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

Judgment reserved on: 20.12.2025

Judgment pronounced on: 12.05.2026

+ **CS (OS) 1499/2008**

TARAPORE & COMPANY

....Plaintiff

Through: Ms. Priya Kumar, Sr. Adv. with Ms.
Neelampreet Kaur, Adv.

versus

M/S NATIONAL THERMAL POWER CORPORATION LTD.

....Defendant

Through: Ms. Kanika Agnihotri, Adv.

+ **OMP 408/2008**

M/S NATIONAL THERMAL POWER CORPORATION LTD.

....Petitioner

Through: Ms. Kanika Agnihotri, Adv.

versus

M/s TARAPORE & CO., ENGINEERS & CONTRACTORS

....Respondent

Through: Ms. Priya Kumar, Sr. Adv. with Ms.
Neelampreet Kaur, Adv.

CORAM:



HON'BLE MR. JUSTICE JASMEET SINGH
J U D G M E N T

1. These are two petitions challenging the Arbitral Award dated 14.03.2008. M/s Tarapore and Co.¹ was the claimant before the Arbitrator whereas National Thermal Power Corporation² was the respondent and Counter Claimant before the Arbitrator.
2. NTPC has preferred O.M.P. No. 408/2008 under Section 34 of the Arbitration and Conciliation Act, 199³ challenging the Arbitral Award to the extent of allowing of Claim Nos. 1(ii), 2, 3 and 4 raised by the Tarapore Co. and to the extent of rejection/partially allowing of Counter Claim Nos. 2, 3, 4, 6 and 8 raised by NTPC. On the other hand, Tarapore has preferred C.S. (OS.) No. 1499/2008 filed under Section 33 of the Arbitration Act, 1940⁴ challenging the Arbitral Award to the extent of rejection/ partially allowing of Claim Nos. 1(i), 2, 4, 5, 6, 7, 8, 9 and 10 raised by Tarapore and to the extent of allowing Counter Claim Nos. 1, 2, 5 and 7 raised by NTPC.

FACTUAL BACKGROUND

3. NTPC is a Government Enterprise and is engaged in the construction and establishment of Super Thermal Power Projects and generation and supply of thermal power to various electricity boards or successor entities throughout India.
4. Tarapore is a duly registered partnership firm engaged in Contracting Business.

¹ "Tarapore" hereinafter.

² "NTPC" hereinafter.

³ "1996 Act" hereinafter.

⁴ "1940 Act" hereinafter.



5. NTPC issued Notice Inviting Tender dated 04.05.1987 for execution of the work of construction of Ash Bund Structure for Fly Ash Disposal at Farakka Super Thermal Power Project Stage-I, Farakka, District Murshidabad, West Bengal⁵. Tarapore emerged as a successful bidder and the Contract valued at Rs. 6.57 crores was awarded to it by NTPC. NTPC issued the Telex of Award⁶ dated 16.02.1988 and further issued a Letter of Award⁷ dated 28.03.1988.
6. The complete set of tender documents contained:
 - i. General Conditions of Contract⁸
 - ii. Special Conditions of Contract⁹
 - iii. Technical specifications
 - iv. Tender drawings
7. The GCC contained an Arbitration Clause being Clause No. 56 which reads as under:

“Clause 56: Arbitration

Except where otherwise provided for in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these

⁵“Work” hereinafter.

⁶“TOA” hereinafter.

⁷“LOA” hereinafter.

⁸“GCC” hereinafter.

⁹“SCC” hereinafter.



conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the General Manager of National Thermal Power Corporation Ltd., and if the General Manager is unable or unwilling to act, to the sole arbitration of some other person appointed by the Chairman and Managing Director, National Thermal Power Corporation Ltd., willing to act as such arbitrator. There will be no objection if the arbitrator so appointed is an employee of National Thermal Power Corporation Ltd., and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid at the time of such transfer, vacation of office or inability to act, Chairman and Managing Director, National Thermal Power Corporation Ltd. shall appoint another person to act as Arbitrator in accordance with the terms of the contract. It is also a term of this contract that no person other than a person appointed by C.M.D., NTPC Ltd., as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.



Subject to as aforesaid, the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings under this clause...”

8. The stipulated period for completion of the project, as per the TOA dated 16.02.1988, was a period of 22 months from the said date.
9. As per NTPC, Tarapore had to mobilize manpower and plant and machinery during the month of March, 1988 but it was only on 04.04.1988 the Tarapore sought permission from NTPC to bring machinery from various sites. Further, despite all the facilities and despite fulfilling the obligations under the contract, Tarapore started the work only on 06.05.1988. Subsequently, Tarapore stopped work on 11.06.1988 and resumed only in January, 1989, thus, wasting the time of 5 months. The work was again halted on 22.06.1989 due to monsoon. Tarapore committed several defaults/breaches of contract and executed only 19% of the Contract whereafter left the site unilaterally without any information in the month of June, 1989. Ultimately after several request, NTPC issued a letter dated 20.04.1990 in terms of Clause No. 41 of GCC to resume the work in 21 days failing which the work would be carried out at the cost of Tarapore and the bank guarantees, securities deposited with NTPC would be encashed and machinery would be confiscated.
10. Since, Tarapore unilaterally abandoned the work, NTPC was left with no option but to terminate the Contract with immediate effect *vide* letter dated 21.09.1990 and was constrained to award the work to



Murshidabad Zila Parishad *vide* Agreement dated 22.09.1990. The Zila Parishad completed the work on 15.08.1994 and NTPC had to incur an additional cost of Rs. 2,65,83,518.00.

11. On the other hand, as per Tarapore, NTPC failed to provide peaceful, congenial conditions at the site of work and due to constant interference from the local trade union leaders Tarapore was unable to proceed to complete the work. Tarapore was forced to leave the site and could not even remove its machinery without the intervention of this Court in suit bearing No. 2108-A of 1990 filed under Section 20 of the 1940 Act.
12. Since there were disputes between the parties, Tarapore invoked arbitration *vide* legal notice dated 11.07.1990.
13. This Court while disposing of the suit No. 2108-A of 1990 *vide* order dated 07.10.1996 directed the NTPC to appoint its General Manager as the Arbitrator, in terms of the Arbitration Clause.

IMPUGNED AWARD

14. Initially, Mr. Shankarlingam, who was then serving as General Manager was appointed as the Arbitrator. Subsequently, after his elevation as a Chairman and Managing Director of NTPC, he appointed Mr. Deshpande, also a General Manager, as the substituted Arbitrator. Mr. Deshpande passed the impugned Award dated 14.03.2008 awarding Claim Nos. 1, 2, 3 and 4 in favour of Tarapore and Counter Claim Nos.1, 2, 5 and 7 in favour of NTPC and thus, hereby awarded NTPC an amount of Rs. 2,55,21,532.85/- and thereafter adjusted an amount of Rs. 11,73,292/- awarded in the favour of Tarapore. Thus, the net amount payable to NTPC by Tarapore totalled to Rs. 2,43,48,240.85/-. Aggrieved by the Award, both the parties have



challenged the said Award. NTPC filed a petition under Section 34 of the 1996 Act whereas, Tarapore file objections under Section 33 of the 1940 Act.

SUBMISSIONS ON BEHALF OF PARTIES

Preliminary objections:

a. Application of 1940 Act versus application of the 1996 Act

15. Ms. Priya Kumar, learned senior counsel for Tarapore, at the outset, challenges the maintainability of the present proceedings filed by the NTPC under the 1996 Act, submitting that the arbitration was invoked in 1990 and is therefore, should be governed by the 1940 Act. Further, the parties consistently proceeded under the 1940 Act, including filing proceedings under Section 20 of the 1940 Act for appointment of the Arbitrator and for revocation of the Arbitrator's authority, and never agreed to be governed by the 1996 Act. Despite specific objections, the present/substitute Arbitrator assumed jurisdiction under the 1996 Act and rendered the Award under the 1996 Act itself. Such unilateral application of the 1996 Act to proceedings governed by the 1940 Act vitiates the Award and renders it liable to be set aside on this ground alone.
16. Opposing the same, Ms. Kanika Agnihotri, learned counsel for NTPC, objects to the maintainability of Tarapore's objections under Section 33 of the 1940 Act and submits that Clause No. 56 of the GCC being the Arbitration Clause expressly applies the 1940 Act or "any statutory modification or re-enactment thereof", thereby making the intention of parties manifestly clear to be governed by the law in force at the time of the proceedings, i.e. the 1996 Act. She further submits that the disputes



were referred to arbitration by order dated 07.10.1996, by which the 1996 Act had already come into force. Further and most importantly, Tarapore itself, by letter dated 04.02.1999 and subsequent correspondence, requested the Arbitrator that the proceedings be conducted under the 1996 Act. Having consented to and participated in the proceedings under the 1996 Act, Tarapore cannot now turn around and invoke the 1940 Act.

b. Appointment of Arbitrator, i.e. the respondent No. 3 in CS (OS) is contrary to the provisions of the 1996 Act

17. Further, learned senior counsel for Tarapore raises another preliminary issue and submits that the appointment of the Arbitrator is contrary to the provisions of the 1996 Act. The appointment of Mr. T. Shankarlingam as Sole Arbitrator was fundamentally flawed and gave rise to a serious apprehension of bias. Though his appointment dated 04.12.1996 was earlier challenged on the ground that he was the General Manager of the very project in dispute, and this Court, while declining to interfere *vide* order dated 12.08.1998, did so only on the premise and presumption that he would act independently and fairly. However, contrary to NTPC's representation that he was no longer in charge of the project and that the proceedings would be conducted in Delhi, Mr. Shankarlingam fixed the first hearing at Farakka without consent or prior intimation to Tarapore. The conduct of a serving NTPC officer, who had dealt with the project and contract in question, was inconsistent with the requirement of impartiality and equal treatment under the 1996 Act. Once his conduct gave rise to a reasonable



apprehension of bias, not only continuation of his mandate but also any subsequent appointment made by him stood vitiated.

18. Learned counsel for NTPC submits that the allegations of bias against Mr. T. Shankarlingam, the respondent No. 2 in C.S. (OS) No. 1499/2008, does not have any basis. Mr. T. Shankarlingam, the original Arbitrator and Mr. G.J. Deshpande, the respondent No. 3 in C.S. (OS) No. 1499/2008 and also the subsequent Arbitrator, acted fairly, independently and with complete impartiality throughout the proceedings. In fact, in the meeting dated 23.03.2002, Mr. Deshpande expressly offered, subject to consent of the parties, to commence the proceedings *de novo*, which itself demonstrates the fairness and transparency adopted in the arbitral process.
19. Moreover, the respondent No. 2, though posted as General Manager, Farakka, had no role in the execution of the balance work or in raising Counter Claims, which had in fact been initiated much earlier and was revised by the competent authority. This Court, in OMP No. 158/1997, had already rejected Tarapore's apprehension that the respondent No. 2 had raised the Counter Claims or had become a judge in his own cause. In any event, the final Award was not passed by the respondent No. 2, rather by the substituted Arbitrator, i.e. the respondent No. 3.

Objections on merits:

20. Learned senior counsel for Tarapore vociferously opposes the Award to the extent of disallowing and partly allowing Claim Nos. 1(i), 2, 4, 5, 6, 7, 9 and 10 and allowing Counter Claim Nos. 1, 2, 5 and 7. She states that the entire Award is devoid of any reasoning and primarily predicated on the findings on the preliminary issues. Even the findings



on preliminary issues are devoid of any reasons and does not even deal with contentions of Tarapore.

21. On the other hand, learned counsel for NTPC, vehemently opposes the challenge of Tarapore and further challenges the Award to the extent of allowing of Claim Nos. 1 (ii), 2, 3 and 4 and rejection of Counter Claim Nos. 2, 3, 4, 6 and 8.

Claim No. 1: Payment under 10th and 12th R.A. Bill

Challenged by both Tarapore and NTPC

22. Learned senior counsel for Tarapore states that the Arbitrator has fallen into manifest error both on facts and in law inasmuch as certain pleas raised by the NTPC have been accepted as correct without perusing any evidence on record. He has failed to appreciate that such measurements were duly and jointly signed by the parties and that the final quantification of the work executed was never in dispute. Since the statements were jointly signed, the Arbitrator was duty bound to accept the Claim in its entirety rather than unjustifiably reducing the same by permitting disputed recoveries.
23. She further contends that the Arbitrator has committed an error in recording a finding that delays were occasioned due to outside factors. He conveniently ignored the fact that NTPC was under a clear obligation to ensure conducive and workable site conditions to facilitate timely execution of the work, and the failure to do so resulted in murder of two engineers of Tarapore. The violation of ensuring conducive and workable site ought to have enured to the benefit of Tarapore. Moreover, the Arbitrator has erred in law in accepting vague and general denials advanced by the NTPC, contrary to the settled



principles that such general denials are liable to be treated as admissions.

24. While opposing the submissions of learned senior counsel for Tarapore, learned counsel for NTPC submits that the challenge to Claim No. 1, pertaining to payments under 10th R.A Bill, is wholly misconceived. The gross amount of the 10th R.A. Bill being Rs. 11,82,064.10 was jointly signed and duly accepted by both parties. Out of the said amount, Rs. 8,77,250.10 was released as an advance to Tarapore. The balance amount stood validly adjusted towards the following:
- Security deposit @ 5% : Rs. 59,103.00/-
 - Mobilisation advance @ 5% : Rs. 59,103.00/-
 - Secured advance : Rs. 1,71,210.00/-
 - Income Tax @2.16% on the balance amount : Rs. 1,609.00/-
 - Interest on mobilisation advance from 21.06.89 to 10.07.89 on Rs. 2,30,090 : Rs. 13,789.00/-
25. Tarapore was duly informed by the NTPC *vide* letter dated 08.08.1989 that no amount remained payable against the 10th and 11th R.A. Bills
26. While challenging the Award with respect to Claim No. 1(ii), which pertains to the 12th R.A. Bill for Rs. 14,68,454/-, the learned counsel for NTPC states that Tarapore failed to send any representative for joint measurement despite repeated requests, including letter dated 03.07.1989. It was only pursuant to the order dated 30.11.1990 of the High Court that joint measurement was conducted. Upon such measurement, the gross value of the Bill came to be Rs. 7,68,933.10/- and, after recovering security deposit of 5% i.e. Rs. 38,446.65, income tax of 2.16% i.e. Rs. 16,608/- and cost of 2.27 MT cement i.e. Rs. 6,356



the net amount payable under the 12th R.A. Bill was computed to be Rs. 7,07,521.50. However, the Arbitrator failed to consider that only a sum of Rs. 4,80,543/- is payable after deducting a sum of Rs. 2,26,798.00 which had already been released to Tarapore as on account payment towards price adjustment amount, which should not have been payable in terms of Clause No. 53.7 of the GCC, as it clearly bars price adjustment where delay was attributable to the contractor, in this case Tarapore. The Arbitrator has himself held that Tarapore is responsible for delay and for abandoning the work. In view thereof, the award to the extent of Rs. 2,26,798.00 is *ex facie* contrary to the contractual provisions and is liable to be set aside.

