$~

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

RESERVED ON – 07.11.2024

% ***PRONOUNCED ON – 03.02.2025***

\+ O.M.P. (COMM) 38/2019

DELHI METRO RAIL CORPORATION LTD .....Petitioner

Through: Mr. Tarun Johri, Mr. Ankur Gupta, Mr. Vishwajeet, Tyagi, Advs.

versus

VOESTALPINE SCHIENEN GMBH, AUSTRIA .....Respondent

Through: Mr. Sanjoy Ghose, Sr. Adv. with Mr. Jeevan Ballav Panda, Mr. Satish Padhi, Mr. Rahul Kaushik, Mr. Rohan Mandal, Advs.

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J.:

PREFACE

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'), seeking to set aside the arbitral award dated 19.09.2018.

2. The impugned award was rendered in the context of the disputes arising out of a contract executed between the parties for the supply of 8,000 Metric Tons of Head Hardened Rails (UIC 60, IRS T-12-2009, 1080 Grade HH) required for the Delhi Metro Phase III expansion.

FACTUAL MATRIX AS AVERRED IN THE PETITION

3. Briefly stated the factual matrix of the case and the controversy involved in the present case as averred by the Delhi Metro Rail Corporation Ltd. ('Petitioner') is as follows:-

   i. Following a competitive bidding process, the petitioner entered into a contract with Voestalpine Schienen GMBH ('Respondent') vide Letter of Acceptance ('LoA') dated 21.06.2013 for a total contract value of Euro 7,832,000.

   ii. The formal agreement was signed on 12.08.2013, and the Respondent furnished a Performance Bank Guarantee ('PBG') for an amount of Euro 783,200, representing 10% of the contract value, as a performance security.

   iii. The contract mandated delivery on a Delivered Duty Paid ('DDP') basis to the Petitioner's designated stores in Delhi, making the Respondent responsible for transportation from the port of entry in Mumbai to the final destination.

   iv. The contract required the Respondent to supply 8,000 MT of rails in three separate lots within 10 months from the date of establishing the Letter of Credit ('LC') which was established on 03.12.2013. The original date of completion for all three lots was as under

      i. Lot 1: 3,000 MT to be delivered by 03.04.2014
      ii. Lot 2: 3,000 MT to be delivered by 03.07.2014
      iii. Lot 3: 2,000 MT to be delivered by 03.10.2014

v. The contract also stipulated specific technical standards and performance obligations, with provisions for Liquidated Damages ('LD') in case of delays. The Respondent delivered all three lots, but the deliveries were delayed. The actual delivery dates are as follows:

i. Lot 1: Delivered on 19.01.2015

ii. Lot 2: Delivered on 20.08.2015

iii. Lot 3: Delivered on 18.02.2015.

vi. Petitioner attributed the delays to Respondent's inefficiencies and encashed the PBG for Euro 783,200. Petitioner also made deductions under the Price Variation Clause ('PVC'), arguing that Respondent's delays had caused adverse cost variations.

vii. Respondent has attributed the delays to a combination of factors, including Logistical Challenges such as Over Dimensional Cargo ('ODC)' restrictions and local disruptions, Petitioner's Operational Lapses such as site readiness issues and delayed approvals and Force Majeure Events such as General elections, strikes, and climatic conditions.

viii. Consequently, the Respondent initiated arbitration under the dispute resolution clause of the contract and the learned Arbitral Tribunal ('AT') was constituted on 24.03.2017.

4. The claims by the Respondent before the learned AT are set out below:

a. Claim 1: Towards outstanding amount in lieu of Commercial Invoice No. 1000136545 dated 09.05.2014 for supply of 2762 pieces of 2999.362 MT of Rails under Lot - 2

b. **Claim 2:** Towards extra amount payable for Price adjustment on account of Positive Price Variation as per the Price Variation Formula agreed under the Contract.

c. **Claim 3:** Towards refund of Amount in lieu of PBG furnished by the Respondent and wrongfully and illegally en-cashed by the Petitioner.

d. **Claim 4:** Towards Loss on account of Goodwill, Reputation and Opportunity Costs.

e. **Claim 5 & 6:** Respondent additionally sought interest on the claimed amounts as well as the costs incurred in the arbitration proceedings.

