IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 262 OF 2024
WITH
INTERIM APPLICATION (L) NO. 21282 OF 2024
WITH
INTERIM APPLICATION (L) NO. 32187 OF 2023
IN
ARBITRATION PETITION NO. 262 OF 2024

Public Works Department Got of Maharashtra National Highways ...Petitioner

Versus

Khare And Tarkunde Infrastructure Pvt. Ltd. ...Respondent

WITH
ARBITRATION PETITION NO. 264 OF 2024
WITH
INTERIM APPLICATION (L) NO. 21288 OF 2024
WITH
INTERIM APPLICATION (L) NO. 32189 OF 2023
IN
ARBITRATION PETITION NO. 264 OF 2024

ASHWINI JANARDAN VALLAKATI
Digitally signed by ASHWINI JANARDAN VALLAKATI
Date: 2026.06.12 12:51:23 +0530

Public Works Department Government of Maharashtra, National Highways Division PWD ...Petitioner

Versus

Khare And Tarkunde Infrastructure Pvt. Ltd. ...Respondent

WITH
ARBITRATION PETITION NO. 263 OF 2024
WITH
INTERIM APPLICATION (L) NO. 32188 OF 2023
WITH
INTERIM APPLICATION (L) NO. 21285 OF 2024
IN
ARBITRATION PETITION NO. 263 OF 2024

Public Works Department Govt of Maharashtra National Hiighways ...Petitioner

Versus

Khare And Tarkunde Infrastructure Pvt. Ltd. ...Respondent

Mr. Amrut Joshi *a/w Ms. Kajal Gupta, Ms. Shweta Singh i/b M. V. Kini & Co., for the Petitioner.*

Mr. Karl Tamboly, Counsel *a/w Mr. Anoop Sharma, Mr. Reehan Ajmerwala, Ms. Ujwala Kamat, Mr. Sumit Khanna, i/b, Sarita D'lima, for Respondent.*

CORAM: SOMASEKHAR SUNDARESAN, J.

RESERVED ON: MARCH 30, 2026

PRONOUNCED ON: JUNE 12, 2026

JUDGEMENT:

Context and Factual Background:

1. This is a Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("***the Act***") impugning an arbitral award dated April 14, 2023 ("***Arbitral Award***"), by which disputes and differences relating to an Engineering Procurement and Construction Contract comprising agreements dated December 17, 2014 and December 24, 2014 (collectively the "***Agreement***") executed between the parties came to be adjudicated.

Ashwini Vallakati

2. The core contention that needs to be dealt with in the challenge is twofold: *first*, that Clause 4.1.5 specifically and categorically provides that the aggregate damages payable shall not exceed 1% of the contract price, and yet, the Impugned Award has held that such limit would not apply in the peculiar facts of the case; and *second*, that interest awarded at the rate of 18% per annum compounded with quarterly rests for pre-arbitration, *pendente lite* and post-arbitration, is contrary to the contract as well as Section 31(7) of the Act.

3. A brief factual overview of facts relevant for purposes of this Petition may be summarised thus:-

A) The Agreement was executed in respect of road infrastructure, broken up into three packages, each of which involved construction of various major and minor bridges of four lanes or two lanes; and two overbridges over land. The three packages were of a value of Rs.~53.24 crores; Rs.~48.80 crores; and Rs.~46.46 crores respectively – aggregating to Rs.~148.51 crores;

B) Disputes and differences arose between the Petitioner, the Public Works Department (“***PWD***”), through the National Highway Division and the Respondent, Khare And Tarkunde Infrastructure Pvt. Ltd. (“***KTIPL***”) over what caused the delays associated with the project;

Ashwini Vallakati

C) The Letters of Acceptance for the project were issued in December 2014. PWD communicated that the "Appointed Date" for the Agreement would be January 27, 2015. This date is important inasmuch as the Agreement provides for completion of the project within a period of 18 months from the Appointed Date. The scheduled completion deadline, on the basis of the Appointed Date, would have been July 26, 2016;