Claim No. 2: Escalation under the Contract

Challenged by both Tarapore and NTPC

27. With respect to Claim No. 2 relating to escalation under the Contract where the Arbitrator awarded an amount of Rs.3,29,585/-, learned senior counsel for Tarapore submits that the Arbitrator has acted in an arbitrary manner in awarding of 50% of the escalation Claim as the Arbitrator himself has categorically held that the delay in execution of the works was justified and occasioned by factors beyond the control of the parties. There was no legal or contractual basis to restrict the escalation Claim to 50%, rather the entire escalation Claim ought to have been allowed. The finding of the Arbitrator that third party interference causing delays fell outside the scope of the contract could not have been a ground to divide the burden of escalation equally between the parties. The failure of NTPC to ensure safety and prevent disruptions, directly contributed to the delays. Furthermore, NTPC



itself had accepted and paid escalation in full, which renders rationale of allowing the Claim of escalation only to the extent of 50%, arbitrary. Thus, the Award, to this extent, suffers from patent illegality and arbitrariness.

28. Learned counsel for NTPC, in this regard submits that Tarapore's Claim for escalation of Rs. 6,59,170/- is contrary to the express terms of the Contract. Although provisions for price adjustment exist in the said contract being Clause No. 8.1.0 of LOA and Clause No. 7.0.0 of the SCC read with Clause No. 53 of GCC, but the same has to be read with Clause No. 53.7 of the GCC which clearly bars such price escalation where delay is attributable to the contractor, in this case Tarapore. Tarapore failed to adhere to the stipulated schedule by commencing work belatedly on 06.05.1988 and also did not execute it as per the work schedule. Hence, no escalation was payable. The Arbitrator, despite noting the delay, erroneously awarded 50% of the Claim on an equitable and hypothetical basis by attributing delay to third parties. The same is *dehors* the Contract.

Claim No. 3: Miscellaneous Works

Challenged by NTPC

29. NTPC opposes the finding on Tarapore's Claim for Rs. 28,550/- and Rs. 8,250/- towards miscellaneous works. It is stated that the same is not covered within the scope of executing the construction of the Ash Bund. The said works were required to be executed by Tarapore for having temporary access to the site, which squarely falls within the obligations of the contractor, i.e. Tarapore, under Clause No. 17.1 of the GCC. The Arbitrator, in allowing the said Claim, has failed to



appreciate the clear import of Clause No. 17.1 and has erroneously awarded amounts contrary to the interpretation of the terms of the Contract. He has further failed to appreciate that there is no provision in the Contract providing for such payment by NTPC. The Award to the extent of Claim No. 2 thus, travels beyond the contractual provisions, including Clause No. 47(a) and (b) of the GCC, and is liable to be set aside.

- 30.** Learned senior counsel for Tarapore, opposes the said challenge and submits that the challenge raised by NTPC to the Award allowing Rs. 36,800/- towards miscellaneous works is wholly untenable. Once the work is executed, NTPC cannot evade payment on a technical plea of scope of the Contract, particularly when the works were carried out in connection with and for the benefit of the project. The objection of NTPC being based on the fact that the Arbitrator has travelled outside the scope of the terms of the GCC, is an unjust attempt to deny legitimate dues for work admittedly performed. Therefore, NTPC cannot be permitted to take advantage of its own breaches, which hindered the proper execution of corresponding obligations. The conduct of NTPC in resisting payment, despite deriving benefit from the work done by Tarapore, is inequitable.

Claim No. 4: Diesel Generating Set Charges

Challenged by both Tarapore and NTPC

- 31.** With regards to Claim No. 4, Ms. Kumar, learned senior counsel, states that the Arbitrator has acted arbitrarily in restricting the Claim to 50% despite recording a clear finding that Tarapore was entitled to free supply of electricity/power and that NTPC had failed to discharge this



obligation, necessitating deployment of diesel generating¹⁰ sets at site. The detailed expenditure incurred in this regard was duly placed on record but still was wholly disregarded without any justification. Further, the Arbitrator arbitrarily presumed that a portion of the electricity was utilized for residential purposes of the labour, in the absence of any evidence led by NTPC in that regard. Such an assumption was beyond the scope of the evidence placed on record. Thus, Award to the extent of Claim No. 4 is liable to be set aside.

32. Learned counsel for NTPC states that the Award of 50% of the Claim amounting to Rs. 1,99,131/- towards DG set charges is extraneous to the Contract. As per Clause No. 5.0.0 of the SCC read with Clause No. 48 of the GCC, Tarapore was permitted reimbursement of power generated strictly for construction purposes at State Electricity Board¹¹ tariff rates. Tarapore, however, utilized the generated power for residential accommodation of its staff, which was expressly excluded from the Contract and chargeable at applicable SEB rates. Despite specific directions issued by NTPC *vide* letter dated 27.01.1989 to segregate lines and install meters for proper assessment, Tarapore failed to comply. Moreover, the DG set deployed was excessive, and Claims based on its running or idling were unjustified. Tarapore cannot seek reimbursement beyond actual and permissible contractual usage. Thus, Tarapore is not entitled to any amount under this head.

Claim No. 5: Idling charges of resources

Challenged by Tarapore

¹⁰“DG” hereinafter.

¹¹“SEB” hereinafter.



33. Learned senior counsel for Tarapore submits that the rejection of Claim No. 5, pertaining to idling charges of plant, machinery and equipment, is liable to be set aside. While the Arbitrator accepted that delays had been caused because of which Tarapore could not complete the work on time, however, he erroneously denied the Claim on the ground that the delays were caused by external factors and that there was no contractual provision entitling Tarapore to idling charges. The Award is liable to be set aside with respect to this Claim as the aforesaid reflects a complete misappreciation of the law of damages, inasmuch as the absence of an express enabling clause does not bar a legitimate claim for damages unless specifically prohibited by the contract. Further, the Arbitrator failed to consider the evidence on record regarding the costs incurred, summarily rejected a substantial Claim without proper reasoning, and ignored material relevant to establishing delay attributable to NTPC.
34. Disputing the same, the stance of NTPC is such that Claim of Tarapore seeking an amount of Rs. 2,72,36,000/- towards alleged idling of plant, machinery and equipment is wholly untenable and has been rightly rejected by the Arbitrator. The Claim is *de hors* the Contract as there is no provision for computation or payment of idling charges. In the absence of any term in the Contract, NTPC cannot be held liable to pay such charges. The alleged delay is attributable to external factors such as law and order disturbances and heavy monsoon, which were beyond the control of NTPC. Tarapore cannot seek to shift the burden of such eventualities upon NTPC.
35. It is further submitted that Tarapore was itself grossly deficient in performance, having executed only about 19% of the work over a



substantial period of 16½ months out of the stipulated 22 months. Tarapore abandoned the site during monsoon in 1988 and resumed only in January 1989, despite the monsoon having subsided much earlier by the middle of August. Notably, no responsible officer was posted at site during this period. The computation of alleged idling charges is, therefore, baseless. Even otherwise, NTPC extended all reasonable assistance and cannot be held liable for circumstances beyond its control. In these circumstances, the Claim has been rightly rejected.

Claim No. 6: Losses on account of removal of components from machinery and equipment

Challenged by Tarapore

36. Challenging the findings on the said Claim, learned senior counsel for Tarapore also contends that the Arbitrator has erroneously rejected Claim No. 6 on the ground that it is outside the scope of Contract. He ignored the fact that it was due to NTPC's fault that Tarapore had to abandon its work and leave behind the equipment. For compensation on such a Claim there is no requirement of a positive clause in the contract in this regard.
37. It is submitted by the learned counsel for the NTPC that the contention of learned senior counsel for Tarapore in respect of Claim No. 6, seeking Rs. 15,33,375/- towards alleged losses arising from removal of components of machinery and equipment, is wholly misconceived and liable to be rejected. It is an admitted position that the machinery and equipment were neither in the custody nor within the premises of NTPC, but were retained by the Tarapore in its own camp office, occupied as a licensee. The said equipment remained under the



exclusive control, custody and security of Tarapore. No liability can be attributed to it for the alleged removal of components or damage to the equipment. NTPC had no role whatsoever in the upkeep, maintenance or security of the Tarapore's machinery.

Claim No. 7: Loss of profit

Challenged by Tarapore

- 38.** It is stated by Tarapore that the Arbitrator has erred in law in rejecting the Claim No. 7 on the ground that it fell outside the scope of the Contract and on the erroneous premise that Tarapore had abandoned the work. The Arbitrator has failed to appreciate that loss of profit is a well-recognized legal entitlement, upheld by the Hon'ble Supreme Court in catena of cases, and could not have been rejected as being beyond the scope of the Contract. Moreover, the conclusion regarding alleged abandonment is also erroneous as the material on record clearly demonstrates that performance was rendered impossible due to supervening circumstances, and therefore, the conclusion of abandonment does not arise.
- 39.** It is submitted by NTPC that the contention of learned senior counsel for Tarapore in respect of the Claim for Rs. 52,16,179/- towards alleged loss of profit is also liable to be rejected. The Arbitrator has rightly disallowed the said Claim, as Tarapore had unilaterally abandoned the work. Tarapore has committed fundamental breaches of the Contract. A party in breach cannot be permitted to Claim loss of profit arising out of its own default. It is an admitted position that Tarapore executed merely about 19% of the work over 16½ months out of the stipulated 22 months, and thereafter abandoned the project without justification.



Despite repeated requests and reminders, Tarapore failed to resume and complete the work.

Claim No. 8: Damages

Challenged by Tarapore

40. Ms. Kumar, learned senior counsel further states that the Arbitrator has erred in law in rejecting Claim No. 8 pertaining to losses on account of idle labour/excess wages and idle establishment, on the untenable ground that involvement of a third party absolves NTPC of its liability. Clause No. 13.2 of the Contract expressly contemplates acts of third parties, and therefore, the conclusion of the Arbitrator is contrary to the terms of the Contract. Even otherwise, it is a well-settled principle that where a party fails to provide adequate facilities for execution of the work, it is liable for the consequences arising therefrom. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court in ***K.N. Sathyapalan v. State of Kerala and Anr.***¹²
41. NTPC rebuts the Claim for Rs. 71,39,262/- towards alleged damages stating that the Arbitrator has rightly disallowed the Claim, holding that no liability can be fastened upon NTPC. The Claim is *de hors* the Contract and is, in substance, merely an extension of Claim No.5. NTPC further specifically denies any obligation to ensure a peaceful or congenial working atmosphere at or around the site as being a public sector undertaking, NTPC cannot be held responsible for matters of law and order, which fall exclusively within the domain of the government authorities. The allegations regarding forced imposition of local labour are unfounded. Hence, the Claim is stated to be baseless.

¹²(2007) 13 SCC 43.



Claim No. 9: Refund of Security Deposit

Challenged by Tarapore

42. With regards to Claim No. 9, Ms. Kumar, states that while deciding whether NTPC is entitled to retain the security deposit merely on the ground that Tarapore could not complete the work, the Arbitrator has failed to appreciate that completion of the work had become impossible for reasons beyond the control of Tarapore, as already demonstrated. In such circumstances, Tarapore could not have been penalized and was, in fact, entitled to appropriate compensation.
43. As per NTPC the Claim of Rs. 1,68,497/- towards refund of security deposit is wholly misconceived and liable to be rejected. The amount of Rs. 5 lakhs was released to Tarapore on submission of bank guarantee. In terms of Clause No. 9.6 of the GCC, 50% of the security deposit is refundable only upon successful completion of the work, and the balance 50% upon expiry of the defects liability period or payment of the final Bill. Tarapore has admittedly failed to perform the contract and abandoned the work. The very purpose of the security deposit is to secure due performance, the same is liable to be forfeited in the event of non-performance.

Claim No. 10: Interest on Claims

44. The Claim pertains to interest and has been challenged by Tarapore. The said challenge has been disputed by NTPC.

Counter Claim No. 1: Unadjusted amount of balance mobilisation advance

Challenged by Tarapore



45. Learned senior counsel for Tarapore, states that the conclusion of the Arbitrator with respect to allowing refund of the balance mobilisation advance and adjusting the same against the Claims of Tarapore is incorrect and illegal.
46. While opposing the said contention, it is submitted by the learned counsel for NTPC that the terms of Clause No. 6.0.0 of the LOA read with Clause No. 54 of the GCC, NTPC had disbursed a total sum of Rs. 26.30 lakhs to the Tarapore as mobilization advance against a Bank Guarantee, carrying interest @ 12% per annum. The said advance was contractually required to be recovered from R.A.Bills @ 5%. However, as Tarapore executed only about 19% of the work and thereafter abandoned the project. NTPC was deprived of the opportunity to fully recover the advance through running Bills. Only a sum of Rs. 5,92,088/- could be adjusted up to the 11th R.A. Bill, leaving a balance of Rs. 20,37,912/- outstanding, payable to NTPC. In these circumstances, NTPC was fully entitled to recover the said amount, and the Arbitrator has rightly allowed the recovery of Rs. 20,37,912/- towards the unadjusted balance of mobilization advance.

Counter Claim No. 2: Interest on mobilisation advance

Challenged by both Tarapore and NTPC

47. The Counter Claim No. 2 pertains to interest on mobilisation advance. Learned senior counsel for Tarapore submits that since the Arbitrator has erred in allowing return of mobilisation advance in Counter Claim No. 1, the interest allowed thereon is also incorrect in law. The Arbitrator has applied different yardsticks in allowing the interest.