5. In response, Petitioner counterclaimed an amount of Euro 463,983.93, alleging breach of contract and damages resulting from delays. Petitioner also sought interest on the counterclaim amount and the costs associated with the arbitration proceedings.

6. Learned AT rendered its award on 19.09.2018 and, *inter alia*, majority of the claims raised by Respondent were held to be valid, while Petitioner's counterclaims were rejected. Thus, the present petition has been filed challenging the award dated 19.09.2018.

BRIEF GROUNDS OF CHALLENGE

7. Mr. Tarun Johri, learned counsel for the Petitioner, has submitted the learned AT committed a fundamental error in distinguishing between the delivery obligations of the respondent at CIF Mumbai and DDP Delhi, contrary to the explicit terms of the contract. Learned counsel submitted that the contract unequivocally provides that the delivery

destination is DDP Delhi, and any delays in the delivery of rails to Delhi were squarely attributable to the respondent. Learned counsel submitted that Clause 26.1 of the General Conditions of Contract ('GCC') and Special Conditions of Contract ('SCC') mandates the imposition of LD at 0.5% per week of the total contract value, capped at 10%, for delays. It has been submitted that the decision of the learned AT, however, erroneously restricted the petitioner's entitlement to LD, thereby re-interpreting the contract in a manner wholly inconsistent with its terms.

8. Learned counsel for the Petitioner further submitted that the learned AT erred in accepting the Respondent's invocation of Force Majeure conditions, citing general elections and transportation difficulties. It has been submitted that Clause 31 of the GCC narrowly defines Force Majeure and does not cover logistical inefficiencies or predictable events such as elections. It has been submitted that the learned AT overlooked the fact that the Respondent concealed the real reason for the delays—namely, the removal of rust from Lot-1 rails stored in Mumbai—which was not disclosed to the Petitioner and falls far outside the scope of Force Majeure.

9. Learned counsel for the Petitioner submitted that the learned AT misapplied the PVC provided under Clause 14 of the SCC by calculating price variations based on the scheduled delivery dates instead of the actual delivery dates. It has been submitted that the express language of the contract mandates that the PVC is to be calculated from the month of tender submission to the month of actual delivery. It has been submitted that the Respondent failed to submit

price adjustment bills, despite reminders by the Petitioner and this failure caused an undue financial burden on the Petitioner.

10. Learned counsel for the Petitioner further submitted that the learned AT's direction to refund the PBG amount is wholly unjustified. It was submitted that the PBG was rightfully invoked by the Petitioner due to the Respondent's persistent contractual breaches, including delayed deliveries and failure to account for negative price variations. It has been submitted that the learned AT ignored substantial evidence submitted by the Petitioner, including communications and reports quantifying financial losses amounting to Rs. 40 crores, which arose directly from the Respondent's non-compliance.

11. Learned counsel for the Petitioner submitted that the award of interest by the learned AT is in direct contravention of Clause 9.2 of the SCC, which explicitly bars the payment of interest on any amounts until the date of the award. Despite this unambiguous provision, it has been submitted that the learned AT wrongfully awarded interest, undermining the sanctity of the contractual terms and violating public policy and is in clear excess of jurisdiction by the learned AT

12. Learned counsel submitted that the counter-claims raised by the Petitioner were wrongly rejected by the learned AT. It has been submitted that the arbitral award suffers from patent illegality and procedural misconduct. It was submitted that the learned AT failed to critically evaluate evidence on record, including letters and submissions that highlighted the Respondent's delays and the Petitioner's resultant losses. Furthermore, the findings on LD, Force Majeure, and PVC are unsupported by adequate reasoning and are

inconsistent with the terms of the contract, rendering the award unsustainable in law. To buttress this contention, reliance has been placed reliance on the judgment of the Supreme Court in ***ONGC v. Afcons Gunanusa JV,*** 2022 SCC OnLine SC 1122, which categorically held that unilateral modifications to contractual terms by an arbitral tribunal are impermissible. Further reliance has also been placed on ***Amiraj Construction Co. v. State of Maharashtra***, 1987 SCC OnLine Bom 125, and ***State of Orissa v. Modern Construction Co.***, 1972 SCC OnLine Ori 47, to submit that unreasonable conduct and deviations from agreed terms constitute misconduct, warranting judicial intervention.

