries (1926) Ltd., (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings [B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. v. West Bromwich Building Society [Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and Attorney General of Belize v. Belize Telecom Ltd. [Attorney General of Belize v. Belize Telecom Ltd., (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles

would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract."

136. Thus, the bare perusal of the aforesaid judgment makes it clear that first and foremost, the express terms of the contract have to be given supremacy and an implied term cannot be added only because the Court thinks it would have been reasonable to have inserted it in the contract. However, a term can be implied in the contract if it is reasonable and necessary to do so in order to given business efficacy to the transaction. NTPC is also a commercial venture of the Government of India. Both the parties to the contract have entered into a commercial contract and the purpose of both the parties is totally commercial in nature. Thus, the test of reasonableness has to be applied equally to both parties. Simply because NTPC is a business organization, they cannot be sermonized to be fair and equitable. The test of "business efficacy" is equally important to NTPC as to JITF. The core question in the present case is whether the damages that have been awarded by the learned Tribunal by inserting Clause 7.3, at all the faces, be it pre-COD or post-termination, fulfils the test of "business efficacy". Secondly, whether the view of the Tribunal of calculating the MGQ at the rate of 2 MMTPA or 3 MMTPA, even after its reduction by the EC to 1.5 MMTPA passes the test of reasonableness.

137. It is also necessary to refer to Section 28, sub-section 3 of the A&C Act, which also mandates that the learned Arbitrator shall take into account the terms of the contract and trade usages applicable to the transaction. It is correct that the Courts are required to keep their hands off and follow the policy of minimum judicial intervention, but at the same time, the awards should be such that it should not prick the conscience of the Court. It is also to be seen that when the quantity of coal had been reduced, the "Doctrine of impossibility or doctrine of frustration" of performing the contract would come into play. The NTPC had argued consistently that they had contractual arguments close to 4 MMT of coal, out of which, 1.5 MMT was reserved solely for Farakka TPP which was more than the quantity permitted by the EC for the First Year Operation Period. It has also been argued that Clauses D and E of the bid document dated 09.02.2015 confers flexibility and empowers NTPC to make revisions in the quantity allocated not only from one mode of transportation to another but also from one Station to another, depending upon the requirement. It has consistently been pleaded that as per Clause 7.1, the coal was to be provided on a fairly evenly spread basis and NTPC was to furnish ICS, a quarterly schedule of quantity with a tentative month-wise break up proposed to be delivered at the Power station. It was the responsibility of the international coal supplier and the JITF to coordinate and distribute the quarterly coal supplies in all the months of the quarter. The learned AT has attributed the entire default to NTPC. Arguments raised by learned SG that the respondent never adhered to the time schedule of unloading and transportation of 1200 MT per day within 5 days, and their average

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

138. It is pertinent to mention that Mr. Shishir Chandra Gupta, CW-1, in his affidavit, has stated about the delays which were not attributed to NTPC. It is pertinent to reproduce Para 69and Para 165of the affidavit of CW-1:-

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

Claimant to comply with the cargo requirements due to the reason that the barge movements were on hold as a result of the shortage in water levels, which consequently caused pile up of cargo at Transfer Point and an OGV waiting to be unloaded at anchorage with 70,000 MT, the Claimant vide the said letter also highlighted that the decrease in water levels was resulting into delays in unloading of cargo and deviation from import schedule as agreed between the Claimant, the Respondent, and the ICS, which was not attributable to the Claimant."

139. Learned SG, in his arguments, has rightly stated that these admissions were not taken into account by the learned AT and placed reliance upon ***Zee Entertainment Enterprise Ltd.* vs. *Klassic Studios and Films Pvt. Ltd***., 2013 [7] Bombay CR357. Learned SG submitted that in this case, the Court set aside the arbitral award because the Tribunal therein, had failed to take into account the admissions made in the evidence. Learned SG has also invited the attention of this Court to the letter dated 13.7.2016 of NTPC and pointed out the operational performance demonstrated during the relevant period. He has also argued that there are admissions of the respondents of their delays in MoM dated 24.12.2015, 05.02.2016, 08.04.2016 and 01.06.2016. It has been submitted that these have not been considered by the learned AT at all which makes the impugned award perverse and is liable to be set aside.