48. Learned counsel for NTPC submits that the Arbitrator has rightly awarded interest on the outstanding mobilization advance. As stated in Counter Claim No. 1, NTPC had advanced a sum of Rs. 26.30 lakhs to Tarapore, out of which a balance of Rs. 20,37,912/- remains unrecovered. In terms of the Contract, the said mobilization advance carried interest @ 12% per annum, and Tarapore is liable to pay interest on the outstanding amount from 11.07.1989 till payment. In these circumstances, the award of Rs. 44,34,049.85/- towards interest was fully justified.

Counter Claim No. 3: Recovered, secured advance paid against materials amounting to Rs. 96,534/-

Challenged by NTPC

49. Ms. Agnihotri, learned counsel, further opposes the findings of the Arbitrator on Counter Claim No. 3 as he has erred in rejecting the Counter Claim for Rs. 96,534/- towards unrecovered secured advance paid against the material. A sum of Rs. 2,31,884/-, belonging to NTPC, remained blocked from 21.04.1989 to 06.08.1991 due to Tarapore's delays and laches, rendering the amount unproductive and unavailable. It was only from 06.08.1991 the material could be used by Murshidabad Zila Parishad. In these circumstances, NTPC should be entitled to interest for the period during which the amount remained blocked.

50. Learned senior counsel for Tarapore submits that Counter Claim No. 3 does not call for any interference. It is submitted that the materials purchased from the said advance were admittedly procured by Tarapore and remained at site when Tarapore was compelled to leave. NTPC,



therefore, had the benefit and possession of the said materials, and no further recovery could lawfully be claimed. If the materials had been used by Tarapore in execution of the work, their value would have formed part of the running Bills, against which the secured advance would have stood adjusted. Thus, NTPC cannot be permitted to repeatedly compensate itself over the same alleged loss.

Counter Claim No. 4: Licence Fee and electricity charges for accommodation of NTPC and FBP quarters

Challenged by NTPC

51. Learned counsel for NTPC also submits that the rejection of Counter Claim No. 4 for Rs. 42,767.75/- towards license fee and electricity charges is wholly erroneous. Clause No. 47 of the GCC only provided for free allotment of land for site-related purposes. Tarapore, however, sought and was allotted residential quarters in NTPC and Farakka Barrage Project townships for its staff, for which it was liable to pay license fee and electricity charges. Tarapore had, in fact, been regularly paying such charges earlier without any demur. There is no contractual provision for waiver of these charges. The Arbitrator, in rejecting the Counter Claim, has failed to appreciate the clear contractual position, rendering the impugned finding liable to be set aside.
52. Learned senior counsel for Tarapore submits that the Counter Claim pertains to alleged license fee and electricity charges for accommodation provided to Tarapore's staff. Under the Contract, it was NTPC's obligation to provide the requisite site area and necessary facilities for labour and staff accommodation in connection with execution of the work. Further, Farakka Barrage Project Authorities



were not parties to the arbitral proceedings, and any claim allegedly raised by them could not be passed on to Tarapore in arbitration. Once provision of site and basic facilities formed part of NTPC's own obligations, no separate recovery on this account could be claimed from Tarapore. Accordingly, the rejection of Counter Claim No. 4 is justified and warrants no interference.

Counter Claim No. 5: Cost of Balance work executed at the risk and cost of the Tarapore

Challenged by Tarapore

53. Learned senior counsel for Tarapore submits that the Arbitrator erred in allowing the Counter Claim towards execution of the balance work at Tarapore's alleged risk and cost. Tarapore was compelled to abandon the site due to NTPC's failure to provide a safe and workable environment for its staff and labour, despite being aware of persistent law and order disturbances and external interference at site. Having failed to ensure workable conditions for execution, NTPC could not thereafter recover the alleged additional expenditure incurred in getting the balance work completed through someone else. The said Counter Claim is contrary to the contract, as the risk and cost clause could be invoked only upon valid termination/cancellation of the Contract, which never took place. Mere reference in the TOA dated 16.02.1988 for execution of work at Tarapore's risk and cost did not amount to termination of the Contract. In the absence of termination in terms of the Contract, the very foundation of the Counter Claim was lacking. Thus, the Award to this extent is liable to be set aside.



54. It is submitted on behalf of NTPC that the Arbitrator has erred in partially allowing the Counter Claim towards cost of balance work executed at the risk and cost of Tarapore. As per Clause EEE of the TOA dated 16.02.1988, NTPC was entitled to get the balance work executed through another agency at the risk and cost of Tarapore upon its failure to complete the work. Though the Arbitrator has rightly held Tarapore to be in default, he has incorrectly restricted the Award only to the differential value of the Contract awarded to Murshidabad Zila Parishad. The Arbitrator has failed to consider the total financial implication incurred by NTPC in completing the balance work, which amounted to Rs. 2,65,83,518/-. In terms of the Contract, the entire cost was recoverable from Tarapore.

Counter Claim No. 6: Amount spent for raising existing ash dyke due to non-completion of stage-1 ash dyke

55. Although the Counter Claim No. 6 has been challenged by NTPC, no substantive arguments were advanced to substantiate the challenge. The same does not warrant independent consideration.

Counter Claim No. 7: Liquidated Damages

Challenged by Tarapore

56. It is submitted on behalf of Tarapore that the Arbitrator has erred in law in allowing Counter Claim No. 7 towards liquidated damages. The said finding is inconsistent with other findings, particularly in the absence of any termination of the contract or prior notice for imposition of such damages. There was neither delay nor default attributable to the Tarapore so as to justify levy of liquidated damages. The Arbitrator has also failed to consider that the Counter Claim was ex facie barred by



limitation. In terms of Section 3 of the Limitation Act, 1963 it was incumbent upon the Arbitrator to independently satisfy himself that the Counter Claim was within limitation; the burden could not have been shifted upon Tarapore. Mere existence of a clause in the GCC does not *ipso facto* justify imposition of liquidated damages. In any event, liquidated damages operate as a cap on liability, and the simultaneous award of both liquidated damages and risk and cost for the same cause of action is impermissible in law. Thus, it is liable to be set aside.

57. Opposing the challenge to Counter Claim No. 7, learned counsel for NTPC states that the Arbitrator has rightly awarded a sum of Rs. 32,88,304/- towards liquidated damages, in terms of Clause No. 9.0.0 of the LOA. The Contract stipulated that the work was to be completed within 22 months from the date of intimation of grant of work, failing which Tarapore would be liable to pay liquidated damages at ½% per week of the contract value for the period of delay. Tarapore failed to complete the work and abandoned approximately 81% of the project, thereby causing substantial delay and breach of contractual obligations. Therefore, the findings on said Counter Claim does not warrant any interference.

Counter Claim No. 8: Interest

Challenged by NTPC

58. It is submitted on behalf of NTPC that the Arbitrator has erred in not awarding interest on the amounts found due to NTPC. It is well settled that an Arbitrator is competent to award interest for the pre-reference, *pendente lite*, and post award periods. In the present case, a sum of Rs. 2,55,21,532.85 has been awarded in favour of NTPC and hence,



interest at 18% per annum ought to have been granted from the date the amounts became due till the date of actual payment.

59. Rebutting the same learned counsel for Tarapore submits that no amount was payable to NTPC in the first place, consequently, no question of payment of interest could arise. Since nothing was payable to NTPC, the Counter Claim for interest was wholly untenable.

ANALYSIS AND FINDINGS

60. I have heard the learned counsel for the parties.
61. Before delving into the merits and contentions raised by the parties of the present case it is pertinent to decide the applicability of the 1996 Act *vis-à-vis* the 1940 Act.

Applicability of the 1996 Act versus the applicability of the 1940 Act

62. The learned counsel for Tarapore argued in the favour of applicability of the 1940 Act whereas learned counsel for NTPC argued in the favour of the applicability of the 1996 Act. However, during the course of arguments, learned counsel for Tarapore fairly conceded to the applicability of the 1996 Act.
63. In the view of the aforesaid, the objections filed under Section 33 of the 1940 Act shall be treated as objections against the Award under Section 34 of the 1996 Act.

Scope of Section 34 under the 1996 Act

64. Since the parties have agreed to the applicability of the 1996 Act, it is apposite to highlight the scope of Section 34 of the 1996 Act as it stood prior to 2015 amendment to the 1996 Act.
65. The Court can only set aside an Arbitral Award on the grounds mentioned in Section 34 of the 1996 Act and not otherwise. The scope



of interference under Section 34 of the 1996 Act is very limited and the Court does not sit as a Court of appeal while adjudicating the objections against the Award. The Hon'ble Supreme Court in *Associate Builders v. DDA*¹³, summarised the scope of Section 34 of the 1996 Act, as it stood prior to 2015 Amendment as under:

“19. When it came to construing the expression “the public policy of India” contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held : (SCC pp. 727-28 & 744-45, paras 31 & 74)

“31. Therefore, in our view, the phrase ‘public policy of India’ used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ‘public policy’ in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to

¹³(2015) 3 SCC 49.



be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

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

xxxx

Fundamental Policy of Indian Law

27. Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head “fundamental policy of Indian law”. It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.



xxxx

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law 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.”*

66. With this scope in mind, I shall now deal with rival contentions with respect to preliminary objections, Claims and Counter Claims.

Plea of Bias against the Arbitrator

67. At the outset, I am of the considered view that the Award stands vitiated by the vice of bias. A detailed analysis which follows, shows that the initial Arbitrator, Mr. T. Shankarlingam, was a serving General Manager of NTPC and the substituted Arbitrator, Mr. Deshpande, who passed the Award was likewise a serving employee of NTPC, having been appointed by the previous Arbitrator, Mr. Shankarlingam upon his promotion to the position of Chairman and Managing Director. The very fact that the appointment of the subsequent Arbitrator was made by an interested official of NTPC, gives rise to reasonable apprehension regarding lack of independence and impartiality in the arbitral process. The doubt further deepens as the impartiality of the previous Arbitrator was already called into question twice by Tarapore at different stages of the Arbitral Proceedings. There is already an existing finding of this



Court in the first challenge to the impartiality of the Mr. T. Shankarlingam, the Court has proceeded forward with the presumption that the Arbitrator being the senior employee of NTPC would act independently and free from bias. The order dated 12.08.1998 passed by this Court reads as under:

“12.8.1998

Present: Mr. Jagdip Kishore for the Petitioner.

Mr. R.K. Joshi for respondent No. 1

O.M.P. No. 158/96 & I.A. No. 12886/96

....

I have heard Mr. Jagdip Kishore, counsel appearing for the petitioner as also Mr. R.K. Joshi, counsel for respondent No.1.

The arbitration agreement is also on record which states that disputes arising between the parties are to be referred to the sole arbitration of the General Manager of National Thermal Power Corporation Ltd., and if the General Manager is unable or unwilling to act, the same shall be referred to the sole arbitration of some other person appointed by the Chairman and Managing Director, National Thermal Power Corporation Ltd. willing to act as such arbitrator. Effect to the aforesaid arbitration agreement was given under order dated 7.10.1996 of this Court, However. while giving effect to the aforesaid arbitration clause, this Court made it clear that the General Manager who was in-charge of the project question the relevant time



might not be appointed as the arbitrator in the present case in order to do justice to the parties and in order to root out element of bias on the part of the arbitrator. It was also mentioned in the said order that the General Manager so appointed as the arbitrator may be preferably a person who is working at the Regional/Head Office at Delhi.

I have considered the tenor of the aforesaid order and I find that the restriction put in the otherwise discretionary power of the Chairman and the Managing Director of National Thermal Power Corporation Ltd., was to the extent that the General Manager who was in-charge of the project in question at the relevant time should not be appointed as the arbitrator. The Court also expressed a desire that while making such appointment, the appointing authority may consider appointing a General Manager, if possible, from the Regional/Head Office at Delhi. It has been categorically stated by the counsel appearing for the respondents that the respondent No.2 was not in-charge of the project in question at relevant time nor he had any occasion to deal with the disputes referred to him for arbitration at that point of time earlier to the present reference. Counsel appearing for the respondents states that the respondent No.2 although at the time of his appointment was working as the General Manager of Farakka Super Thermal Power Station, but, has since been promoted as the Executive Director (Engineering Services) and at present is posted as such at the EOC



Complex, Noida.

It is also submitted that the counter claim of the respondent was revised under the charge of the respondent No.2. However, it is stated by the respondent No.1 in its affidavit that the claim was revised by and at the instance of the Chief Construction Manager and that the respondent No.2 had nothing to do with the said revision. Thus, this apprehension and statement of the petitioner is also found to be without basis.

The respondent No.2 is admittedly a very senior and responsible officer holding a very high position in the Corporation. No definite allegation of bias except for making very vague statement has been made in the petition by the petitioner. I have no doubt in my mind that senior and responsible officer like the respondent No.2 would be always free from any biasness and would definitely act as an independent quasi-judicial authority in deciding the proceedings pending before him. In that view of the matter, I do not find any merit in this petition and the same stands dismissed with the aforesaid observations. The interim order passed on 2.1.1997 stands vacated.

The arbitrator shall proceed with the arbitration proceedings immediately after giving notice of the parties. As stated by the counsel for the parties, time for making of the award by the arbitrator stands extended by one year from the date of receipt of a copy of this order.”



68. This Court deems it appropriate to independently examine the impartiality of the Arbitrator on the basis of contentions advanced by the parties. Tarapore, upon noticing that numerous instances of bias on behalf of Arbitrator, wrote a representation dated 05.03.2002 to the respondent No. 2, i.e. the previous Arbitrator, highlighting the instances of such bias and misconduct during proceedings. Before the said representation, the learned counsel of Tarapore also wrote letters dated 28.02.2002 and 01.03.2002 to the Arbitrator mentioning that the dates for the hearing are not being fixed mutually by the Arbitrator and are also being cancelled at his pleasure. Further, the misconduct of Arbitrator to the colleague of the learned counsel for Tarapore was also highlighted in the letter dated 01.03.2002.
69. NTPC was granted time to file a reply to the representation dated 05.03.2002. Eventually, after a delay of 6 months, the reply to the said representation was filed by NTPC. Hearing on the said issue was conducted by the original Arbitrator but no minutes were recorded. Upon enquiring about the outcome of the representation Tarapore received a letter dated 12.12.2002 from the Arbitrator that the objections of Tarapore shall be considered at the time of publishing the Award. Meanwhile, Mr. T Shankarlingam, the original Arbitrator, got promoted to the position of Chairman and Managing Director and thus, appointed Mr. Deshpande as the subsequent Arbitrator.
70. Tarapore protested against the said appointment *vide* letter dated 18.10.2006 to respondent No. 2 and also wrote a letter dated 14.10.2006 to the subsequent Arbitrator pointing out that Tarapore would require 4 days travel time to reach Farakka and prayed for an alternate venue.