SUBMISSION ON BEHALF OF THE RESPONDENT

13. *Per Contra*, Mr. Sanjoy Ghose, learned senior counsel for the Respondent has submitted that the present petition is devoid of merit and award warrants no interference. It has been submitted that the award has been rendered after the learned AT thoroughly analyzed the contract and evidence, addressing all claims and counterclaims with reasoned findings.

14. Learned senior counsel submitted that the Petitioner's contention regarding delay and liquidated damages lacks substance. It has been submitted that the learned AT rightly concluded that delays in Phase II were caused by factors beyond the control of both parties. Moreover, it has been submitted that the withdrawal of the extension of time granted by the Petitioner, after the Respondent's performance, was contractually impermissible as per Clause 33 of the GCC. Reliance has

been placed on ***North Delhi Municipal Corporation v. IJM Corporation Berhad***, 2022 SCC OnLine Del 1208, wherein it was held that once an EOT is granted, it cannot be reassessed to the detriment of the contractor after the period has elapsed.

15. Learned senior counsel, while addressing Claim 2 on price variation, has submitted that the learned AT appropriately applied Clause 14 of the SCC. It has been submitted that the learned AT correctly directed that any price adjustment should account for fluctuations during Phase II, preventing either party from unjust enrichment. It has been submitted that the Petitioner's objections to this finding are unfounded, as the price variation formula was implemented per the contractual terms.

16. Learned senior counsel, with respect to the refund of PBG submitted that the PBG already stood discharged as per Clause 17.4 of the GCC, which specified a discharge period of 28 days post-contract completion. Further, it has been submitted that encashment of the PBG on 29.01.2016 by the petitioner despite the completion of the contract in absence of any notice invoking the warranty clause under Clause 27.4, was illegal and contrary to the contractual provisions. It has been submitted that the learned AT, in its detailed findings, correctly directed the refund of the encashed PBG.

17. Learned senior counsel, regarding the award of interest, submitted that the Tribunal correctly relied on Clause 15.5 of the GCC, which provides for interest on delayed payments at the SBI PLR rate. It has been submitted that the learned AT's interpretation of the conflicting clauses between the GCC and SCC aligns with established principles,

as upheld in ***Delhi Metro Rail Corporation v. Voestalpine Schienen GmbH***, OMP (COMM) No. 116 of 2018.

18. Learned senior counsel, on the counterclaims raised by the Petitioner, submitted that the Petitioner failed to demonstrate or quantify any actual loss suffered due to the alleged delays. It has been submitted that as per ***Maula Bux v. Union of India***, AIR 1970 SC 1955, and ***Kailash Nath Associates v. Delhi Development Authority,*** (2015) 4 SCC 136, the burden of proving actual loss rests on the claimant and in view thereof the Petitioner's unsubstantiated claims regarding losses were unsustainable.

19. Learned senior counsel further submitted that judicial interference under Section 34 of the Act is extremely limited and the present petition fails to meet any threshold of any interference. It has been submitted that courts cannot sit in appeal over the Tribunal's findings or re-appreciate evidence. Reliance has been placed on ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI,*** (2019) 15 SCC 131, and ***Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum Rajgurunagar***, (2022) 4 SCC 463,

20. Learned senior counsel submitted that the award, being well-reasoned and consistent with the facts and evidence on record, merits no interference by this Court and therefore petition is liable to be dismissed

FINDING AND ANALYSIS

21. The petitioner has invoked Section 34 of the Act which provides the manner and grounds for challenge of the arbitral award. Under Section

34 of the Act, as contained in Chapter VII 'Recourse Against Arbitral Award' a party can challenge the arbitral award on the limited grounds enumerated in it. Section 34 reads as follows:

> *"(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). (2) An arbitral award may be set aside by the Court only if-- (a) the party making the application 1[establishes on the basis of the record of the arbitral tribunal that]-- (i) a party was under some incapacity, or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or*
>
> *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or (b) the Court finds that-- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) the arbitral award is in conflict with the public policy of India. 1[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-- (i) the making of the award was induced*

or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.] 2[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter. (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award. 3[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement. (6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on

which the notice referred to in sub-section (5) is served upon the other party.]

22. The Scheme as outlined in the Act indicates that the legislature, in its wisdom intended that there should be a limited intervention of the Courts in arbitral proceedings. The words used in the provision "*An arbitral award may be set aside by the Court only if*", underscores the legislative intent to confine judicial intervention to exceptional circumstances. The statutory framework is a reflection of India's adherence to the UNCITRAL Model Law, aiming to promote arbitration as an efficient, final, and binding dispute resolution mechanism.