D) The Agreement was terminated by PWD on October 25, 2018 — nearly three and a half years after the Appointed Date;

E) The core issue in these proceedings centres around the provision of the Right of Way ("***ROW***"). Under the Agreement, PWD was to provide KTIPL with ROW to the extent of at least 90%[1] of the total length of the project within a period of 15 days from the date of execution of the Agreement. The balance 10%[2] of the ROW was to be handed over within a maximum of 150 days from the Appointed Date;

F) On February 20, 2015, PWD wrote to KTIPL, declaring that January 27, 2015 would be the Appointed Date. It is common ground that 90% of the ROW had not been handed over by this date. The very next day, on February 21, 2015, KTIPL wrote to PWD stating that the

1. Clause 4.1.3(a) read with clause 28.1.
2. Clause 8.2

ROW had not been handed over, and therefore, the Appointed Date was incorrect;

G) By June 21, 2015, the first milestone under the project was reached;

H) On February 15, 2016, KTIPL wrote to PWD, listing the difficulties faced and highlighting that land and the ROW had not been handed over, requesting that 90% of the ROW be handed over;

I) The parties traded correspondence between March 9, 2015 and August 10, 2016, which would establish that 90% of the ROW had not been handed over. The land necessary for grant of the ROW had not been acquired, which would indicate that handing over the same to KTIPL was impossible;

J) The parties held meetings and eventually it was agreed that a ROW for approaches for five bridges and two road overbridges would be handed over by November 15, 2016;

K) On July 11, 2016, KTIPL requested an extension of time for completion of the project and grant of such request was recommended by PWD;

L) The second milestone was reached only by January 24, 2017. On May 11, 2017, PWD acknowledged the delay and recommended payment of the maximum amount of damages and extension of time until July 30, 2017;

M) Another letter dated August 7, 2017 from PWD recommended extension up to March 31, 2018 and payment of the maximum amount of damages;

N) Requests for extension of time were not formally granted and the applications were pending awaiting approval from the Ministry of Road, Transport and Highways;

O) On April 14, 2018, KTIPL wrote a letter stating that the handover of ROW was in bits and pieces and access was also difficult since the land was surrounded by private land. KTIPL raised a claim for delay in handover of ROW. On April 27, 2018, KTIPL wrote another letter asserting that ROW had not been handed over despite lapse of two years since the scheduled date of completion;

P) Arbitration was invoked by KTIPL on October 1, 2018; and

Q) PWD terminated the Agreement by notice dated October 25, 2018.

Analysis and Findings:-

4. It is against this backdrop that submissions were made before this Court by Mr. Devang Vyas, Learned Senior Advocate for PWD along with Mr. Amrut Joshi, Learned Advocate for PWD, and by Mr. Karl Tamboly, Learned Advocate for KTIPL. The matter was first heard last year, but due to the significant efflux of time since the hearing, the matter was fixed for hearing afresh on March 30, 2026. Learned Advocates addressed the Court afresh and judgement was reserved.

5. At the threshold, the provisions of Clause 4.1.5, which is relied upon by PWD for its contention on the quantum of damages is worthy of being reproduced:

> *"Notwithstanding anything to the contrary contained in this Agreement, **the Parties expressly agree that the aggregate Damages payable under Clauses 4.1.4, 8.3 and 9.2 shall not exceed 1% (one per cent) of the Contract Price**. For the avoidance of doubt, the **Damages payable by the Authority under the aforesaid Clauses shall not be additive if they arise concurrently from more than one cause but relate to the same part of the Project Highway**.*
>
> *Both the parties agree that **payment of these Damages shall be full and final settlement of all claims of the Contractor and such compensation shall be the sole remedy against delays of the Authority and both parties further agree this as final cure against delays of the Authority**."*

[Emphasis Supplied]

6. A plain reading of the foregoing would point out that this provision essentially entails a cap on the aggregate damages payable under Clause 4.1.4, Clause 8.3 and Clause 9.2 at 1% of the contract price. If damages were to arise under multiple clauses but relate to the same part of the project, the damages shall not be aggregated for purposes of this cap, but shall be subsumed within the cap.