Despite this the hearing were fixed at Farakka. Tarapore further, *vide* letter dated 18.12.2006 informed the subsequent Arbitrator that he had become functus officio and requested him not to proceed with the Arbitration as a petition revoking his authority had been filed in this Court. Yet, the subsequent Arbitrator continued with the hearing and shifted the venue to Kolkata disregarding the fact that there had been a petition filed to revoke his authority. Furthermore, the Award was reserved and was passed on 14.03.2008 in the absence of Tarapore.

71. The facts enumerated above show that the apprehension of bias against the Arbitrator was not unfounded. Upon perusal of the facts and circumstances, the hierarchical relationship between the two Arbitrators, being Chairman and Managing Director and a senior officer of NTPC further strengthens the apprehension of bias which strikes at the very root of the arbitral process. Additionally, the order dated 07.10.1996 categorically observed that the General Manager so appointed as the Arbitrator may preferably be a person who is working at the regional office/ head office at Delhi. The same was reiterated in the order of 12.08.1998. The said observations were primarily made for the reason that Delhi was a convenient and neutral venue for Tarapore. Despite the same the Arbitration proceedings were conducted at Farakka only with a view to cause inconvenience and obstacles in Tarapore pursuing the Arbitration proceedings. As a result of holding the hearing in Farakka and later on shifting the venue to Kolkata, Tarapore could not participate in the last few proceedings. The said conduct is clearly contrary to the order of this court on 07.10.1996, reiterated on 12.08.1998.



72. In the view of the above factual instances, the Award is to be set aside on the ground of bias alone. Even though the award is likely to be set aside on this ground only, I am considering the claims on merits as well.

Findings on Preliminary Issues is devoid of reasoning

73. A careful examination of the Award shows that the findings returned by the Arbitrator on the preliminary issues which pertain to the delay and abandonment of Work and alleged interference by local politicians and trade unions, forms the foundation for adjudication of the Claims and Counter Claims. In the Award at paragraph No. 23, the Arbitrator framed preliminary issues arising out of the arbitration proceedings as under:-

“23. PRELIMINARY ISSUES ARISING OUT OF ARBITRATION PROCEEDINGS :-

Whereas after perusing the entire Arbitration record including the claims and counter claims, written statements and rejoinder thereof submitted by the parties, the undersigned is of the view that to adjudge the claim and counter claim of the parties the following issues between the parties needs to be decided by the undersigned:

a) Whether the reasons like alleged interference by the local politicians, trade unions leaders and deteriorating law and order situation in the region as highlighted by the claimant in their pleadings resulting in alleged delay in execution of work and alleged abandonment of contract by the claimant fall



within the scope of contract, if yes to then what extent.

b) Whether reason of the alleged unprecedented rains during the contract period resulting in alleged delay in execution of work and alleged abandonment of the contract by the claimant thereof fall within the scope of the contract, if yes then to what extent.

c) Whether respondents had any obligation under the contract to provide safety and security to the claimant during execution of contract work and if yes to what extent.

d) Whether allegedly such conditions were prevalent at around the site, which made it impossible for the claimant to continue the work and it made the claimant company to abandon the work and whether abandonment of contract due to such reasons is within the scope of contract , if yes to what extent.”

74. However, after framing the aforesaid issues, from paragraph No. 24 onwards, the Arbitrator has verbatim reproduced terms of the Contract, letters written by the parties, averments made by the parties in statement of Claim, Counter Claim and Rejoinder and documents relied on by the parties for more than 30 pages. Thereafter, the Arbitrator gave his findings on preliminary issues as under:-

“38. FINDINGS ON PRELIMINARY ISSUES:-

The undersigned after carefully perusing the arbitration record is of the opinion that the occurrence of law & Order



problem as mentioned in the above issues was never denied completely by the respondent company either during the performance of the contract or during arbitration proceedings, but only liability for the same is denied.

Further no evidence is raised by either party on the issues of external problems, but prima facie it seems that claimant had indeed faced adverse site conditions, but I see no provision in the contract between the parties by which respondent company could be made liable to compensate any loss sustained by the contractor because of intervention of third parties. Further it is also clear from the record that respondent company had no control over these external factors although help was rendered by them to the claimant company to find a solution to such issues.

The undersigned is of the opinion that it is not within the jurisdiction of the undersigned to absolve the claimants from the performance of their part of the contract as undertaken by them merely because its performance has become onerous on account of an unforeseen turn of events.

Further from record it seems that though these law & order problems had initially caused delay in execution of contract by the claimant, but even when the situation seemed to have improved, claimant did not chose to perform their obligations under the contract rather abandoned the contract.

39. *Whereas in view of the above findings, the basic issues*



are decided as follows:-

a) Whether the reasons like alleged interference by the local politicians, trade unions leaders and deteriorating law and order situation in the region as highlighted by the claimant in their pleadings resulting in alleged delay in execution of work and alleged abandonment of contract by the claimant fall within the scope of contract, if yes to then what extent. **Finding: Such reasons do not fall within the scope of the contract and as such claimant could not be absolved from their obligations under the contract on such account.**

b) Whether reason of the alleged unprecedented rains during the contract period resulting in alleged delay in execution of work and alleged abandonment of the contract by the claimant thereof fall within the scope of the contract, if yes then to what extent.

Finding: Such reasons do not fall within the scope of the contract and as such claimant could not be absolved from their obligations under the contract on such account.

c) Whether respondents had any obligation under the contract to provide safety and security to the claimant during execution of contract work and if yes to what extent.

Finding: Under the contract no-where any duty is cast upon the respondent to provide safety and security.

d) Whether allegedly such conditions were prevalent at around the site, which made it impossible for the claimant to



continue the work and it made the claimant company to abandon the work and whether abandonment of contract due to such reasons is within the scope of contract, if yes to what extent.

Finding: From perusal of record, it is apparent that claimant indeed had faced adverse site conditions at the start of the contract, but on the strength of records available in absence of clear evidence, it is difficult to reach to the conclusion that it was impossible for them to continue the work, but it is clear that by the time Govt. had extended help, the claimant had abandoned the contract. So I had no difficulty in holding that claimant could not be absolved from their obligations under the contract on such account.”

75. A perusal of the above shows that the Arbitrator while adjudicating the preliminary issues has failed to undertake the exercise of appreciating the documents, analysing the submissions made by the parties. The Award to the extent of preliminary findings, to say the least, is cryptic and unreasonable.
76. The Arbitrator has without any form of analysis has made a brief conclusions that even though law and order situation did create hindrance for Tarapore to complete the work but the delay caused due to the same could not absolve Tarapore from its liability under the Contract. The same is not supported by any other reasoning. Further, the Arbitrator observed that the government had extended support and assistance to Tarapore, but the Award does not disclose as to what



assistance was extended and how such assistance was adequate. The averments regarding the kidnapping of the officials, lapses in the law and order situation, forced employment of local labour at higher wages has neither been adverted to nor analysed by the Arbitrator. It has nowhere been discussed in the paragraphs reproduced above as to how there was interference by local politicians, trade unions and its consequences on the delay of execution of work. Even though hindrance in completion of work was caused, there is no analysis or reasons underpinning the conclusion of the Arbitrator that Tarapore could not be absolved from its liability under the Contract. The said findings of delay attributable to Tarapore is unreasoned.

77. The Statement of Claim and Rejoinder clearly raised averments regarding the such hinderances. The same is reproduced as under:

“22. That the Claimant gave repeated notices to the Respondent that the political & labour atmosphere prevalent in the region and particularly at the work site was not congenial and conducive to working. There was a lot of political interference by the local parties. Labour was being forced upon the Claimant by these local politicians and trade union leaders with arbitrary rates of wages attached to the said workforce irrespective of the fact whether these workmen did any work or not. Any resistance resulted in throwing of bombs on the officers of the Claimant, creation of law and order situation and thereby preventing the execution of Claimant’s work at the site, which included kidnapping and gheraoing of the officials of the Claimant,



thereby causing further hinderance to the execution of the work. The police and district administration also failed to check these unsocial and anti-social elements. In this manner, the Claimant to employ against its will, workers of these local political parties and trade union leaders at wages higher than those contemplated by the Claimant while making the offer to the Respondent and the Respondent failed to do anything about it. Over and above, these workmen expected payment of wages to be made to them irrespective of the fact whether they work or not in the course of the day. This added burden also contributed to the delays in as much as the forced Claimant was prevented from making full use of the plant, machinery and equipment mobilised for this work. The Claim-also not permitted to bring its labour force altogether and was coerced into agreeing to 50% of the labour force being employed locally which was also increased to 70% under threat of violence, The Respondent was fully aware these circumstances but failed to do anything about it except a few letters to the Police and Local Administration and in this manner the claimant was prevented from executing the work due to the failure of the Respondent in providing peaceful and conducive atmosphere at and around the place of work at the project site. These factors will be further elaborate while dealing with the specific claims in this regard.”



Further there were several correspondences between Tarapore and the senior officers of NTPC and the local administration of Murshidabad which the Arbitrator has reproduced in his Award. The same are reproduced as under:

a. *“In a letter dated 24.05.1988 Tarapore. has written to NTPC that the work is started on 06.05.88 and was proceeding smoothly but stopped from yesterday due to some extraneous problem. In another letter dated. 01.06.88 the GM of Claimant Company had written to officer in charge that some unidentified miscreants have thrown 5 nos. of country bombs on the air at our ash pond area. You are therefore requested to kindly institute a case and do the needful to avoid further such incidents. In another communication dated 04.06.88 the GM of claimant company has written to the officer in charge, Farakka P.S. that Mr. Panu Sekha of Jodpokharia village has threatened our site engineer Sh. T Khadanga with dire consequences if he has not been employed immediately. Thereafter there is a series of letters annexed with their claim by M/s. Tarapore & Co. where they have written to the state authorities about law and order problems and attacked on their officials.”*

b. In letter dated. 24.12.1988, Tarapore had written to Senior Manager of NTPC as under:

“Yesterday, we met SDO alongwith the letter of your Manager (P&A). Be apprised him the situation prevailing



here and requested for Immediate police picket at Malancha and he advised us to meet S.P., Murshidabad. We rushed to Berhampore to meet S.P. who had agreed for police picket from 24.12.88. In their letter dated. 06.01.89 at page 173 of their claim addressed to the Chief Construction Manager, NTPC the claimant company had asked to depute the NTPC officials to attend the site regularly.”

- c. In a communication dated 24.02.1989, Tarapore had addressed several issues to the DM, Murshidabad. The same is reproduced as follows:-

“Our present problem is supply of sand, metal and boulder. Our sub-contractors, whom we engaged recently to execute the work, are creating problems to us. Before recruitment of these subcontractors we had agreed that 50% of the entire work will be given to subcontractors and the remaining 50% will be done by our company, including earthwork and supply of boulder, metal, sand etc. But of late our earth work area was reduced to 14%, as this area has been encroached by the sub contractors. To have a calm and peaceful atmosphere, we have not viewed this seriously. But we reiterated them that 50% supply of materials will be done by us. When we started bringing materials through our appointed Agencies, some subcontractors objected them. They terrorized our agency



and forced them to flee with their trucks fully loaded with supplies.

The subcontractors recruited recently are mainly from Malancha and Shankarpur village. Appointment of these contractors were made in consultation with the local leaders, and selection were their choice only. It appears that they are hard core criminals. Now they are out of control of the leaders and doing everything at their own will and pleasure.

The sub contractors are supposed to supply materials at their area only allotted to them by us. Now they are demanding that they will take entire supply and not to allow anyone else to ring materials. They are not agreeing the rate fixed to other agency for supply and demanding Increase in rate.

If we are cannot started the pitching work now, the earthwork whatever we have done, will be washed away during rainy season which will cause heavy loss to us.

We strongly feel that unless we remove some bad elements, we cannot achieve our progress here. We apprehend Intimidation from them, if we take such action. We therefore, request you to kindly help us in this regard. We may also require personal protection for us as these people will Gherao and humiliate us on our way.”

- d. In another letter dated 05.04.1989 Tarapore had written to the following to Senior Manager (CC) the following:



“Further to our letter No.358/862/89 dated. 05.04.89, we wish to Inform you that SARBA DALIYA COMMITTEE formed by all parties except CPM posing a threat to us. They may enforce us to employ their workmen around 500 through agitation. We presume that they may launch a blockade on NH-34 to pressurize us to concede their demands. We may mention that we are having enough workmen with us, more than our requirements. Hence, the question of recruitment of workmen does not arise. if they launch mass movement, it may hamper our progress. This is for your information.”

- e. In letter dated 09.05.1989 Tarapore highlighted several issues to the then Power Minister of West Bengal by stating the following:

“From 11.01.89, the work appeared to have started smoothly, but periodic pin pricks and disruptions in work have continued and are getting worse. Against 50% area agreed to be worked by local sub-contractors, they have now usurped more than 80% area under coercion and threat of violence. Also while the local sub contractors do not possess the means to cope up with pace of quantum of work, they are obstructing agencies employed directly by us from bringing materials and doing work. Also local sub-contractors do not listen to our engineers, frightening them by threats of violence. The local political leadership does not seem to have the desired influence, nor hold, over



the prevailing situation and cannot bring matters under control. We are bringing to their notice almost daily disruptive activities taking place and they are either unwitting or unable to do anything.

Our machinery is not being permitted to be utilized and are largely idle. We are not being allowed to operate at optimum levels to sustain ourselves. We have already incurred crushing losses and continue to incur further heavy losses month after month. Beside this, daily large quantities of diesel, petrol are drained out by the Drivers in connivance with our security guards, from the vehicles, adding us to further loss. We are neither able to take disciplinary action nor remove them from service due to intimidation and threats.

The materials such as boulder, huts pipes etc. brought to our work site are not allowed to be unloaded unless 'MASTAN' taxes are paid to local goudas, though our contract are Inclusive of loading and unloading charges.