23. Regarding scope and ambit of challenging the arbitral award the Supreme Court in ***MMTC Ltd. V.JM. Combine*** (2019) 4 SCC 163, *inter alia* held as under:

> *"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) …"*
>
> *12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts.*
>
> *Xxx*

> *14.…the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision."*

24. In ***K. Sugumar v. Hindustan Petroleum Corporation Ltd***. (2020) 12 SCC 539 it was inter alia held that there is the highly constricted power of the court to interfere with an arbitral award for the reason that if parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. It was further *inter alia* held that interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.

25. In ***PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin,*** 2021 SCC OnLine SC 508, *inter-alia* held that:

> *"43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is*

> *now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award."*

26. In the present petition, the primary challenge being put up by the petitioner assailing the impugned award is that the findings of the learned AT are vitiated by patent illegality, and procedural irregularities, as the award is based on fundamental misinterpretation of the contractual terms agreed upon by the parties.

27. It is no longer *res integra* that arbitral tribunals possess the jurisdiction to interpret contracts based on their terms, the conduct of the parties, exchanged correspondences, surrounding circumstances, and pleadings. Construction of the terms of the contract is primarily for the arbitrator to decide, unless it is found that such a construction is not at all possible. The courts while exercising the jurisdiction under section 34 of Act cannot reappraise the material and substitute its own view in place of the arbitrator and the interference does not entail a review of the merits of the dispute.

28. In ***Navodaya Mass Entertainment V. J.M Combine***, (2015) 5 SCC 698, Apex Court *inter alia held as under:*

> *"**8.** In our opinion, the scope of interference of the court is very limited. The court would not be justified in*

reappraising the material on record and substituting its own view in place of the arbitrator's view. Where there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the arbitrator. Once the arbitrator has applied his mind to the matter before him, the court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the arbitrator would prevail."

29. Similarly, In ***Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited*** AIR 2019 SC 2908, it was *inter alia* held that an Arbitral Tribunal must decide in accordance with the terms of the contract but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on the ground there could be any other interpretation. It was further *inter alia* held that construction of the terms of a contract is primarily for an Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

30. It is also a settled proposition that errors of fact cannot be corrected by the court while exercising the jurisdiction under Section 34 of the Act as it does not sit in appeal over the award. In ***Parsa Kente Collieries Limited*** (supra) it was further *inter alia* held that a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It was further observed that thus an award based on little evidence or on evidence which does not

measure up in quality to a trained legal mind would not be held to be invalid on this score. Reliance can also be placed upon ***NHAI v. ITD Cementation (India) Ltd***., (2015) 14 SCC 21 and ***SAIL v. Gupta Brother Steel Tubes Ltd.,*** (2009) 10 SCC 63, ***South East Asia Marine Engg. & Constructions Ltd. [SEAMAC Limited] v. Oil India Ltd.*** AIR 2020 SC 2323, ***NTPC Ltd. v. Deconar Services (P) Ltd.***, 2021 SCC OnLine SC 498, ***UHL Power Company Ltd. Vs State of Himachal Pradesh*** 2022 INSC 202

31. The Apex Court in ***OPG Power Generation Private Limited*** (Supra) also discussed the legal principles governing judicial interference with arbitral awards under Sections 34 of the Act. The three-judge Bench, while emphasizing the limited scope of judicial review, stresses the importance of preserving the finality of arbitral awards and respecting party autonomy in arbitration. The Apex Court emphasized that arbitral awards are not to be interfered with casually unless the award suffers from such a degree of perversity that it affects the core of the matter. It was observed that courts must resist the temptation to substitute their own interpretation of the contract or re-evaluate the evidence unless the award is found to be so irrational that no reasonable arbitrator could have arrived at the same conclusion. The Apex Court reiterated that the jurisdiction under Section 34 is supervisory in nature and cannot be equated to appellate jurisdiction. The Apex Court *inter alia* held as under:

> *"68. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited*

grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorized as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of subsection (2-A) of Section 34 of the 1996 Act.

69. In Dyna Technologies (supra), a three-Judge Bench of this Court held that Courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law."