7. PWD would point out that the Learned Arbitral Tribunal has indeed noticed the provisions of Clause 4.1.5 and PWD's contention in this regard. However, PWD would contend that the Learned Arbitral Tribunal's reasoning is flawed since it has placed reliance on judgements that would not apply to the present dispute. The contention is that the restriction of 1% has not been applied to the facts of this case and effectively, the Learned Arbitral Tribunal has rewritten the contract between the parties.

8. On the face of it, this appears to be a reasonable and logical contention, particularly given the strength of the language and the *non-obstante* provision. However, on closer examination of the law and the assessment of evidence by the Learned Arbitral Tribunal, it does not appear to be that simple.

9. It would be necessary to examine how the Learned Arbitral Tribunal has gone about dealing with this issue. What is evident on the face of the Impugned Award and the material on record is that the delay in providing the ROW or obtaining approval from Railway Authorities in terms of Clause 4.1.3 of the contract, would entitle KTIPL to damages in accordance with the provisions of Clause 8.3 and to an entitlement to a time extension in accordance with Clause 10.5. This is set out in Clause 4.1.4 which is extracted below:-

> *"4.1.4* ***Delay in providing the Right of Way or approval of GAD by railway authorities, as the case may be, in accordance with the provisions of Clause 4.1.3 shall entitle the Contractor to Damages in a sum calculated in accordance with the provisions of Clause 8.3 of this Agreement and Time Extension in accordance with the provisions of Clause 10.5 of this Agreement.*** *For the avoidance of doubt, the Parties agree that the Damages for delay in approval of GAD by the railway authorities for a particular road over-bridge/under-bridge* ***shall be deemed to be equal to the Damages payable under the provisions of Clause 8.3 for delay in providing Right of Way for a length of 2 (two) kilometre for each such road over-bridge/under-bridge****."*

[Emphasis Supplied]

10. The provision of the ROW itself would necessitate a review of Clause 4.1.3(a) which sets out PWD's obligation to provide KTIPL with the ROW and the same is extracted below:-

Ashwini Vallakati

"4.1.3 ***The Authority shall provide to the Contractor****:*

(a) upon receiving the Performance Security under Clause 7.1.1, ***the Right of Way in accordance with the provisions of Clauses 8.2 and 8.3, within a period of 15 (fifteen) days from the date of this Agreement, on no less than 90% (ninety per cent) of the total length of the Project Highway****;"*

[Emphasis Supplied]

11. A plain reading of the foregoing would indicate that PWD was obligated to provide the ROW in accordance with the Agreement, within a period of 15 days from the date of the Agreement, on *no less than* 90% of the total length of the project. This would indicate that the bargain entered into between the parties envisages a timeframe that would necessarily require PWD to provide the ROW well within just 15 days of receiving the performance security under the contract. Evidently, there is a chronic and clear default on PWD's part in complying with its obligation to provide the ROW, which was envisaged at a very early stage of the contract. It is commonsensical and logical that the provision of the ROW was virtually to be given at the threshold and the rest of the bargain fashioned by the parties in the Agreement is premised on such ROW being available.