Lastly, a fantastic charter of demands has been initiated by the CITU, on behalf of our workmen, and we were forced to agree to their demands, resulting an additional expenses of Rs. One lakh per month. To have peaceful atmosphere and to augment the progress we also agreed to exorbitant rates to all item of work."

- 78.** No doubt the award can be short on detailed reasons and analysis but cannot be devoid of the same. The present award is one such Award



where the reasoning is not merely brief but is substantially absent, is totally cryptic and does not show any basis much less reasonable basis for the Arbitrator to arrive at his conclusions on the preliminary issues. Hence, the fountain head of the analysis of the Claims and Counter Claims itself is perverse and against the public policy of India. A mere reproduction of pleadings followed by conclusions cannot satisfy the requirement of “reasons”.

79. The Award must show a link between the material on record and the conclusion reached, which is lacking in the present case. The requirement of a reasoned Award is not a mere formality rather a statutory mandate by Section 31 (3) of the 1996 Act. The same reads as under:

31. Form and contents of arbitral award.—

xxx

(3) The arbitral award shall state the reasons upon which it is based, unless-

*(a) the parties have agreed that no reasons are to be given, or
(b) the award is an arbitral award on agreed terms under Section 30.”*

80. The requirement of an Award having adequate and intelligible reasoning is further fortified by catena of judgments including *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*¹⁴, wherein the Hon’ble Supreme Court held as under:

“34. The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and,

¹⁴(2019) 20 SCC 1.



which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.

35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the



contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.

xxxx

42. From the facts, we can only state that from a perusal of the award, in the facts and circumstances of the case, it has been rendered without reasons. However, the muddled and confused form of the award has invited the High Court to state that the arbitrator has merely restated the contentions of both parties. From a perusal of the award, the inadequate reasoning and basing the award on the approval of the respondent herein cannot be stated to be appropriate considering the complexity of the issue involved herein, and accordingly the award is unintelligible and cannot be sustained.

- 81.** The said principle was reaffirmed by the Hon'ble Supreme Court in ***OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.***¹⁵The relevant paragraphs read as under:

“80. We find ourselves in agreement with the view taken in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1, paras

¹⁵(2025) 2 SCC 417.



27-43] , as extracted above. Therefore, in our view, for the purposes of addressing an application to set aside an arbitral award on the ground of improper or inadequate reasons, or lack of reasons, awards can broadly be placed in three categories:

- (1) where no reasons are recorded, or the reasons recorded are unintelligible;
- (2) where reasons are improper, that is, they reveal a flaw in the decision-making process; and
- (3) where reasons appear inadequate.

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

- (a) the parties have agreed that no reasons are to be given, or
- (b) the award is an arbitral award on agreed terms under Section 30.

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

83. Awards falling in Category (3) require to be dealt with care. In a challenge to such award, before taking a decision the Court must take into consideration the nature of the issues arising between the parties in the arbitral proceedings and the degree of reasoning required to address them. The



Court must thereafter carefully peruse the award, and the documents referred to therein. If reasons are intelligible and adequate on a fair reading of the award and, in appropriate cases, implicit in the documents referred to therein, the award is not to be set aside for inadequacy of reasons. However, if gaps are such that they render the reasoning in support of the award unintelligible, or lacking, the Court exercising power under Section 34 may set aside the award.

82. The preliminary findings rendered by the Arbitrator, being short of adequate and intelligible reasoning, are thus in clear contravention of Section 31 (3) of the 1996 Act. The requirement of a reasoned Award acts as a fundamental safeguard in ensuring fairness in the Arbitration proceedings. Inadequacy of reasons or unintelligible reasons strikes at the very root of Arbitral process. In the present case, absence of reasons goes to the root of matter as the findings on the preliminary issues. Accordingly, the findings on preliminary issues are set aside for being violative of fundamental policy of the Indian Law and perverse under Section 34 of the 1996 Act.

Claim No. 1

83. There are two parts to the challenge to Claim No. 1. The total Claim amount raised in Claim No. 1 is Rs. 17.73 lakhs out of which first being Claim No. 1(i) relates to pending amount of Rs. 3,04,814 for 10th R.A. Bill and the second being Claim No. 1(ii) relates to pending amount of Rs.14,68,454 against the 12th R.A.Bill. The amount awarded by the Arbitrator is Rs. 7,07,341/-. The challenge to the findings on the said Claim is due to the non-consideration of joint measurements made by



the parties and further non-appreciation of the fact that the final quantification in the R.A.Bills was never disputed by the NTPC. Thus, NTPC did not have the right to unilaterally adjust the outstanding amounts towards various heads. It is NTPC's case that with respect to 10th R.A. Bill the amount alleged to have been pending was adjusted under various heads and thus, there was nothing payable under the 10thR.A. Bill and that with respect to the 12th R.A. Bill the price escalation adjustment is barred by the Contract in case the delay is attributable to Tarapore. Thus, the said Claim should not have been allowed.

- 84.** The Arbitrator disallowed the Claim No. 1(i) pertaining to the 10th R.A. Bill and allowed the Claim No. 1 (ii) pertaining to 12th R.A. Bill. The findings of the Arbitrator is reproduced as under:

“In view of the above rival submissions made by the parties and also perusing the documents relied upon in the light of admissions/denial by the other party, including the general condition of the contract as applicable in the present contract which says as follows regarding contract price adjustment:-

“53.1 The rates quoted by the tenderer shall be the base price, which will be subjected to PRICE ADJUSTMENTS In accordance with the conditions and formats prescribed herein and further subject to satisfying the requirements specified in this clause only.

53.2 The contract price (for definition please refer clause No.3(e) of GCC-Definitions) as awarded shall be the base



price, unless otherwise specified. A certain fixed percentage of the base price shall not be subject to any price adjustment. The balance percentage to be specified shall be of identified components towards Labour, Materials and HS Diesel 0:1 (POO and shall be subjected to price adjustment.

The fixed component and the identified components shall vary from contract to contract depending upon the scope of works) and shall be furnished in the special conditions of contract, which will be attached to the tender documents.

53.7 Price adjustment(s) shall be calculated for the quantum of works executed for the month or the period of the bill as per agreed work schedule. For the purposes of payment/recovery of price variation provisions, the contractor would be eligible for such claims or shall be liable for refund on the quantum of work scheduled to have been executed in the month or period as per the agreed work schedule or the actual quantum of work done provided always that such quantum of work done is more than or equal to the scheduled quantum of work as per the agreed work schedule. In other words the contractor shall not be eligible for these claims nor liable for payment/refund under these provisions if the work has been delayed beyond the scheduled dates for reason attributable to contractor. However, the contractor would be eligible for claim or liable for refund for price adjustments for quantities of work executed beyond the schedule date based on the value of Indices as applicable to



the schedule dates of execution, for such delayed work provided that If the Indices during the extended period are lower than the indices during scheduled dates of execution, then lower Indices shall be applicable.”

I am of the view that so far as the claim towards 10th RA Bill is concerned, the claimant had denied as having received the letter dated 08.08.1989 and also denied the adjustments as given by respondent in their Written Statement in relation to 10th RA Bill. But it is seen that other than making a general denial, the claimant had failed to show exactly how such adjustments were are wrong. In order to disprove such adjustments, the onus, was on the claimants to show that such adjustments were not valid, in my opinion a mere denial would not be suffice and accordingly the claim of the claimant in regard to 10th RA Bill is disallowed.

So far as the claim in regard to 12th RA Bill is concerned, I am of the view that unless otherwise agreed thereafter, the parties would be governed by the above provisions of GCC, So far as the question "whether the delay is attributable to the contractor or not" is concerned, undersigned is of the view that as decided above in preliminary issues, it has been held that the acts of the third parties were indeed involved in the delay, but within the scope of contract such third parties cannot be taken into account.

Initially, in the claim the claimant had contended that they are entitled to a sum of Rs. 14,68,454.00, whereas the



respondent had contended that under the 12th RA Final Bill only a sum of Rs.7,07,521.50. The respondent had paid a sum of Rs.2,26,798/- as on account payment as price adjustment amount which it was not entitled to received and accordingly claimant are entitled to receive a sum of Rs. 4,80,543.50/- only. In their rejoinder, the claimant had not contended that the sum of Rs.7,07,521.50. as calculated by respondent is wrong, rather the claimant had contended that all these adjustments against the 12th RA Bill are impugned and are denied. However, in view of an admission of the respondent that a sum of Rs.4,80,543.50 was found as payable against the 12th RA Bill, an interim award on admissions may be made to this effect. As for the payment of escalation made already by the respondent and appropriate from the claimant's RA Bill, the question of unilaterally adjusting the same would not arise once the payment is agreed and paid. In my view also, the amount of Rs. 2,26,798/- paid to claimant cannot be subsequently adjusted by respondent by holding that Price adjustment was not payable.

AWARD:-

In view of the findings given above, the claimant is awarded a sum of 4,80,543.50/-+ Rs. 2,26,798/- = 7,07,341.50/- only towards 12th RA Final Bill. So far as the question of interest on this amount is concerned, the same would be dealt in award to claim no.10, which deals with interest on all claims.”



85. With respect to 10th R.A. Bill, being Claim No. 1(i), challenged by Tarapore, the Gross amount of Bill stood to be Rs. 11,82,064/-. It is not disputed that the 10th R.A. Bill of the said amount was jointly signed by both the parties. Further it is also not in dispute that only an amount of Rs. 8,77,250 was released towards the said Bill and the balance amount Rs. 3,04,814 was adjusted towards various heads being contractual deductions. The argument of Tarapore rests on the fact that the joint 10th R.A. Bill was signed and accepted by NTPC without any reservations or qualifications. Once the Bill has been raised and accepted in totality no deductions could be permitted. The said argument of Tarapore has neither been considered nor been adverted to. In this regard NTPC further relies on the letter dated 08.08.1989 was duly sent to Tarapore informing them about the status of payment under the 10th and 11th R.A. Bills. The same reads as under:

“NTPC REGD. ACK.DUE”

PS: 42: 01: 01/245

08-08-89

To

The Managing Partner,

M/s. Tarapore & Co.

Dhun Building, 827, Anna Salai,

Madras : 600 002.

Subj : Constn of Ash bund structure for fly ash disposal,

LOA No. 01:CC:42:128(R)/DICA dated 28-3-88.

Ref. No. Your letter No. 600/2422/89 dtd. July 21, 1989.



Dear Sir,

With reference to your above letter the matter has been verified from our Finance Deptt and it is found that after correction nothing is payable to you against 10th & 11th bills. As regards to the 12th RA bill you may please note that the joint measurement of works were not completed due to non-availability of Engineers from your end. A letter to this affect was issued to R.E.at site (Copy enclosed) which is self-explanatory. Though it was told to us by your Site engineer, Shri T. Khadanga that he would be available here for taking the measurements and signed in the bill, he left site suddenly without any intimation to us.

Under the circumstances, processing of 12th RA bill could not be possible at this end. However, after the completion of Joint measurement and signing of the bill by your representative there- after bill would be forwarded to Finance for further disposal.

Necessary action from your end in this matter is requested please.

Thanking you,

Yours Faithfully,

(A K Bhattacharya)

Dy. Manager (CC)



Copy forwarded for information :

- 1) *CCM/FS TPP*
- 2) *SR.MGR(CC)*

86. It is the contention of NTPC that the letter crystallises the position of NTPC regarding 10th R.A.Bill. The receipt of letter has been disputed by Tarapore in its Rejoinder before the Arbitrator as under:

“It is denied that the claimant received any letter dated 03/07/1989 or 08/08/1989, as alleged by the Respondent and, as such, no such intimation as alleged, was received by the claimant from the Respondent. The fact that the claimant had prepared and submitted its 12th R.A.Bill, did not prevent the Respondent from cross-checking the correctness of the measurements and making payments therefor, but it lacked the will and intent to make payments. On the contrary, the Respondent was responsible for virtually pushing the claimant out of the site and not even allowing the claimant to remove its plant, machinery and other equipment, for which the claimant had to take recourse to law and seek appropriate orders from court in this regard.”

87. The Arbitrator has not given any finding regarding the letter dated 08.08.1989, whereas the Arbitrator has just mentioned that Tarapore has denied ever receiving such letter. This shows that the Arbitrator has failed to take into consideration and material evidence and objections with respect to the same. Further, the assumption of the Arbitrator that the adjustments made by NTPC needed to be shown to be wrong is beyond the terms of the Contract and is contrary to the clear evidence



on record. There is no term in the Contract that permits NTPC to unilaterally adjust the any amount in a Bill already signed by both the parties.

88. In this view of the matter, an Award in violation of the terms of the Contract or going against the terms of the Contract falls within the parameter of Section 34 of the 1996 Act and is, thus, vitiated by patently illegality. In the view of the above, the Award is liable to be set aside to the extent of Claim No. 1(i) as being patently illegal as per the ratio laid down in *PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust*.¹⁶ The relevant paragraphs read as under:

“85. As such, as held by this Court in Ssangyong Engg. & Construction Co. Ltd. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213], the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, rewriting a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the court and as such, would fall in the exceptional category.

86. We may gainfully refer to the following observations of this Court in Bharat Coking Coal Ltd. v. Annapurna

¹⁶(2023) 15 SCC 781.



Construction [Bharat Coking Coal Ltd. v. Annapurna Construction, (2003) 8 SCC 154] : (SCC pp. 161-62, para 22)

“22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.”

87. It has been held that the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction.

*89. It has been held that an Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers *ex debito justitiae*. It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.*

90. In that view of the matter, we are of the considered view, that the impugned award would come under the realm of



“patent illegality” and therefore, has been rightly set aside by the High Court.”

89. Claim No. 1 (ii) is challenged by NTPC. With respect to Claim No. 1(ii), initially the Claim was quantified at Rs. 14,68,454. The same included the amount under 11th R.A. Bill which remained unmeasured and amount of 12th R.A. Bill, where final sum payable was Rs. 7,07,512/-. It is the case of NTPC that it paid a sum of Rs. 2,26,798/- on account of price adjustment and the same should not have been paid in terms of Clause No. 53.7 of the GCC. The said Clause reads as under:

“53.7 Price adjustment(s) shall be calculated for the quantum of works executed for the month or the period of the bill as per agreed work schedule. For the purposes of payment/recovery of price variation provisions, the contractor would be eligible for such claims or shall be liable for refund on the quantum of work scheduled to have been executed in the month or period as per the agreed work schedule or the actual quantum of work done provided always that such quantum of work done is more than or equal to the scheduled quantum of work as per the agreed work schedule. In other words the contractor shall not be eligible for these claims nor liable for payment/refund under these provisions If the work has been delayed beyond the scheduled dates for reason attributable to contractor. However, the contractor would be eligible for claim or liable for refund for price adjustments for quantities of work executed beyond the schedule date based on the value of



Indices as applicable to the schedule dates of execution, for such delayed work provided that If the Indices during the extended period. are lower than the Indices during scheduled dates of execution, then lower Indices shall be applicable.”