32. Thus, in the light of the above said legal proposition it is now necessary to scrutinize the arbitral award strictly within the confines of the limited grounds enumerated under Section 34 of the Act and to determine whether it meets the threshold for judicial interference.

33. Following is the claim-wise discussion on the findings by the Tribunal:

CLAIM NO. 1

34. In respect of Claim no. 1, learned AT has *inter alia* held that:

"BOQ of the Contract has two items. First item is the CIF price of the rails, whereas the second item is "Price for Inland Transportation &other services in India". Since the rails were received at Mumbai seaport well in time and 90%

of the CIF value of the rails was released by the Respondent to the Claimant on production of the related documents, no default in supply up to Mumbai Seaport could be attributed to the Claimant. Therefore AT decides that the Liquidated Damages cannot be levied on the portion of the Contract which has been duly performed by the Claimant. However to honour the Contractual Provision, if the LD has to be imposed, it should be limited to only the "Part Contract Price i.e. for Inland Transportation &other services in India" wherein the Claimant has defaulted, fully or partly. This will meet the ends of justice. In fact, at one point of time, this was proposed by the Claimant himself vide Letter dated 12-01-16"

35. Petitioner has objected to the learned AT's findings on the ground that it incorrectly bifurcated the Respondent's delivery obligations into two distinct parts—supply of rails to Mumbai and their transportation to Delhi—contrary to the contract's explicit terms. Petitioner asserts that the contract required delivery on a DDP basis to Delhi, not just to CIF Mumbai, and that Mumbai was merely an intermediate milestone. Petitioner further contended that the learned AT misinterpreted the LD provisions by exempting the Respondent from penalties for delays in transportation from Mumbai to Delhi. Citing Clause 26.1 of the GCC and SCC, Petitioner has argued that LD at 0.5% per week of the total contract value (capped at 10%) applies to any delay in delivery and should be imposed on the Respondent's overall performance, including timely delivery at DDP Delhi, without being divided between different stages of delivery.

36. However, this court is of the opinion that the objections raised by the Petitioner lacks substance. Learned AT has returned a finding of the fact that delays were caused by shared inefficiencies. It has rightly been

held that while the Respondent bore responsibility for certain logistical lapses, delays were also attributed to the Petitioner's administrative inefficiencies and force majeure conditions. The learned AT, to arrive at its finding, has carefully examined the inland transportation delays of the rails from the Mumbai Seaport to Delhi and noted that the Petitioner had delayed the opening of a commercially operable LC—a critical milestone in the delivery timeline. It has been noted that although the contract was executed on August 12, 2013, the LC was only opened on December 3, 2013, which adversely impacted the rolling program and subsequent delivery schedules. Furthermore, learned AT has correctly noted that the LC was issued for only 90% of the CIF value instead of the entire contract value (inclusive of inland transportation), violating contractual provisions and imposing additional financial burdens on the Respondent.

37. Additionally, the learned AT justified the claim after noting that the Petitioner failed to provide clear and suitable delivery site details in Delhi, with the designated locations proving unsuitable for handling ODC, such as 18-meter-long rails, thereby causing further logistical delays. Learned AT also attributed additional delays to force majeure conditions, including the General Elections in India (April-May 2014), inter-state border restrictions, and inherent transportation challenges associated with moving ODCs cross-country.

38. Regarding DMRC's concerns over quality issues, the learned AT has rightly determined that there was no substantial defect in the supplied rails. The rusting observed during transportation was deemed superficial, having no impact on the quality of the rails. The learned

AT, after careful consideration, dismissed the Petitioner's argument that rusting caused delivery delays, concluding that the issue was minor and was effectively resolved before delivery. Additionally, since the rails were inspected and approved prior to shipment, claims of a material breach were rightly held to be unfounded.

39. Learned AT as the final authority on the quality and quantity of evidence, opined that while the Petitioner imposed LD for delays, it failed to demonstrate specific losses incurred due to those delays. The learned AT observed that time was not of the essence in the contract, as it contained provisions allowing for extensions, making the imposition of LD subject to scrutiny under Section 55 of the Indian Contract Act, 1872. The learned AT ruled that LD imposed on the portion of the contract successfully performed (i.e., delivery to Mumbai Seaport) was unjustified. However, LD for delays in inland transportation to Delhi was upheld, with the Tribunal recalculating the amount to apply only to the relevant portion of the contract.