Section 28(3) of the Act:

12. The cap on damages, as indeed the tight timeline of 18 months, are all facets of the Agreement that are founded on the obligation of PWD to provide

90% of the ROW within 15 days, subject to receipt of the performance security. If this foundational element is missing, it stands to reason that the Learned Arbitral Tribunal would have to assess the damage suffered and the manner in which the reciprocal promises in the same agreement were vitiated and how they ended up getting adjusted. It is this principle that is codified in Section 28 of the Act – the provision whereof is extracted below:

> *28*. ***Rules applicable to substance of dispute.—***
>
> *(1) Where the place of arbitration is situate in India,—*
>
> *(a) in an arbitration other than an international commercial arbitration,* ***the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;***
>
> *(b) in international commercial arbitration,—*
>
> *(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;*
>
> *(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;*
>
> *(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.*
>
> *(2) The arbitral tribunal shall decide ex aequoet bono or as amiable compositeur only if the parties have expressly authorised it to do so.*

Ashwini Vallakati

(3) ***While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction****.*

[Emphasis Supplied]

13. Prior to the significant amendments to the Act effected in 2015, Section 28(3) made it a statutory obligation of an Arbitral Tribunal to adjudicate the dispute "*in accordance with*" the terms of the contract and to take into account usages of trade applicable to the transaction. After the amendment, Section 28(3), which is extracted above, requires the Arbitral Tribunal, *in all cases*, to *take into account* the terms of the contract *and* trade usages applicable to the transaction.

14. This is a conscious departure by Parliament to give greater elbow room and leeway to the Arbitral Tribunal to adjudicate the facts, taking into account the peculiarities of the case. The facts of the case in hand are indeed extraordinary. The deadline for completion was 18 months from the Appointed Date. The Agreement itself was terminated three and a half years after the Appointed Date. The Learned Arbitral Tribunal as the best judge of the quality and quantity of evidence and in the matter of interpretation of contract, has returned logical and reasonable findings of fact including on the conduct of the parties during the course of implementing the Agreement; the

understanding among them; their understanding before the litigation started; the termination of the Agreement after the litigation started; and the interpretation of the limit on damages bearing in mind the provisions of Section 28(3) of the Act.

15. I must hasten to add that Section 28(3) of the Act is not a license to ignore the terms of the contract at all, but it is a statutory recognition that when parties invest their trust in an Arbitral Tribunal to adjudicate their disputes, the Arbitral Tribunal would take into account the terms of the contract as opposed to the earlier position of adjudicating only "in accordance with" the contract. It is in extraordinary situations such as the matter at hand, that it is arguable that the scheme of the fine balance of reciprocal promises that the parties wove together may be required to be given business efficacy where it otherwise presents completely irrational and absurd consequences. Therefore, the evident objective is that the informal, non-Court adjudication must be given greater leeway to do justice without ignoring the terms of the contract but equally taking into account the contract rather than adjudicating only in accordance with the contract while ignoring how the parties conducted themselves.

16. The term "*in accordance with*" entails a mandatory stipulation while the term "*take into account*" would entail factoring in the terms of the contract.

Therefore, if the contract in question contains a provision of limiting damages, needless to say, it cannot be wished away or ignored. However, when the statutory stipulation is to "*take into account"* such provision of the contract, as a conscious departure from the phrase "*in accordance with*", the legislature in its wisdom has specifically held that the arbitral tribunal must have regard to the contract. Yet, in a peculiar situation such as this, where the ROW has simply not been provided for an inordinately long period of time with the Appointed Date fixed by the PWD being ignored by the PWD itself, the empowerment of the Arbitral Tribunal to decide the validity of the limit in the contract introduced by Section 28(3) cannot be ignored.

17. It is the absurdity of the reciprocal promises being in conflict that justifies invocation of the business efficacy test in the peculiar factual matrix at hand. The Learned Arbitral Tribunal has examined the contentions of the parties and noticed that KTIPL's contention that handing over of the ROW is the very genesis of the performance under the contract. That apart, the Learned Arbitral Tribunal examined the provisions of the Clause 4.1.5 and the contention of KTIPL that PWD's reading of the same is an unconscionable and arbitrary reading and that, if the clause were to be read in that manner, it would be contrary to the provisions of the Indian Contract Act, 1872 ("***Contract Act***") itself.