140. It is pertinent to mention that learned AT irrespective of the directions of MoEF has calculated the shortfall, taking into account 3 MMT. It is quite surprising how the NTPC could have violated the directions given by authority and opened itself to various kinds of prosecutions and adverse consequences. The perseverance of the environment is the duty

of one and all and violation of the same cannot be allowed to be carried out at any cost. It becomes the statutory obligation of everybody to comply with the directions relating to the environment. Thus, the finding of the learned Arbitral Tribunal in calculating the MGQ taking into account 3 MGQ on the face of it, is perverse. In regard to the responsibility of getting the EC, the learned AT has proceeded on the premises that NTPC being the project proponent, was required to take the EC. However, in this regard, it is necessary to refer to the following provisions of the TPA:-

> *"Article 3.1C (ii) puts an obligation on the operator to procure all applicable permits/licenses/clearances, unconditionally, or if subject to conditions, then all such conditions must have been satisfied in full and such applicable permits/licenses/clearances are kept in full force and effect during the construction and operation of the project."*

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

141. It is also pertinent to mention here as borne out from the record that NTPC, vide letter dated 25.02.2014, invited the attention of the respondent to the condition precedent of the operator which is in response to the letter of the respondent dated 20.02.2014, whereby, a request was made for reimbursement of fee against studies awarded by JITF on CIFRI for environmental clearance of Farakka IWT Project. NTPC, inviting the attention on the provisions of TPA and clause 3.1C of the TPA reiterated that all the clearances required for the project are

to be taken by the operator. It is also pertinent to mention here the letter dated 30.04.2014, which was also related to the operational delays on the part of the respondent. The perusal of the record indicates that consent to operate the project dated 16.09.2016 was taken by the respondent and the responsibility of NTPC was limited to facilitating the clearance. The Court considers that after reduction by MoEF in the First Year Operation Period from 3 MMTPA to 1.5 MMTPA, has to be taken into account. It is a basic principle that what is prohibited by law cannot be directed to be enforced in any manner.

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

terms of the TPA specifically provides it to be the responsibility of JITF. Therefore, on the face of it, the NTPC cannot be held liable for this.

143. With regard to Claim No. 5A relating to NTPC's Consultation Notice, Termination Notice and Requisition Notice, the learned Tribunal, *inter alia*, held it to be illegal, invalid, *non-est* and of no effect. Learned AT, taking into account the submissions made by JITF, *inter alia*, held that as on 03.05.2017, the issue regarding the Consultation Notice was over from the prospective of NTPC and stood revoked. It was noted that in the Termination Notice, NTPC had taken new grounds for which no consultation notice was given. The learned Tribunal, *inter alia*, was of the view that the issue regarding delay in Phase 1 and Phase 2 could not have been taken as a ground for termination of the project. The learned AT took into account the letter dated 17.05.2017 of the Chairman and MD of NTPC to IWAI, where it was stated that NTPC has stopped all action for procurement of imported coal. The plea of JITF is that the Termination Procedure as provided under Article 13 of the TPA, has not been followed by NTPC. Thus, the Termination Notice dated 24.07.2017 is illegal and bad in law. The learned AT, *inter alia*, held that the termination by NTPC, taken from any angle, seems to be with *mala fide* reasons and not for the alleged defaults of JITF and noted that NTPC had no intention to restore the contract at the relevant time, NTPC was relying on domestic coal, which was cheaper than the imported coal and cost-effective to NTPC.

144. Learned Arbitral Tribunal, further inter alia, held that as the termination is *mala fide*, JITF is entitled to recover from NTPC the damages, which

are already pre-estimated in the contract, by way of MGQ amount. The learned AT took into account that the respondent had put money to create the infrastructures like the Jetty, conveyor belts, and junction houses, which will be the assets of NTPC, and therefore, the pre-estimated damages are the amount to which the respondent is entitled to as per TPA. It was also noted that despite stay of the termination notice, NTPC did not take any step to allot any quantity to JITF for transportation. Learned AT, inter alia, held that JITF is entitled for the amount which is provided in the TPA.