90. In the preliminary findings, the Arbitrator holds that although delays were due to third parties and external conditions, Tarapore could not be absolved from the delays caused in execution of the project but on the other hand permits price escalation contrary to Clause No. 53.7 of the GCC. The Arbitrator, despite having recorded a preliminary finding that there was no cogent evidence to establish that the hindrances allegedly caused by external factors were of such a grave nature as to compel Tarapore to abandon the work, and that Tarapore could not be absolved of its contractual liability to complete the work, failed to consider NTPC's case in the context of Clause No. 53.7 of the GCC.
91. In the light of such a finding, it was incumbent upon the Arbitrator to consider whether, in view of delay being attributable to Tarapore, the amount of Rs.2,26,798/-, earlier paid towards price adjustment, was at all payable under the contract or was liable to be adjusted from the amount found due under the 12th R.A. Bill. However, the Arbitrator has rendered no reasons as to why the said amount could not be adjusted afterwards. He has awarded the same by merely observing that, once the amount stands paid, it could not subsequently be appropriated. Thus, the Arbitrator has completely overlooked the Clause No. 53.7 of the GCC despite his own finding. Therefore, impugned Claim No. 1(ii) is *ex facie* inconsistent, self-contradictory and contrary to the terms of the contract, unsupported by reasons. Consequently, the Award in



relation to Claim No. 1(ii) is liable to be set aside as being patently illegal as per the ratio in *PSA Sical Terminals (P) Ltd.*¹⁷

92. I have also earlier part of my judgment held that the findings on the preliminary issues are also devoid of reasons and hence, needs to be set aside. The above analysis of the Claim No. 1(ii), is not withstanding the fact that even the preliminary issues are findings are unsupported by any reasoning.

Claim No. 2

93. The Arbitrator awarded Rs. 3,29,585/-, i.e. 50% of the price escalation claimed by Tarapore after recording a finding that delay in execution of the work was attributable to third parties. Since, the delay attributable to third parties were held not covered by the Contract, the Arbitrator allowed 50% of the Claim on equitable grounds. The said finding of the Arbitrator reads as under:

“Findings

Considering the rival submissions, arguments and documents produced by the parties in regard to this claim, the undersigned is of the opinion that the delay indeed had been caused due to the intervention of 3rd parties, but these 3rd parties do not come within the scope of the contract and accordingly both the parties should bear the brunt for delay in work equally as the same cannot be attributable to either of them in totality.

In addition, it is found that the respondent were paying escalation to the claimant during the performance of the

¹⁷Supra n. 16.



contract and accordingly following award

Award on claim no.2.

The claimant are awarded 50% of the claimed amount towards price escalation in view of the above finding of the undersigned in regard to this claim and accordingly an amount of Rs.3,29,585.00 is awarded in regard to claim no.2 to claimant.”

94. The learned senior counsel for Tarapore opposes the said finding of only 50% of escalation Claim as the Arbitrator has himself held that delay was justified and was caused due to factors beyond control of the parties whereas learned counsel for NTPC states that such a Claim is contrary to the terms of the contract.
95. The contractual framework with regard to price escalation is governed by Clause No. 8 of the LOA read with Clause No. 53 of the GCC and Clause No. 7 of the SCC. These provisions provide for specific set of formulas and circumstances where such price escalation can be given. The Clause No. 8 of the LOA and Clause No. 7 of SCC read as under:

“8.0.0 CONTRACT PRICE ADJUSTMENT

8.0.1 The item rates mentioned in Schedule of items (Annexure-A) are subject to price adjustment as detailed in clause 7.0.0 of Special Conditions of Contract, read in conjunction with clause 53 of General Conditions of Contract (for Civil Works). The total quantum of such price adjustment amount shall be limited to Rs. 78,91,929/-(Rupees Seventy eight lakhs ninety one thousand nine hundred and twenty nine only) being 12% of the



contract value defined in clause 3.0.0 above.”

**7.0.0 CONTRACT PRICE ADJUSTMENT (___ REFER
CLAUSE NO. 53 OF GCC)**

*7.1.0 The value of co-efficients for contract price
Adjustment as detailed under clause 53.4 of general
condition of contract shall be as under.*

<i>S. NO.</i>	<i>COMPONENT</i>	<i>VALUE OF CO-EFFICIENT</i>
<i>1.</i>	<i>Fixed Component</i>	<i>0.50</i>
<i>2.</i>	<i>Labour Component</i>	<i>0.20</i>
<i>3.</i>	<i>Material Component (other than the owner issue materials)</i>	<i>0.25</i>
<i>4.</i>	<i>Fuel Component</i>	<i>0.05</i>

- 96.** It is pertinent to highlight that Clause No. 53.7 stipulates that Tarapore shall be eligible for such price escalations only in the case when the delay is not attributable to Tarapore. The Arbitrator was required to adjudicate the Claim in dispute as per the terms of the Contract. On the perusal of the findings of the Arbitrator, it is evident that 50% of the price escalation was granted to Tarapore only on equitable grounds as the delay could not have been attributed to just one party. The same is outside the scope of the Contract. The reasoning does not show reliance on any term of the Contract which permits that the price escalation can be apportioned in case the delay is attributable to third party.
- 97.** The role of an Arbitrator is to interpret and apply the terms of the Contract. Being the creature of Contract and bound by its four corners, the Arbitrator certainly could not have travelled outside the scope of the



Contract and nor could have decide the Claim based on equity, side lining the contractual terms. Granting benefit of price escalation partially in the present Claim would, thus, amount to re-writing of the terms of the Contract. The Arbitrator could not have allowed 50% of the Claim to do equity when the Contract itself does not permit him to do so. This approach is also contrary to Section 28 (2)¹⁸ of the 1996 Act and strictly prohibited under the scheme of the 1996 Act. It proscribes the Arbitrator to decide disputes between the parties, *ex aequo et bono*, i.e. on the basis of equity and conscience, unless the parties so permit. In the absence of express authorisation to decide the dispute on the basis of equitable considerations, the Award to the extent it grants relief under Claim No. 2 is contrary to 1996 Act and thus, violative of Fundamental policy of Indian Law.

98. Reliance in this regard is placed on *M.S.T.C. Ltd. v. Jain Traders*¹⁹ wherein the Court held that the Arbitrator cannot decide a Claim based on equity. The relevant paragraphs read as under:

“18. This distinction has been completely ignored by the learned Arbitrator and he has, on the basis of equitable considerations and his notions of fairness, superimposed the concept of proportionate refund in Clause 5.3, even though the same is specifically excluded from Clause 5.3.

19. The Arbitrator is bound to implement the contractual clauses and cannot go contrary to them. He cannot decide on the basis of his notions of equity and fairness, particularly in

¹⁸Section 28 (2): The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

¹⁹2011 SCC OnLine Del 3304.



such a manner that it goes contrary to the specific contractual terms. Section 28(2) of the Act provides that “The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so”. (emphasis supplied). The phrase “ex aequo et bono” means “according to equity and conscience” (see Black's Law Dictionary 6th edition). In relation to the expression “Amiables compositeurs” the Black's Law Dictionary refers to “Amicable compounders” and states that “amicable compounders are arbitrators authorized to abate something of the strictness of the law in favour of natural equity”. The parties in this case have not agreed that the Arbitrator may “decide as an amiable compositeur or on the basis of “justice and fairness”. Therefore, the learned Arbitrator could not have disregarded the plain and grammatical meaning of Clauses 5.3 and 5.4 of the General Conditions of Contract to give way to his own sense of equity, fairness or justice. Reference in this regard may also be made to the decision in Food Corporation of India v. Chandu Construction, (2007) 4 SCC 697 The Supreme Court in this decision held as follows...”

99. The above principle was also reaffirmed in ***Power Grid Corporation of India Limited v. Ranjit Singh And Company LLP***²⁰ wherein it was reiterated that the Arbitrator is bound by the terms of the Contract, the Claims cannot be decided on the basis of equity and fairness.

²⁰O.M.P. (COMM) 134/2023, Ref Paragraph Nos. 21-25.



Claim No. 3

- 100.** The said Claim pertains to payment for miscellaneous works. Under Claim No. 3 (i) and (ii), Tarapore sought separate payments of Rs. 28,550/- and 8,250/- towards miscellaneous work being construction of temporary pipe culverts across an existing nallah and for providing a bund across a nallah.
- 101.** In this regard the submission on behalf of NTPC is that the miscellaneous charges are not covered under the Contract. Rather the work falls within the obligation of Tarapore. On the other hand, Tarapore contends that once the work is executed, NTPC cannot evade payment on a technical plea of scope, particularly when the works were carried out in connection with and for the benefit of the project.
- 102.** The Arbitrator has awarded the said Claim in the favour of Tarapore as Clause No. 17.1 of the GCC nowhere states that incidental works to the main contract would be done by Tarapore at their own cost. The said finding reads as under:

“Findings

The respondent had relied upon clause no.17.1 of the GCC, the same is reproduced below:

"The contractor shall provide, if necessary or if required on the site, all temporary access thereto and shall alter, adapt and maintain the same as required from time to time and shall take up and clear them away as and when no longer required and as and when ordered by the Engineer-in-Charge and make good all damage done to the site".



The undersigned is of the view that the above provision of GCC nowhere states that such incidental works to the main contract would be done by them at their own cost, so accordingly this claim of the claimant cannot be denied to them as the respondent have not denied the performance of such Incidental works".

Award on claim no.3

The claim no.3 is awarded in favour of the claimant for an amount of Rs.28,550.00+ 8,250.00 =Rs.36,800.00 only.”

103. The plain reading of Clause No. 17. 1 of the GCC makes it evident that it is the responsibility of Tarapore to alter, adapt and maintain the site and temporary access thereto. The nature of construction, i.e. construction of temporary pipe culverts across an existing nallah and for providing a bund across a nallah, were undertaken to provide temporary access to the site and thus, in terms of Clause No. 17.1 of the GCC, the liability to pay for such miscellaneous work which is clearly the responsibility of the Contractor, Tarapore herein, cannot be fastened upon NTPC. Thus, the Award is liable to be set aside as it is contrary to the plain reading of the Contract. The Arbitrator has gone beyond the terms of the Contract. The Award contrary to the terms of the Contract is liable to be set aside under Section 34 of the 1996 Act as the same falls under patently illegality. Reliance in this regard is placed *PSA Sical Terminals (P) Ltd.*²¹

Claim No. 4

²¹Supra n. 16.



104. Under Claim No. 4, Tarapore sought reimbursement of charges towards expenditure incurred on DG sets. Tarapore contends that the Arbitrator's findings of restricting the Claim to 50% despite there being a clear contractual provision that Tarapore is entitled to a free electricity supply, is arbitrary. On the other hand, NTPC relies on Clause No. 5.0.0 of SCC read with Clause No. 48 of GCC and states that Tarapore was permitted reimbursement of power generated only for construction purposes at the SEB rates. However, Tarapore utilised the power for the staff colony purposes.

105. In this regard the finding of the Arbitrator with respect to Claim No. 4 reads as under:

"Findings with regard to claim No.4:

The clause 5.0.0 of the special conditions of contract and clause 48 of GCC are reproduced below as the same are relied upon by the respondent.

Clause 5.0.0 of the Special Condition of Contract

POWER SUPPLY: (CLAUSE 48 OF GCC)

NTPC may supply power free of cost subject to availability at one point in site fabricator shop and at one point in erection site. But NTPC cannot assure continuous power supply to the contractor. Non-supply of continuous power shall not be a reason for force majeure and extension of time or this account shall not be granted. In order to adhere to the work schedule contractor should make their own arrangement for power by setting up diesel generating sets. The cost of power so generated and utilized for construct purpose alone will be



reimbursed at the prevailing tariff rates of SEB for industrial consumption.

Considering the rival submission of the party and the documents in this regard as referred by the parties, the undersigned is of the opinion that clause 5.0.0 is indeed attracted notwithstanding the fact that respondent could not supply power to the claimant and the claimant was free to charge from the respondent as per the prevailing tariff rate of SEB for industrial consumption. It is seen that the claimant has stated that the DG sets were brought at site for the purpose of the project and they were put to use or remain idle for the project and nothing else.

No evidence was led by either party to prove or disprove that electricity generated from the DG set was or was not used for residential or construction purposes. In view of this fact the payment should have been raised by the claimant as per clause 5.0.0 of the Special Terms and Conditions only but it is admitted fact that respondent to have failed to provide electricity to the claimant and claimant used the DG sets.

Award on claim no.4:-

In view of the above findings, the undersigned is of the opinion that in absence of tariff rate of S.E.B at the relevant time and the quantum of electricity consumption, the undersigned is of the opinion that 50% of the claim amount in regard to claim 4 may awarded to the claimant in the peculiar circumstances of the case to meet the ends of justice.



Accordingly an amount of Rs. 99,565.50/- is awarded in favour of the claimant in respect of this claim.

106. In this regard Clause No. 5.0.0 of the SCC and Clause No. 48 of the GCC are relevant and are reproduced as under:

“5.0.0 POWER SUPPLY:(CLAUSE 48 of GCC)

NTPC may supply power free of cost subject to availability at one point in site fabricating shop and at one point in erection site. But NTPC cannot assure continuous power supply to the Contractor.

Non-supply of continuous power shall not be a reason for force majeure and extension of time on this account shall not be granted. In order to adhere at the work schedule Contractor should make their own arrangement for power by setting up Diesel Generating sets.

The cost of power so generated and utilized for construction purpose alone will be reimbursed at the prevailing tariff rates of SEB for industrial consumption.”