Ashwini Vallakati

Case Law Analysed:

18. KTIPL's submission was that the limit of damages to 1% irrespective of the nature, extent and quantum of the breach by the counterparty would be contrary to the provisions of Sections 23, 28, 54, 55 and 73 of the Contract Act. This submission was examined by the Learned Arbitral Tribunal, which led to consideration of the judgement of the Delhi High Court in ***Simplex Concrete***[3] to extract the analysis of the operation of Section 73 of the Contract Act. The principle that a clause in a contract cannot be interpreted in a manner that would prevent the award of reasonable damages as a fundamental first principle of contract law has been alluded to in the said judgement, invoking the decision of the Supreme Court in ***G. Ramachandra Reddy***[4]. Likewise, the Learned Arbitral Tribunal cited the judgement of the Supreme Court in ***K.N. Sathyapalan***[5] to notice that parties would ordinarily be bound by the terms agreed upon in the contract, but if one of the parties is unable to fulfil its obligations, and that has a direct bearing on the work to be executed by the other party, the Arbitral Tribunal would be vested with authority to compensate the non-defaulting party for the additional costs incurred as a result of the failure of the other party to perform its obligations.

*3 Simplex Concrete Piles (India) Ltd. v. Union of India – **2010 SCC OnLine Del 821** – Paras 1, 3, 9, 10, 14, 15 & 16*
*4 G. Ramachandra Reddy v. Union of India – **(2009) 6 SCC 414** – Paras 19 to 27*
*5 K.N. Sathyapalan v. State of Kerela – **(2007) 13 SCC 43***

19. In ***Ssangyong***[6], the Supreme Court analysed the amendment to Section 28(3), after noticing that the intention of this amendment was to overcome and overrule the effect of the law earlier declared by the Supreme Court in ***ONGC***[7], which had held that any conflict with the terms of a contract in an arbitral award would result in the award being against public policy. The Arbitral Tribunal being the best arbiter of the interpretation of the contract, held that a hidebound approach to a 1% cap on damages regardless of the nature, degree and extent of the breach by PWD is an absurd proposition. The Arbitral Tribunal is entitled to hold that the limit would not apply in such situations where the imposition of the limit itself is interdependent on other reciprocal promises contained in the very same contract.

20. Therefore, in my opinion, the reliance by the Learned Arbitral Tribunal on ***Simplex Concrete*** cannot be held to be irrelevant or inapplicable. Indeed, the findings of the Learned Arbitral Tribunal, in my opinion, cannot be held to be absurdly unjustified and perverse in a manner that necessitates setting aside the Impugned Award. I have carefully examined the judgements extracted by the Learned Arbitral Tribunal and the application of the principle gleaned from them to the facts of the case. The Learned Arbitral Tribunal found that the Agreement required completion of the work within 18 months,

6 Ssangyong Engg. & Construction Co. Ltd. v. NHAI – ***(2019) 15 SCC 131*** *– Paras 38 to 41*
7 ONGC v. Saw Pipes Ltd. – ***(2003) 5 SCC 705***

with not less than 90% of the site being handed over to KTIPL within 15 days from the signing of the agreement and furnishing of the performance security.

21. The Learned Arbitral Tribunal found that while Clause 4.1.5 may be a *non obstante* provision, it has to be read as a part of the contract harmoniously with the other requirements in the contract and cannot be read in a manner that is totally divorced from the foundational obligation of handing over not less than 90% of the site to KTIPL, and that too within 15 days of the provision of the performance security. If all conditions in the Agreement had been met, the Learned Arbitral Tribunal was of the view, that the limit set out in Clause 4.1.5 could be logically applied and enforced. However, the obligatory provision of 90% of the ROW was nowhere in sight. The delays caused by this reason itself amounted to more than 545 days, approximately 18 months, and therefore, it was held that it would be wholly irrational, unfair and illogical to hold that the limit under Clause 4.1.5 would inexorably apply with damages being restricted to 1% of the contract value.