145. Learned Arbitral Tribunal, inter alia, held as under:-

> *"183, One more aspect is that during the 2nd year of operation, NTPC terminated the TPA. However, the said termination notice was stayed by this Tribunal, which was again uphold by the Hon'ble High Court. Interestingly, despite operation of the stay order, NTPC did not take any step to allot any quantity to JITF for transportation. Therefore, 3rd year onwards, NTPC of its own chooses not to utilize the project facility for MGQ, which was its obligation as per Article 7.3.*
>
> *184. If NTPC's intention was right, NTPC should have immediately resume allotment and ask JITF to transport coal, when the termination order was stayed. We are afraid, this is not the case. NTPC's silence and in action goes against NTPC. From the facts, as discussed above, it is quite clear that NTPC has taken a considered decision that it will not utilize the project facility for MGQ for the remaining period. In that case, JITF is obviously entitled for the amount which is provided in the TPA itself. As stated earlier, the amount is provided in the 'T'PA, after giving a reduction of around 32.5% on account of operational cost.*
>
> *185. While claiming, JITF has prayed for only the amount which it is entitled as per TPA, i.e., the amount after giving the requisite discount. Para 00under the Claim No. 5A and*

Annexure C-116, makes it clear that JITF is asking for the amount only as per TPA. JITF is asking for INR 1108,93,05,000/- which is the amount calculated as per TPA after giving the discount, otherwise the total amount would be INR 1642,86,00,000 /-.

186. The other ramification is that post issuance of COD w.e.f. 15.06.2015more than 3112 years has lapsed. The Tribunal has already held that it is NTPC, which has majorly attributed towards the delay. In such an eventuality almost 5112 years has lapsed. Also, this has not been refuted successfully by the NTPC that it did have Coal for performance by JITF under the Agreement. There is lot of gap between alleged ordering and procuring and both cannot be used synonymously.

187. Thus, in view of above, even in case of unlawful and illegal termination of the TPA by NTPC, NTPC is liable and responsible to compensate JITF and pay the MGQ Amount for the balance years (3rd, 4th, 5th, 6th and 7thyear) of the Operation Period to JITF (Rs.1108,93,05,000/- along with applicable Taxes) being the pre-estimated genuine amount of damages.[Reference can be made to Shriram Rupam vs. Madangopal Gowardhan reported in The Calcutta Weekly Notes Vol. VIII Page No. 25; ONGC Ltd. vs. Saw Pipes Limited reported in (2003)5 SCC705; BHNL Limited vs. Reliance Communication Limited reported in(2011)1 SCC 394 and Construction and Design SenJices vs. DDA reported in (2015)14 sec 263].

188. However, as this Tribunal has already held that the Termination is invalid, during the remaining period of seven years of phase II, if the NTPC will demand the JITF to carry the Coal and provide the quantity of coal in consonance with the terms of agreement, then the JITF shall be liable to carry/ transport the coal in accordance with the terms and conditions of the agreement. Though the additional wharfage from KoPT has not been allowed, however, the JITF shall be entitled to wharfage from any other port, in case the coal is offered from transport/ carrying by NTPC to JITF."

146. Similarly, Claim No.6 and Claim No.7 were also allowed. However, the counterclaim and additional counterclaim were dismissed.

147. The discussions made hereinabove, makes it clear that the learned Tribunal has granted Rs.11,08,93,05,000/- as a "pre-estimated genuine amount of damages" for a period of five years. It is an admitted fact that there was no operation for five years. The award of damages is covered under Sections 73 and 74 of the Indian Contract Act. Section 73 of the Indian Contract Act reads as under:-

> *"73. Compensation for loss or damage caused by breach of contract.*
>
> *When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> *Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*
> *Compensation for failure to discharge obligation resembling those created by contract: When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.*
> *Explanation: In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."*

148. The bare perusal of Section 73 of the Indian Contract Act makes it clear that a party who has suffered on account of the breach is entitled for compensation for any loss or damage caused to it. Section 73 does not visualize any "pre-estimated" or "pre-fixed damages". Thus, in order to claim the compensation under Section 73, the claimant has to prove the actual loss or damages in accordance with the contract.