40. Given the limited scope of judicial review under Section 34 of the Act, 1996, as well as the learned AT's reasoned decision, this court finds no grounds to interfere with the findings with respect to the claim no. 1.

CLAIM NO. 2

41. In respect of Claim no. 2, Learned AT held as under:

> *"Thus considering the arguments of the Claimant as well as the Respondent, the international trade practices vis-a-vis the Contractual provisions. Arbitral Tribunal is of the view that for the purpose of working out the Price Adjustment, the delivery month can be considered as stipulated in the Contract initially i.e. 4 months, 7months and 10 months from the date of opening of the LC. It translates to the*

delivery months as April 2014 for Lot-1, July 2014 for Lot-2 and October 2014 forLot-3. The Price indices of the relevant periods are already available with the parties.

8.2.11 AT thus decides that the Claimant shall calculate the Price Variation as per the given formula taking the delivery months as April 2014 for Lot-1, July2014 for Lot-2 and October 2014 for Lot-3, and submit the statement to the Respondent for verification. If the amount works out to be positive for the Claimant, the Respondent shall add this amount in the pending Invoice amount for payment to the Claimant. In case the PV amount works out to be negative against the Claimant, the same shall be deducted from the aforesaid Invoice, and the balance amount against the Invoice after adjustment of the amount of revised LD as worked out above by the AT and the Price Adjustment as directed above, shall be paid to the Claimant."

42. The Petitioner has challenged the learned AT's findings in respect of Claim No. 2, arguing that the learned AT misapplied the PVC under Clause 14 of the SCC by calculating price variations based on the scheduled delivery dates instead of the actual delivery dates. The Petitioner contended that the express language of the contract mandates that PVC calculations must be based on the period from the month of tender submission to the month of actual delivery. Additionally, the Petitioner alleged that the Respondent failed to submit price adjustment bills despite multiple reminders, resulting in an undue financial burden on the Petitioner.

43. However, this court is of the opinion that the findings, as discussed above have been arrived at after taking into account various clauses of agreement between the parties. It may be reiterated at the cost of brevity that the arbitrator is the final arbitor of the facts and is entitled

to interpret the terms of the contract. The interpretation of a contract falls within the domain of the arbitrator, and such an interpretation can only be set aside if same is patently illegal or perverse in case of domestic arbitration and against the public policy of India in cases arising out of international commercial arbitration. The question is whether the court, while hearing the challenge against the impugned award under Section 34 of the Act, can go into a threadbare examination of the various clauses of the agreement between the parties so as to find out whether the finding arrived on by the learned arbitrator is correct or not. I consider that such an exercise by this court in the present jurisdiction is not permissible. The court has to only see whether the interpretation as on arrived by the arbitrator could be arrived by any prudent person or just and not perverse. It may also be reiterated while interpreting the term of a contract, the court cannot substitute its own view with the view of the arbitrator if it based upon logic and reason.

44. However, in order to satisfy the judicial conscience, this court has gone through the various clauses of the agreement between the parties and finds no merit in the argument of the Petitioner. Learned AT correctly applied Clause 14 of the SCC and observed that the Respondent did not raise any objections to the PVF during the pre-bid conference, contract execution, or the early stages of contract performance. The learned AT has duly noted that the Respondent only disputed the PVF after a decline in raw material prices, suggesting that the challenge was driven by market fluctuations rather than a genuine contractual dispute. After analyzing the contractual provisions and industry practices, the learned

AT has rightly concluded that the contract explicitly linked the delivery month to the receipt of goods at the Delhi depot. However, to ensure fairness and consistency, the learned AT determined that delivery months should be considered as initially stipulated in the contract—April 2014 for Lot-1, July 2014 for Lot-2, and October 2014 for Lot-3—based on the delivery schedule tied to the opening of the LC. The Court does not find any substantial ground warranting interference.