22. The Learned Arbitral Tribunal found that the work site involving approaches to the bridge could indeed be considered to be reasonably problematic since there could be ownership of private lands in the process. However, the handing over of the site was so inordinately delayed that the work envisaged to be done in 18 months was prolonged by an additional 27

months and then only upon arbitration being invoked, was the termination notice issued. The Learned Arbitral Tribunal could not be blind to the fact that KTIPL was at the site for 45 months prior to the termination and therefore could not be held to be limited in its claim for damages to 1% of the contract value as envisaged in Clause 4.1.5.

23. The Learned Arbitral Tribunal took the view that the restriction in Clause 4.1.5, if enforced in the manner canvassed by PWD, would place a premium on non-compliance and allow PWD to take benefit of its own wrong. This has been squarely held in reliance upon the judgement of the Delhi High Court in ***Simplex Concrete***.

24. It is hard to hold that the interpretation of contract by the Learned Arbitral Tribunal is an unreasonable one. It is in conformity with the law declared by a High Court and it would not be possible to hold that such a view is completely perverse or contrary to law. The judgements analysed by the Learned Arbitral Tribunal cannot be brushed aside as being inapplicable, inasmuch as the judgements indeed squarely dealt with the interpretation of clauses that severely limited damages and thereby hampered the assessment of reasonable damages incurred by a party that is a victim of a breach of contract by the counterparty. For a deployment for 45 months in a project envisaged to be completed in 18 months, with 90% of the ROW being required

Ashwini Vallakati

to be provided upfront, with that threshold not even being met when termination was effected, which termination too was done after arbitration was invoked, the Learned Arbitral Tribunal has indeed dealt with the matter taking into account the substantive law of India and the contract.

25. Likewise, the Learned Arbitral Tribunal has relied upon the judgement in ***Wing Commander***[8] to indicate how the Supreme Court did not enforce a term of the contract which provided for a specific rate of damages in the event of a failure, since the Agreement in question had been manifestly breached by one of the parties and that too when the Agreement was evidently one-sided. Therefore, the Learned Arbitral Tribunal interpreted the contract in the context of the law declared to hold that restricting damages to an insignificant, tiny ceiling without regard to the web of interconnected obligations contracted by the parties, is untenable.

26. In my opinion, the contention of PWD that the Learned Arbitral Tribunal has relied upon inapplicable judgements is not at all tenable. The judgements analysed and extracted are directly on point. Therefore, when an Arbitral Tribunal interprets the contract, unless the interpretation is manifestly arbitrary in a manner that goes to the root of the matter, the Section 34 Court ought not to disturb a reasonable and plausible finding

8 Wing Commander Arifur Rahman Khan v. DLF Southern Homes (P) Ltd. – ***2020 16 SCC 512***

Ashwini Vallakati

returned by the Learned Arbitral Tribunal. The nuanced and interconnected web of timelines contracted by the parties lies at the heart of the dispute between the parties. The contract was meant to be performed within a predetermined and identified timeframe. Such timeframe entailed interconnected obligations that needed to be performed. Ignoring the reciprocal promises and simply taking one of the promises alone as being binding, regardless of all the other provisions of the contract, would render the interpretation canvassed by PWD to be wholly unreasonable, irrational and contrary to common sense, quite apart from placing a premium on violation of such a degree that there would be no disincentive at all for a wanton breach of the obligation.

27. In my opinion, the reasoning provided by the Learned Arbitral Tribunal in interpreting Clause 4.1.5, and indeed Clause 1.2.1(w) is a reasonable one. Clause 1.2.1(w), which refers to the provisions of contract that determine damages on a per-day basis and not to provisions imposing an overall cap on the total quantum of damages, was held by the Learned Arbitral Tribunal to fall in the realm of liquidated damages, which would then be governed by the principles enunciated in ***Kailash Nath***[9]. On the other hand, the restriction of 1% on the overall quantum of damages was held to be deviant from the very

9 *Kailash Nath Associates v. DDA – **(2015) 4 SCC 136***

concept of the need to demonstrate damages and the need to assess damages, which is the very principle articulated in ***Kailash Nath***.