149. Section 74 of the Contract Act deals with contracts where there are "pre-estimated" or "pre-fixed" damages. Section 74 reads as under:-

> *"74- Compensation for breach of contract where penalty stipulated for:*
>
> *When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*
>
> *Explanation.- A stipulation for increased interest from the date of default may be a stipulation by way of penalty."*

150. The simple reading of Section 74 makes it clear that in order to claim the compensation under Section 74, the party may not be required to prove the damages and the damages have to be awarded as mentioned in the contract. However, it acknowledges the concept of "reasonable compensation". The amount so granted also should not exceed the amount specified in the contract.

151. In ***Fateh Chand v. Balkishan Dass,*** 1963 SCC OnLine SC 49, it was inter-alia held as under:

8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjusted in the light of Section 74 of the Indian Contract Act, which in its material part provides:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for."

9. The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties : a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the

penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

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

to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach."

152. In ***Maula Bux* vs. *Union of India*,** (1969) 2 SCC 554, it was held :

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

153. In ***ONGC Ltd.* vs. *Saw Pipes Ltd.*** (2003) 5 SCC 705, it was inter alia held as under:

"64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Contract Act and the ratio laid down in Fateh Chand case [Fateh Chand v. Balkishan Dass, (1964) 1 SCR 515 : AIR 1963 SC 1405] , SCR at p. 526 wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and

compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him.…

***

67. … In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been

specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.

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

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

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

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

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

pre-estimate by the parties as the measure of reasonable compensation."

154. Before proceeding further, it is also necessary to refer to the relevant clauses of the TPA. Article 14 of the TPA provides the chapter "Compensation for breach of agreement".

"ARTICLE 14: COMPENSATION FOR BREACH OF AGREEMENT
14.1 Compensation
(a)Termination due to Force Majeure Event
(i) No payment shall be paid by any party in case operation stops due to Force majeure,
(ii) The period of operation shall be increased by the same duration for which event of force Majeure exists.
(b) Termination due to Operator Event of Default
If the termination is due to Operator Event of Default, NTPC shall forfeit the Performance security submitted by Operator. Termination due to NTPC Default In the event this Agreement is terminated due to NTPC Event of Default then NTPC shall buyback the Unloading Infrastructure and Material Handling System at (1) Debt Due plus (2) 100% (one hundred percent) Equity.
Provided, however, for the purposes of this Agreement Debt Due and Equity shall not exceed the value as determined. on a normative capital cost of [Rs. 90 crores] that is financed on Debt to Equity ratio of 70:30 and assuming than he repayment over 7 (seven)years period after COD.
(d) Termination due to IWAI Default
No payment: shall be paid to any parties to this contract in case project terminated due to IWAI Event of Default."

155. The Court, at the outset, considers that the award of damages by the learned Arbitrator for the five years of contract in which, in fact, no activity has taken place, taking recourse to Clause 7.3 is totally illegal and perverse. If the contract had been terminated rightly or wrongly,

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

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

157. The attention has been invited during the course of the arguments by the learned SG to the various letters dated 09.03.2017, 13.04.2017, 03.05.2017 and 29.05.2017. It was submitted that these

letters/evidences were not taken into account by the learned Arbitral Tribunal which makes the award unsustainable. There is a substance in the argument of learned SG that though, the single instance of default was rectified by the respondent, the overall delay and default were never rectified, which justified the action of NTPC in terminating the contract. Learned AT has invoked Clause 7.3 even post termination of the contract by NTPC, which is also hit by Clause 1.4 of the TPA. Clause 1.4 of the TPA reads as under:

> *"1.4 Ambiguities within the Agreement*
> *In case of ambiguities or discrepancies within this Agreement, the following shall apply:*
> *(a) Between two Articles of this Agreement, the provisions of specific Articles relevant to the issue under consideration shall prevail over those in other Articles;*
> *(b)Between the Articles and· the Annexures, the Article shall prevail, save and except as expressly provided in the Articles or the Annexures;*
> *(c)Between the dimension scaled from the drawing and its specific written dimension, the latter shall prevail; and*
> *(d)Between any value written in numerals and that in words, the latter shall prevail.*
> *(e)Between the provisions of this Agreement and any other documents forming part of this agreement, the former shall prevail."*

158. In view of Clause 1.4 of the TPA, since Clause 14.1(c) specifically provides "compensation" in case of "termination due to NTPC's default", it was totally unreasonable on the party of the Arbitrator.