“48. Power Supply:

(a) Engineer-in-Charge will provide without charge electricity consumed at the job site at one point of the distribution system as per requirement as may be decided by the Engineer-in-Charge, Electricity furnished will be 440 volts, 3 phase, 50 cycles and 230 Volts. 1 phase 50 cycles. Each Contractor shall provide and install all necessary transformers, switch-gear, wiring, fixtures, bulbs and other temporary equipment for further distribution and utilisation



of energy for power and lighting and shall remove same on completion of the work. Should, however, electricity be used in the Contractors labour staff colony, the power so consumed shall be charged at the prevailing tariff rate of State Electricity Board as prevalent for that area at the time of award of work; the supply may be withdrawn if the power is used for purposes other than for the work of the project and the Contractor shall not be entitled to any claim whatsoever or account of any such action taken by the Engineer-in-Charge.

(b) The Contractor shall indicate in his proposal his requirements of the above facilities

- 107.** Perusal of Clause No. 5.0.0 of the SCC read with Clause No. 48 of the GCC clearly recognises that NTPC was required to provide free electricity subject to the availability and in case the supply was not available, Tarapore was required to make its own arrangements of DG sets and the cost incurred by Tarapore was to be reimbursed at the prevailing tariff rates of the SEB.
- 108.** The Arbitrator has agreed that it was NTPC which had the liability to provide the electricity and it was due to NTPC's failure to provide the power, Tarapore had to deploy DG sets. Further, the Arbitrator himself has recorded a finding that NTPC has led no evidence which could show that the power generated was used for residential purposes or any purpose other than construction. Even in the absence of the said evidence and only on the basis of non-availability of prevalent SEB tariff rates 50% of the amount claimed was awarded in the favour of



Tarapore. The Arbitrator's reasoning to allow or disallow the 50% of the Claim is based on nothing but surmises and conjectures.

109. The award of 50% of the Claim to meet the ends of justice is against the dicta laid down in *M.S.T.C. Ltd.*²² and *Power Grid Corporation of India Limited*²³ as no claim can be allowed on the basis of equity and the same is strictly barred under the 1996 Act. Due to the aforesaid reasons, the Award is liable to be set aside to the extent of Claim No. 4.

Claim No. 5 to Claim No. 9

110. Tarapore has further challenged Claim Nos. 5, 6, 7, 8 and 9 and are being considered together.

111. The Claim No. 5 pertains to idling charges to the tune of Rs. 2,72,36,000/-. The said Claim is challenged by Tarapore. While challenging the finding on the said Claim learned senior counsel for Tarapore has contended that the Arbitrator has erroneously denied the Claim on the ground that the delays were caused by external factors and that there was no contractual provision entitling Tarapore to idling charges. On the other hand, NTPC supports the finding of the Arbitrator and states that the Claim of Tarapore is *de hors* the Contract as there is no provision for computation of such idling charges. Further, Tarapore itself is grossly deficient in the performance as it executed only 19% of the work in 16 ½ months out of the stipulated 22 months for completion of work. After adjudicating the Claim, the Arbitrator held as under:

“FINDINGS

Whereupon considering the rival submissions made by the

²²Supra n. 19.

²³Supra n. 20.



parties with regard to claim 5 and documents produced in this regard, the undersigned is of the opinion that claimant have failed to show any provision in the contract as per which idling charges are to be calculated and accordingly to be paid by the respondent. Unless the contract contains a provision for the same, it would not be open for the undersigned to adjudicate upon the same.

While examining the claim on merits, it is found out by the undersigned that the interference by the third parties due to law-order problem as also the monsoon emerges as the main reason for delay resulting in idling charges and as per respondent, they cannot held liable for the same even though they had not denied the occurrence of the same. So far as the other reasons for delay are concerned, it is submitted that the same are denied by the respondent and upon examination, the same could not be proved by the claimant.

The undersigned has held in the preliminary issues itself that delay on account of external interference cannot be taken into account and the same is outside the scope of the contract and moreover, no indulgence on this account may be shown to the claimant in the facts and circumstances of this claim no.5.

AWARD ON CLAIM NO. 5

A Nil award is given in respect of claim no. 5 in view of the above findings.”



- 112.** Tarapore has challenged Claim No. 5 on the grounds summarised under the following heads:
- a.* Delay in issuance of detailed construction drawings
 - b.* Delay in allotment/release of the camp/construction site
 - c.* Delay in release of mobilisation advance
 - d.* Failure on part of NTPC to provide peaceful working conditions
 - e.* Interference by the local politicians due to which workers with higher wages were forced upon Tarapore
 - f.* Unscheduled and excessive monsoon that flooded the ashpond/ worksite.
- 113.** From the perusal of the Award, in the facts and circumstances of the case, it is apparent on the face of the Award that the Award to the extent of Claim No. 5 has been rendered without any reasons. The Arbitrator has devoted so many pages in recording the rival submissions and the arguments of Tarapore and NTPC and has provided absolutely no reasoning to dismiss the Claim. Considering the complexity of the issues involved, the Arbitrator ought to have provided some analysis/ reasoning, if not detailed, dealing with the contentions of each Claim raised and not merely by stating the opinion it has formed. It is equally important for an Award to provide reasoning as to how the Arbitrator has arrived on a particular conclusion.
- 114.** A perusal of the contentions of Tarapore and the basis of the Claim of Tarapore shows that the Arbitrator has left the Claim ‘unreasoned’ and the contentions of the parties ‘unanswered’. He has nowhere dealt with or adverted to the challenges posed by Tarapore with respect to delay in issuance of detailed construction drawings, delay in allotment of the



construction site and the delay in releasing of mobilisation advance. He briefly dismissed the reasons for delay stating that no evidence has been led. The reasoning provided by the Arbitrator is namesake and the merits of the dispute have not been dealt with. Thus, the Award is unintelligible. An Award that does not deal with the contentions of parties shows that the Arbitrator has conveniently ignored questions and arguments which were uncomfortable and were going against its employer, NTPC. Such an apparent bias hits at the foundation of the Award and the Arbitral proceedings.

- 115.** Tarapore, in Claim No. 6, has challenged the non-granting of losses on account of removal of components from machinery and equipment to the tune of 15,33,375/- on the following grounds:
- a.* Tarapore was compelled to leave the site due to the disturbed and hostile environment and was not permitted to remove its plant and machinery which resulted into retention of the same on the site.
 - b.* NTPC failed to provide safe and secure working environment and the site was affected by various reasons including but not limited to political pressure, bomb attacks, trade union disputes which rendered the performance of the project impossible.
 - c.* Further, even after the work had become impossible, NTPC prevented the removal of Tarapore's machinery and equipment from the site. Tarapore further relied on the order dated 30.11.1990 of this Court to emphasise that NTPC did not permit the removal of machinery in the ordinary course.
 - d.* Upon re-entry, Tarapore conducted an inventory check whereupon it found that major equipment were missing thus causing actual loss



of machinery. The machinery was in good working condition when it was left at site and subsequently became non-operational due to the loss of parts. The loss was occasioned due to omission on part of NTPC.

116. The Arbitrator while adjudicating Claim No. 6 failed to consider or deal with any of the contentions advanced by Tarapore in that respect. The Claim has been rejected by rendering minuscule and cursory reasoning that the Claim is outside the scope of Contract. Tarapore has categorically stated that even though this Claim is not covered by any contractual clause same is predicated on the fact that NTPC did not permit Tarapore to remove its machinery from the site as NTPC failed to provide a secure working environment. In order to substantiate the said aspect Tarapore also pleaded that two of its engineers were murdered at site. The Arbitrator failed to discuss said contentions of Tarapore. The finding on the Claim is conspicuously silent on the basis for such a conclusion. I have already held that preliminary findings regarding delay being attributable to Tarapore and that despite third party hindrances Tarapore could not be absolved from its liability to complete the work, is unsupportive and unreasoned. Hence, the above finding on preliminary objection adversely affects this Claim.

117. Further, the Arbitrator also did not deal with any evidence placed on record by Tarapore particularly, the order dated 30.11.1990 of this Court, which specifically ordered NTPC to let Tarapore remove its machinery from the site. Equally, the Arbitrator did not advert to the contention with respect to the missing inventory, despite the same having been urged. The approach adopted by the Arbitrator is clearly



one sided and suffers from selective consideration of evidence which favoured NTPC. The relevant finding of the Arbitrator reads as under:

“Findings :-

Considering the rival submissions of the parties, the undersigned is the opinion that the claim 6 is outside the scope of the contract and respondent cannot be held liable for any loss to machinery and equipments left behind by the claimant.

So far as the claim of the claimant that the respondent have forcibly retained the machinery and equipment is also not corroborated by any evidence

Award :-

In view of the above finding, Nil award is given in respect of Claim 6.”

118. Claim No. 7 pertains to Loss of profit to the tune of Rs. 52,16,179/-.

Tarapore challenged the Claim on the ground that Tarapore estimated the total Contract value to be Rs. 6,57,66,082/- meanwhile they were only permitted to execute the work to the extent of Rs. 1,36,04,290/- and substantial work was left unexecuted. Consequently, it was contended that they were deprived of an opportunity to earn profit on unexecuted portion and the delays and defaults were solely attributable to NTPC.

119. The Arbitrator while adjudicating the Claim No. 7, has again conveniently ignored his own earlier and contradictory finding on preliminary issues that there were third party hindrances. Again, the finding on preliminary issues have bearing on this Claim and this



should be set aside on that ground only. Without prejudice, the Arbitrator was required to appreciate the effect and consequence of such finding of third party hinderances on the Claim No. 7 raised by Tarapore. No evidence has been appreciated and discussion has been held in that regard. Further, yet again, no reasoning has been rendered as to how the Claim falls outside the scope of the Contract especially when Tarapore has pleaded that it was NTPC who did not allow Tarapore to complete the remaining work thus, depriving Tarapore of the opportunity to earn profit. The findings are based on bald conclusion and clearly suffers from the vice of one sided and selective approach convenient to NTPC. The same is reflected and evident from findings on Claim No. 7 which reads as under:

“Finding:

Considering the rival submission of the parties, the undersigned is of the opinion that this claim is outside the scope of the contract. Even otherwise, no liability can be held on respondent as the claimant themselves have abandoned the work and respondent were not liable for the same in any way.

Award:

In view of the above findings, this claim of the claimant is not admissible, accordingly a Nil award is given.”

120. Claim No. 8 pertains to damage on account of idle labour or excess wages to the tune of Rs. 40,80,676/- and idle establishment and infructuous overhead expenses to the tune of 30,58,586/-. Tarapore challenged the said Claim on the ground that Tarapore was compelled



to employ local labour unions which insisted that only local persons be engaged who also charged higher rate of wages. Tarapore had contended that it was NTPC's obligation to provide a congenial and workable site. Thus, after considering the 20% overhead and profit, the labour component of the executed work was taken at approximately 80% of the value of work done. Further it was due to the hostile work environment it was compelled to keep its establishment, supervisory staff and overhead structure expenses.

121. The Arbitrator adjudicated the Claim and recorded his finding as under:

“Findings:

On perusal of rival submission of the parties and record, the undersigned is of the opinion that this claim is outside the scope of the contract. Moreover, as it had been held by the undersigned that acts of 3rd parties were involved and for which, no liability can be put upon respondents for either engagement of local labour by claimant or on the ground of idle establishment and infructuous over-head. It is also pertinent to point out here that in addition to above conclusion, it is also found that claimant have failed to put forth any evidence to prove their contentions in regard to this claim.

Award on claim no.8:

In view of the above findings, Nil award is given in respect of claim no.8.”

122. Since, I am already of the opinion that the findings of the Arbitrator with respect to the preliminary issues are unsupported by reasons and



suffer from non-application of mind, the reasoning with respect to Claim No. 8 founded upon and substantially influenced by the said preliminary findings also cannot be sustained. The preliminary findings have been inconsistently applied in all the Claims and Counter Claims to suit the advantage of NTPC. Once the foundational basis of the Claim stands vitiated, the finding with respect to the Claim No. 8 also goes away as the same does not contain any other reasoning or basis.

123. Claim No. 9 pertains to Refund of security deposit Rs. 1,68,497/-.

Tarapore raised the Claim of refund of security deposit as in terms of Clause No. 9.1 (a) of the GCC, NTPC was entitled to deduct security deposit from running Bills until the aggregate amount reached the prescribed ceiling of Rs. 1,00,000/-. NTPC ignored the above ceiling and continued to deduct amount from the Bills. NTPC only released an amount of Rs. 5,00,000/- thereby leaving the sum of 1,18,497/- being retained by the respondent without any justification. Further, NTPC had already accepted a demand draft of Rs. 50,000/- towards initial security deposit and despite this NTPC deducted Rs. 50,000/- in lieu of the said security.

124. The findings of the Arbitrator with respect to Claim No. 9 clearly ignore the challenge posed by Tarapore. The Arbitrator yet again did not give any findings or reasonings with respect to Clause No. 9.1 (a) of the GCC and did not return any finding as to why prescribed ceiling of Rs. 1,00,000/- was ignored by the Arbitrator. He has merely reproduced Clause No. 5.0.0 of the LOA and has not even dealt with the said Clause of the LOA. The findings read as under:

“Finding:-



Considering the rival submissions and clause 5.0.0 of the letter of award which says as follows:

5.1.0 “In line with clause 18 of the notice inviting tenders of the GCC for civil works, the earnest money deposit will be treated as a part of the security deposit, on acceptance of tender. Since you have furnished a bank guarantee for Rs.50,000/- (Rupees fifty thousand only) in lieu of earnest money deposit alongwith your proposal you are requested to deposit Rs.50,000/- through demand bank draft drawn in favour of National Thermal Power Corporation Ltd., payable at New Delhi along with your unconditional acknowledgement & confirmation of this letter of award, where after the bank guarantee earlier submitted by you shall be discharged by us. Alternatively you shall submit a fresh unconditional and irrevocable bank guarantee from a nationalized bank for Rs.50,000/- towards initial security deposit, in the proforma acceptable to NTPC, valid for a period of 90 (ninety only) days after the defects liability period as defined in clause 33 of the GCC for civil work i.e. upto and inclusive of 16.03.91 and you shall extend the validity of the bank guarantee as required by NTPC at your own cost.