28. To my mind the serious deep limit placed under Clause 4.1.5 would be applicable only if there had been a reasonable delay in handing over the ROW. I am afraid that the contention that even if the Agreement had been terminated only another decade later, with ROW not having been given, the cap on damages would still be 1%, would lead to an absurd outcome and make a mockery of contract law. The delay in this case is abnormal and the exclusionary clause cannot be blindly applied. This is where the business efficacy test would have to be applied to make sense of the Agreement.

29. Mr. Tamboly's reliance on another decision of the Delhi High Court in ***MBL***[10] to contend that clauses in a contract that restrict the right of a party to claim damages would defeat the very purpose of the Contract Act, resonates with me in accepting the approach of the Learned Arbitral Tribunal, that there cannot be a limit on the right of a party to claim damages, is a reasonable and logical proposition. To my mind, although at first blush Clause 4.1.5 presents a strong argument in PWD's favour, on a reflection upon the facts and the evidence assessed by the Learned Arbitral Tribunal, the Impugned Award does

10 *MBL Infrastructures Ltd. v. DMRC* – ***2023 SCC OnLine Del 8044***

not return an impossible finding for a Section 34 Court to upset the arbitral findings.

30. PWD would place reliance on a number of judgements to contend that the Arbitral Tribunal cannot go beyond the terms of the contract. These include the decisions in ***Bright Power***[11]; ***Vilayati Ram***[12]; ***Ssangyong***; ***Recon***[13]; ***Deccan Chronicle***[14]; ***Sal Udyog***[15]; ***Manraj***[16]; and ***PSA SICAL***[17].

31. To my mind, each of these judgements is distinguishable. The decision in ***Bright Power*** related to interest and an agreement between the parties to waive the payment of interest. This is not a judgement that relates to a severe limit on damages. In ***Vilayati Ram***, this Court set aside an arbitral award on the basis of a categorical finding that the clause limiting damages was excluded by the arbitral tribunal from consideration. On the other hand, in the instant case, PWD's reliance on Clause 4.1.5 has been noticed, considered and dealt with, with an extensive analysis as to why it would constitute a provision contrary to the Contract Act.

11 *Union of India v. Bright Power Projects (India) Pvt. Ltd. –* ***(2015) 9 SCC 695***
12 *Vilayati Ram Mittal (P) Ltd. v. Reserve Bank of India –* ***2017 SCC OnLine Bom 8479***
13 *Union of India v. Recon, Mumbai –* ***2020 SCC OnLine Bom 2278***
14 *Board of Control for Cricket in India v. Deccan Chronicle Holdings Ltd –* ***2021 SCC OnLine Bom 834***
15 *State of Chhattisgarh v. Sal Udyog (P) Ltd. –* ***(2022) 2 SCC 275***
16 *Union of India v. Manraj Enterprises –* ***(2022) 2 SCC 331***
17 *PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust –* ***(2023) 15 SCC 781***

32. ***Ssangyong*** does not appear to be of any assistance to PWD. The Learned Arbitral Tribunal has indeed given detailed reasons in the paragraphs 6.2.22 to 6.2.36 to squarely explain how the provisions of Clause 4.1.5 cannot be read in isolation without taking a holistic view of the Agreement. I have already dealt with the detailed reasoning adopted by the Learned Arbitral Tribunal and in fact, as stated earlier, I find that the analysis of Section 28(3) set out in ***Ssangyong***, if anything, supports the plausible view taken in the Impugned Award in respect of how Clause 4.1.5 ought to be interpreted. As regards ***Recon***, in my opinion, by reason of the explanation set out in relation to ***Ssangyong***; the applicability of ***Simplex Concrete***; the analysis set out in this judgement as to why the Impugned Award is logical and plausible; and indeed, the provisions of Section 28(3) of the Act, the Impugned Award is not worthy of being disturbed.