159. Thus, in view of the foregoing discussions, the Court is of the considered opinion that the impugned award suffers from patent illegality and is violative of public policy and shocks the conscience of

the Court. It is also pertinent to mention here that the interim orders passed by the learned Arbitral Tribunal and upheld by this Court and the Apex Court, were passed only at the interim stage. In this regard, attention has been invited to the order dated 02.07.2018 of the Apex Court in SLP 10350/2018, where it was specifically stated that the interim order will not be treated as binding for final adjudication of the matter by the learned Arbitral Tribunal.

160. Before parting, it is necessary to mention that the Arbitrator's obligation to resolve the dispute includes an obligation to conduct the arbitral proceedings and decide the case with appropriate care and skill. It is advantageous to refer to the judgment of this Court in ***Satluj Jal Vidyut Nigam Ltd. vs. M/s Jaiprakash Hyundai Consortium & Ors.***, 2023 SCC OnLine Del 4039, whereby, it was *inter alia*, held as under:-

> *"54. At this stage, it would be apposite to highlight the duty of care that Arbitrators must exercise in dealing with financial claims based on the mathematical derivations in the context of complex construction contracts. An arbitrator's obligation of care, skill and integrity has been emphasized by the various authors and has also been judicially recognized. In Mustill and Boyd: Commercial Arbitration, it has been stated as under:*
> *"……*
> *When accepting the burden of the reference, the arbitrator can be regarded as undertaking three principle duties - namely to take care, to proceed diligently and to act impartially. The existence of a moral obligation to perform these duties is undeniable.*
> *…."*
> *In Gary B. Born: International Commercial Arbitration, it has been stated as under:*
> *"……..*

International Arbitrator's Obligations of Care, Skill and Integrity

The arbitrator's obligation to resolve the parties' dispute includes an obligation to conduct the arbitral proceedings and decide the case with appropriate care, skill and professional integrity. The arbitrator's duties of care and skill are in some respects akin to those imposed on other professionals, such as lawyers, accountants and bankers (although as discussed below, the enforcement of these obligations is radically different because of the arbitrator's entitlement to immunities). This obligation includes devoting the necessary time and attention to the case, and addressing the evidence and submissions with the skill and ability necessary to understand. These obligations also extend to a duty to decline appointment in arbitrations for which a potential arbitrator is ill-prepared or ill- suited, whether by virtue of lack of expertise, language abilities, or otherwise... ....."

Entertaining financial claims based on novel mathematical derivations, without proper foundation in the pleadings and/or without any cogent evidence in support thereof can cause great prejudice to the opposite party. Especially in the context of construction contracts where amounts involved are usually astronomical, any laxity in evidentiary standards and absence of adequate diligence on the part of an arbitral tribunal in closely scrutinizing financial claims advanced on the basis of mathematical derivations or adoption of novel formula, would cast serious aspersions on the arbitral process. The present case is an example where substantial liability has sought to be fastened on one of the contracting parties based on specious paper calculations. It cannot be overemphasized that arbitral tribunals must exercise due care and caution while dealing with such claims."

161. The foregoing discussions make it clear that the learned Arbitral Tribunal passed the impugned award which suffers from "patent illegality" and shocks the conscience of the Court. Since the award is

so perverse, it has to go in totality. The Court considers that the impugned award in totality has to be set aside as having been passed on the wrong premises and falls into the category of "perverse" and "patently illegal". The parties shall be free to avail the appropriate legal remedies.

162. Accordingly, the impugned award dated 27.01.2019 passed by the learned Tribunal is set aside. Since the impugned award has been set aside, the bank guarantees furnished by the respondent against the release of amount by virtue of under Section 17 of the Arbitration and Conciliation Act may be en-cashed by the petitioner after the expiry of the period available to the respondent for filing the appeal, if any, against the present order.

163. The present petition alongwith pending applications stands disposed of.

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164. Since the award dated 27.01.2019 has been set aside in the judgment passed in the other connected matter i.e. O.M.P. (COMM) 204/2019, the present petition alongwith pending applications, if any, also stands disposed of in the said terms.

Judgment be uploaded on the website forthwith.

DINESH KUMAR SHARMA, J

30 JANUARY, 2025
Pv/dy/kr/ht