5.2.0 Further, security deposit shall be deducted from all your ‘on account payments’ at the rate of 5% only of the gross value of each bill till the security deposit so deducted together with the initial security deposit of Rs.50,000/-



referred to in para 5.1.0 above amounts to Rs. 10,00,000/- (Rupees ten lakhs only) unless the entire security deposit amounting to Rs. 10,00,000/-only is deposited by you in cash or in any of the forms mentioned in clause 9.0 of the GCC for civil work.

5.3.0 You shall keep the bank guarantee submitted by you towards earnest money deposit valid till such period(s) till the bank guarantee towards initial security deposit/security deposit furnished by you is accepted by NTPC”.

Keeping in view of the above rival submissions, the undersigned is of the opinion that in view of the fact that claimant could not complete the work and left the site, so the respondent may adjust the same towards their dues and can forfeit the security deposit.

Award on claim no.9 :

In regard to claim no.9 Nil award is given.”

125. The Arbitrator has dealt with all the Claims in a wholly cursory manner by merely stating his opinion without affording any reasoning for the said opinion. The Award does not disclose any discussion whatsoever with respect to the reasoning as to why the said Claims were outside the scope of the contract and what material or terms of the Contract was considered to come to a specific findings in all the aforesaid Claims. Further, there is no analysis of pleadings and submissions of the parties. The Arbitrator has mechanically reproduced the paragraphs of the pleadings of the parties with respect to that Claim but has not analysed



them. There is no reasoning afforded to connect the conclusions of the Arbitrator with the discussion in the Award.

126. A reasoned Award is not an empty formality. It ensures that the Arbitrator has applied its mind to adjudicate the dispute. The Arbitrator is required to give a reasoned Award. The same is also supported by the scheme of the 1996 Act. Section 31(3) of the 1996 Act mandates the Arbitrator to give a reasoned Award. Such reasoning must be intelligible and adequate. The same was held in the case of *Dyna Technologies (P) Ltd.*²⁴ and reaffirmed by the Hon'ble Supreme Court in *OPG Power*²⁵.

127. For the aforesaid reasons, the Award in respect of Claim Nos. 6 to 9 does not survive.

128. Claim No. 10 pertains to interest on all Claim amounts. It does not survive for consideration as the Award to the extent of findings on Claim is set aside.

Counter Claims

Counter Claim Nos. 1 and 2

129. The Counter Claim No. 1 relates to unadjusted amount of balance mobilisation advance to the tune of 20,37,912/- and the Counter Claim No. 2 pertains interest on mobilisation amount.

130. It is Tarapore's case that allowing refund of the balance mobilisation advance and adjusting the same against the Claims of Tarapore is incorrect. On the other hand it is NTPC's case that it had disbursed a total sum of Rs. 26.30 lakhs to Tarapore as mobilization advance. The

²⁴Supra n. 14.

²⁵Supra n. 15.



said advance was contractually required to be recovered from R.A.Bills. However, as Tarapore executed only about 19% of the work and thereafter abandoned the project, Tarapore has deprived NTPC of the opportunity to fully recover the advance through running Bills. Only a sum of Rs. 5,92,088/- could be adjusted up to the 11th R.A. Bill, leaving a balance of Rs. 20,37,912/- outstanding, payable to NTPC.

131. Tarapore opposed the said Counter Claim before the Arbitrator contending that although NTPC had paid a sum of Rs. 26.30 lakhs towards mobilisation advance, however, the said amount does not remain recoverable by NTPC as the substantial Contractual Claims of Tarapore remained unpaid by NTPC. Thus, mobilisation advance stood adjusted against the amounts otherwise due and payable by NTPC under the Contract. The Arbitrator with regard to the said Counter Claim has merely recorded the objection of Tarapore that substantial amounts have not been paid, but he has nowhere dealt as to how these unpaid amounts should not be adjusted against the mobilisation advance. The Award to the extent of Counter Claim No. 1 is devoid of reasoning. The Arbitrator merely mechanically reproduced the pleadings of the parties in extenso and without dealing with any rival contentions and delving into reasoning the Arbitrator just rendered his bald conclusion. Such an approach goes contrary to the law laid down in *Dyna Technologies (P) Ltd.*²⁶ and *OPG Power.*²⁷ The Arbitrator is expected to return proper adequate and intelligible findings in order for the Award to be proper. For the said reasons, Counter Claim No. 1 is

²⁶Supra n. 14.

²⁷Supra n. 15.



liable to be set aside. Same is evident on perusal of the findings reproduced below:

“Finding:

In view of the rival submissions it is very clear that a mobilization advance of Rs. 26.30 lacs was paid by the respondent to the claimant and the sole ground of the claimant in opposing this counter claim is that substantial claims of the claimant having not been paid by the respondent. In view of the undersigned, this counter claim is maintainable.

Award on counter claim no.1

In view of the above findings in regard to counter claim no. 1, the respondent is entitled to a sum of Rs. 20,37,912/- only and accordingly respondent are awarded this sum in respect of counter claim no. 1.”

- 132.** Further, Counter Claim No. 2 pertains to interest on the mobilisation advance which is the subject matter of Counter Claim No. 1. Since finding with respect to Counter Claim No. 1 has already been held to be unsustainable in law, it shall be apposite to set aside the finding on Counter Claim No. 2 as well as it is purely consequential in nature.
- 133.** The finding with respect to Counter Claim No. 4 suffers from the same infirmity and reads as under:

“Finding:

Considering the rival submissions, it is found that respondent were not under any contractual obligation to pay to FBP and accordingly such payment if any made by respondent is



outside the scope of this contract.

Award on counter claim no.4:

Keeping in view the findings a nil award is made in regard to this counter claim. “

134. This finding is liable to be set aside for the very same reasons as provided for Counter Claim No. 1. The Arbitrator has with respect to Counter Claim No. 4, in a single line, merely observed that NTPC was under no obligation to make payment to FBP and that such payment was made outside the scope of the Contract. However, no reasons whatsoever have been assigned as to how such conclusion has been arrived at. In the absence of any proper, intelligible or adequate reasoning, the finding on Counter Claim No. 4 cannot be sustained and is accordingly liable to be set aside.

Counter Claim No. 3

135. The Counter Claim No. 3 pertains to unrecovered secured advance paid against materials amounting to Rs. 96,534/- calculated on diminishing value. The case of NTPC is that since the sum of Rs. 2,31,884 remained unrecovered and blocked from Tarapore, it is liable to pay interest on the said amount from 21.04.1989 to 06.08.1991. On the other hand Tarapore contends that materials purchased from the said advance were procured by Tarapore and remained at site when Tarapore was compelled to leave which were later used by Murshidabad Zila Parishad.

136. The Arbitrator's rejection of the said Counter Claim is premised on the admission of NTPC having used the material left behind by Tarapore in completion of the project. The said finding reads as under:



“Findings:

In their Counter claim itself, the respondent themselves have said that the left over materials of the claimant were used by the Murshidabad Zilla Parishad. In their reply also, the claimant have not disputed the amount advanced, but according to them they have left materials of the value of about Rs. 4.40 lacs and the respondent have consumed these materials while getting the job done through Murshidabad Zilla Parishad. The respondent is oblige to give credit of that amount in the overall accounting. Keeping in view the rival submissions, the undersigned is of the opinion that in the light of respondent’s own admission about use of materials by Murshidabad Zilla Parishad while executing the balance work done, this counter claim is not proved by the respondent.

Award on counter claim no.3 :-

Accordingly a Nil award is made in respect of this claim”

137. The finding returned by the Arbitrator on Counter Claim No. 3 is also unsustainable and liable to be set aside. A perusal of the Award shows that the Arbitrator rejected the said Counter Claim solely on the basis that the leftover materials of Tarapore were used by Murshidabad Zila Parishad while executing the balance work. However, the Arbitrator failed to examine the real nature and scope of the Counter Claim, namely, recovery of the unrecovered secured advance paid against material and the interest thereon. The mere assertion that some materials were left at site and were subsequently used for completion of



the balance work could not, by itself, furnish a complete answer to the Counter Claim unless there was a clear finding, supported by reasons as to whether that the value of such materials had in fact been duly adjusted or appropriated towards the advance already released. No such calculation has been undertaken in the Award. The Arbitrator has not returned any finding as to how the unrecovered component of the advance of Rs. 96,534/- ceased to remain recoverable. The Award is silent as to the basis for rejecting the Counter Claim for interest for the period during which the amount allegedly remained blocked and was not utilised by anyone. Thus, the finding does not account for the extent of adjustment, or the consequences flowing from the admitted advance paid under the contract. In the absence of any cogent and intelligible reasoning on these aspects, the rejection of Counter Claim No. 3 cannot be sustained and is accordingly liable to be set aside.

Counter Claim No. 5 and Counter Claim No. 7

138. The Counter Claim No. 5 is with respect to cost of balance work executed at the risk and cost of Tarapore. The Arbitrator has partially awarded an amount of Rs. 1,57,61,267/- in the favour of NTPC. The said liability, maintainability and quantification of the said Counter Claim was challenged by Tarapore on the following grounds:

- a.* Tarapore contended that the Counter Claim was barred by limitation
- b.* Further, it contended that without prejudice to its denial towards liquidated damages, once the Contract itself provided for liquidated damages, NTPC was not entitled to raise any independent or additional claim for damages, more so when the delay and



non-completion of work is Tarapore's fault and the termination of contract on part of NTPC was not justified.

c. Balance work has been awarded much after the expiry of the original contractual period. Thus, while computing the differential cost, Tarapore was entitled to credit for escalation in prices of labour and material. Thus, the calculation is erroneous.

139. The Arbitrator while adjudicating the said Counter Claim only relied on Clause EEE of the TOA. The finding of the Arbitrator is based on the interpretation of the said Clause itself. He has not appreciated the objections aforesaid, raised by Tarapore. Such an Award based on non-appreciation of contentions of parties cannot be found to be intelligible. The findings are reproduced as under:

“Considering the rival submissions and upon perusal of record, the undersigned is of the opinion that as per the clause EEE of the telex of award dtd. 16.02.88, which provided as follows:

“Your performance of work under this contract will be closely monitored initially for a period of 3 (three only) calendar months from the start of work at site after the mobilization period specified in the work schedule. In case of any shortfall in execution of the quantities of works as per the contractual schedule quantities specified in the work schedule, you will be advised and required to make good the shortfall in the quantities in the next two only month. In case the shortfall in the quantities of works could not be made up by you, then



action will be taken in terms of clause 41 of GCC for civil works. NTPC shall have a right to engage another agency to execute the balance quantities of work covered under the scope of this contract at your risk and cost.”

In view of the above, it is clear that uncompleted work in the contract was to be executed at the risk and cost of the claimant. In their reply to this claim, the claimant have stated that the balance value of the work left by the claimant is stated to be Rs. 5,31,55,388.00 and the value of work awarded to Murshidabad Zilla Parishad is stated as Rs. 6,89,16,655.00 and the difference between the two is about Rs. 1.58 crores. The respondent have calculated alongwith this amount the permissible deviation limit stipulated in the contract and as per them the net final implication is Rs. 2,65,83,518.00 only. The calculation as given by them at Annexure 27 & 28 of their counter claims had been perused by the undersigned. It is also found that the claimant have not said anything with regard to such calculations in their reply to counter claims. So far as the congenial working condition not provided to the claimant is concerned, it has been held above that the same is outside scope of the contract and respondent cannot be held liable for the same.

Considering the totality of the circumstances, the undersigned is of the views that by awarding the net difference between Rs. 6,89,16,655/- and Rs. 5,31,55,388/-,



that comes to Rs. 1,57,61,267/- only, the justice would be done in the matter.

Award on counter claim no.5 :-

Accordingly, in regard to counter claim no.5, the respondent are awarded a sum of Rs. 1,57,61,267.00/- only towards this claim.”

140. The Counter Claim No. 7 pertains to liquidated damages to the tune of Rs, 32,88,304/-. Tarapore opposed the said Counter Claim on the preliminary ground that the Counter Claim is barred by limitation and further on merits that liquidated damages cannot be levied against Tarapore when the execution of work was itself impeded due to NTPC’s own acts. The Arbitrator awarded an amount of 32,88,304/- to NTPC. From the perusal of the Award it is evident that the Arbitrator has failed to discuss how and why the Counter Claim is not barred by limitation and further, has not adverted any findings on objections of Tarapore on merits. The finding to the extent of Counter Claim No. 7 is inadequate.

“Findings:-

Considering the rival submissions and documents of record, the undersigned is of the opinion that the claimant have failed to prove as exactly how this claim is barred by limitation. The other objections of the respondent have already been dealt earlier and I am of the opinion that liquidated damages are indeed payable by the claimant in accordance with the terms of the GCC applicable to the contact.



So far as the quantum of compensation is concerned, the same is found to be correct in accordance with the terms of the contract i.e. 5 % of the total contract value – Rs. 32,88,304/-

Award on counter claim no. 7 :-

In view of the above findings, the respondent are awarded a sum of Rs. 32,88,304/- only towards claim no. 7.”

141. The Arbitrator again mechanically reproduced the pleadings of the parties and without dealing with any rival contentions and delving into reasoning, the Arbitrator just rendered his conclusion. As already observed above, such an approach goes contrary to the law laid down in *Dyna Technologies (P) Ltd.*²⁸ and *OPG Power.*²⁹ The Arbitrator is expected to return proper, adequate and intelligible findings in order for the Award to be proper. For the said reasons, Counter Claim Nos. 5 and 7 are liable to be set aside.

142. Counter Claim No. 8 pertains to interest on all Counter Claim amounts. It does not survive for consideration as the Award to the extent of Counter Claim is set aside.

143. Since the Award is being set aside, the Claim No. 11 and Counter Claim No. 9 relating to the costs of litigation also are set aside.

CONCLUSION

144. For the reasons recorded herein above, the Award is at the outset vitiated by the apprehension of bias and should be set aside on this ground alone. Even otherwise, a perusal of the analysis of the Award

²⁸Supra n. 14.

²⁹Supra n. 15.



shows that the Arbitrator has either based its reasoning on equity or is unintelligible and the Arbitrator has not rendered any findings for allowing or disallowing of Claims or Counter Claims. Such an unreasoned and unintelligible Award should be set aside on the ground of perversity under Section 34 of the 1996 Act.

145. Accordingly, suit and petition are allowed and the impugned Award dated 14.03.2008 is set aside in its entirety.

146. The suit and petition are disposed of with pending applications, if any.

MAY 12, 2026/(MU)

JASMEET SINGH, J.