CLAIM NO. 3

45. In respect of claim no. 3, learned AT *inter alia held as under:*

> *"8.3.9 Firstly, the Respondent imposed LD for the breach of the Contract and thereafter to recover the amount of LD and Negative Variation in Price Adjustment, the Respondent en-cashed the Performance Bank Guarantee.*
>
> *8.3.10 Having considered the arguments of the Claimant as well as the respondent and the referred Court judgments, the Arbitral Tribunal has noted that the Performance Bank Guarantee (PBG) stood discharged of the performance obligations of the Claimant on completion of the supplies/delivery of rails and was subsisting as a Warranty on the date of encashment. Its invocation and encashment by the Respondent without complying mandatory provisions of the Contract under Clauses 27.4, 27.5 and 27.6 of GCC/SCC is in gross violation of the Contract provisions, hence illegal.*
>
> *8.3.11 In terms of Clause 17.2 of the GCC, the Respondent was entitled to the proceeds of the Performance Security as compensation for any loss resulting from the Claimant's alleged failure to complete its obligations under the Contract. In no case the proceeds of the Performance Security can be used to recover alleged claim of the Respondent on account of negative variation in Price Adjustment, which is not in the nature of compensation for any loss arising out of failure of any Performance obligations. Thus the Arbitral Tribunal finds*

that the action of Respondent for invocation and encashment of the PBG is wrong and illegal and the Respondent is liable to refund entire amount of EURO 783^200.00 to the Claimant with interest."

46. With respect to the findings of the learned AT regarding the refund of the PBG, the petitioner has contended that the PBG was rightfully invoked due to the Respondent's persistent contractual breaches, including delayed deliveries and failure to account for negative price variations. Petitioner further argued that the learned AT ignored substantial evidence, including communications and reports quantifying financial losses of Rs. 40 crores, which allegedly arose directly from the Respondent's non-compliance.

47. The Court considers that learned AT has justified its decision to refund the encashed PBG through its detailed finding. Learned AT held that the invocation and encashment of the PBG by the Petitioner was in clear and gross violation of contractual provisions, specifically Clauses 27.4, 27.5, and 27.6 of the GCC and SCC. The learned AT noted that the PBG was initially furnished as security for the Respondent's performance obligations under the contract, but once the Respondent completed its supply obligations, the PBG no longer served as Performance Security and instead remained only to cover warranty obligations. The learned AT, while interpreting the relevant clauses, highlighted that under Clause 27.4 of the GCC, the Petitioner was required to notify the Respondent of any defects, provide evidence thereof, and grant the Respondent an opportunity to inspect and remedy such defects. The Petitioner's failure to follow these mandatory procedural requirements rendered the invocation of the PBG invalid.

Additionally, the learned AT correctly noted that Clause 17.2 of the GCC expressly limits the use of performance security proceeds to compensating losses directly resulting from the Respondent's failure to fulfill performance obligations. However, in this case, the Petitioner invoked the PBG to recover claims for LD and negative variations in Price Adjustment, which the learned AT determined were not performance-related failures and, therefore, outside the permissible scope of PBG invocation. Furthermore, learned AT noted the PBG was invoked on January 21, 2016, after it had already ceased to function as a Performance Security and was only subsisting as a warranty obligation. The Petitioner's failure to adhere to contractual conditions for warranty claims, combined with the misuse of PBG proceeds for purposes not allowed under the contract and thus the learned Tribunal concluded that the invocation and encashment of the PBG were wrongful and illegal. Accordingly, the Tribunal's decision to direct a refund of the PBG was justified, and this court finds no reason to interfere with that determination.

CLAIM NO. 4

48. Claim No. 4 pertained to the loss endured on account of goodwill, Reputation and Opportunity costs. The learned AT observed that while the Petitioner's actions had impacted the goodwill and reputation of the Respondent, however, since the matter had already been challenged by the Respondent before the courts and the issue was sub-judice, the learned AT refrained from expressing any opinion or issuing any direction regarding the claim and found itself unable to assess or quantify such a claim in the arbitration proceedings. Consequently, the

claim for loss of goodwill and reputation was rejected by the learned AT. The said finding has not been challenged by the Petitioner.

CLAIM NO. 5

49. In respect of claim no. 5, the learned AT *inter alia* held as under:

> *"Considering the fact that GCC Clause 15.5 as supplemented by SCC Clause 15.5does provide for payment of interest on money due at the rate of State Bank of India Prime Lending Rate, which on 01.04.2018 was 13.45% p.a., after 60 days of submission of invoice accompanied with relevant document in acceptable form, and the final delivery of rails of Lot-2 at Delhi was made on 20.08.2015, The Tribunal awards to the Claimant simple interest @ 13.45% p.a. on the amounts to be worked out as below, from 20.10.2016 till the payment is made by the Respondent-"The net amount of Claim-1 i.e. Euro 478181.76 (+) or (-) the amount of Price Variation (Claim-2) to be worked out as per the principle laid down in Para8.2.10 & 8.2.11 supra, depending on whether the Price adjustment due to Price Variation works out to be positive or negative for the Claimant".8.5.7 As regards interest on the amount of Performance Guarantee en-cashed by the Respondent (Euro 783,000.000) and Is to be refunded by the Respondent to the Claimant as per Para 8.3.11 above, The AT decides that the claimant should be paid simple interest @ 12% per annum on Euro 783,000.00 from21,01.2016 (the date of encashment) till the payment is made."*

50. Regarding the award of interest, Petitioner has raised objections that in view of Clause 9.2 of the SCC, the Arbitrator had been expressly prohibited from awarding any interest on the amount found due and payable by the Petitioner to the Respondent. However, despite this prohibition being brought to the notice of the learned AT, learned AT has granted interest in favour of the Respondent, thereby violating the mandate of Section 28(3) of the Act.

51. In the present case, while rendering a finding in respect of Claim no. 5, the learned AT has interpreted distinct provisions of the contract between the parties. These are Clause 15.5 of the GCC, supplemented by SCC Clause 15.5 which provides for the payment of interest at the State Bank of India Prime Lending Rate (13.45% per annum as of 01.04.2018) in case of delayed payments beyond 60 days from the submission of an invoice accompanied by acceptable documentation. The learned AT also noted that that conflicting provisions existed within the contract, specifically SCC Clause 9.2, which prohibits the payment of interest on the delay of amounts awarded in arbitration. At this juncture, it is pertinent to mention that this coordinate bench of this Court vide it's judgment dated 13 March 2018 in OMR (COMM) No. 116 of 2018 between the same parties titled ***Delhi Metro Rail Corporation Ltd. v. Voestalpine Schienen***, upheld an arbitral tribunal's discretion in interpreting the provisions. The Court emphasized that an Arbitral Tribunal's interpretation, if reasonable and not perverse, should not be interfered with. In light of this settled principle of law, this Court finds no merit in the objection raised by the counsel for the petitioner as far as the award of interest in favour of the respondent is concerned

CLAIM NO. 6

52. Claim No. 6 pertained to the cost of the proceedings. A similar counter claim was also raised by the petitioner herein and the learned AT decided that both parties should equally share the Tribunal's fees and bear their own respective costs.

COUNTER - CLAIMS

53. On the other counterclaims raised by the petitioner, the learned AT considered the arguments advanced by the parties and pleadings submitted and rejected them on the following grounds:

a. On the first counterclaim, which sought payment of Euro 1,442,338.97 for LD and recalculated Price Variation amounts, the learned AT found it linked to Claim no. 1,2 and 3 previously decided in favor of the respondent. The learned AT ruled that the petitioner must pay the net invoice amount, adjusted for LD and Price Variation, to the respondent, rendering the counterclaim unsustainable.

b. On the second counterclaim for interest at 18% on the counter-claimed amount, the learned AT dismissed it, as no amount was found due to the petitioner.

54. From the discussion above, it is evident that the learned AT meticulously evaluated the material presented before it and thoroughly examined the documents filed by the parties. The learned AT, in its detailed and reasoned award, addressed each claim and counterclaim with due regard to the terms of the contract, the conduct of the parties, and the applicable legal principles. The learned AT's findings demonstrate that it carefully balanced the contractual provisions, the actions and inactions of the parties, and the principles of fairness. The counterclaims raised by the petitioner were also addressed comprehensively.

CONCLUSION

55. As discussed in the foregoing paragraphs, the scope of interference and intervention by a Court in an Arbitral Award is limited in view of the legislative intent behind the enactment of the Act, and even if raised, a challenge to an Arbitral Award must satisfy the test laid down in the Act as well as that interpreted by the Supreme Court.

56. Therefore, upon consideration of facts and circumstances, submissions made on behalf of the parties and observations and findings in the Award, this Court finds that there is no merit in the instant petition and the challenge therein to the impugned Award.

57. Accordingly, the instant petition is dismissed for being devoid of merit. Pending applications, if any, also stand dismissed.

DINESH KUMAR SHARMA, J

FEBRUARY 03, 2025
AR/N/SMG