33. To avoid prolixity, each and every judgement cited to make the same point is not being extracted and dealt with – I have given a fair indication above, of the principle underlying these multiple judgements. It cannot be said that any rewriting of the contract or any new provision not envisaged by the parties has been brought in and substituted by the arbitral tribunal. Instead, in my view, what the Learned Arbitral Tribunal has done is interpret the Agreement in a logical and reasonable manner to give it business efficacy.

Ashwini Vallakati

Such interpretation squarely falls in the domain of the Learned Arbitral Tribunal.

Business Efficacy Test:

34. A quick word on business efficacy is necessary. Mr. Joshi would rely on the principle that only when a commercial contract presents an ambiguity necessitating an inquiry into the true intent, purport and interpretation of a contractual provision, that the business efficacy test can be applied. A purposive interpretation cannot be lightly resorted to if the terms of the contract are clear and unambiguous, leaving no scope for interpretation whatsoever. In that context, Mr. Joshi would submit that resorting to an interpretation going behind the plain language of the contract under the garb of commercial wisdom and business efficacy is wholly impermissible. In my opinion, the general proposition as stated, being not in itself exceptionable, when seen from the factual prism of this case, this is a fit case for application of the business efficacy test.

35. In situations where the provisions of a contract when applied to a problematic fact pattern as seen in the instant case, lead to ambiguity of such an order, particularly in a commercial contract, that the commercial wisdom and the commercial sense in striking such a bargain call for review by the Arbitral Tribunal, it is not wrong to invoke the business efficacy test. The

Supreme Court in the case of ***Nabha Power***[18] has clearly declared the law on the business efficacy test. The Supreme Court noticed various earlier judgements on how to give commercial sense to terms in a contract that may not lend themselves to a clear unequivocal meaning, in the following terms:

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

18 *Nabha Power Ltd. v. Punjab SPCL –* ***(2018) 11 SCC 508***

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

[Emphasis Supplied]

36. In coming to the foregoing view, the Supreme Court endorsed and reiterated what had been stated in a long line of judgements that had endorsed these principles including in the cases of ***Dhanrajamal Gobindram***[19] (paragraph 19); ***D.N. Revri***[20] (paragraph 7); and ***Satya Jain***[21] (paragraphs 33 to 35). Applying these well-known principles, in my opinion, effectively what the Learned Arbitral Tribunal has found is clearly justifiable on the aforesaid parameters.

37. Indeed, an arbitrator cannot ignore the conditions of a contract or a head of claim that is prohibited by contract. Indeed, as stated by Mr. Joshi, an award cannot be passed in manifest ignorance of the terms of the contract. However, in the facts of the instant case, it cannot be said that the Learned Arbitral Tribunal has manifestly ignored Clause 4.1.5. On the contrary, the issue involved is how to apply Clause 4.1.5 and whether Clause 4.1.5 in its

19 Dhanrajamal Gobindram v. Shamji Kalidas & Co. – ***1961 SCC OnLine SC 28***
20 Union of India v. D.N. Revri & Co. – ***(1976) 4 SCC 147***
21 Satya Jain v. Anis Ahmed Rushdie – ***(2013) 8 SCC 131***

terms enabled, or even required the Learned Arbitral Tribunal to completely ignore the breach of various other provisions of the contract.

Conclusion on Clause 4.1.5:

38. In a multi-clause contract, if one clause is to be interpreted in a manner that inflicts violence upon another part of the contract, it would follow that both such clauses would need to be reconciled. The reconciliation of Clause 4.1.5 with the timelines envisaged in the Agreement, holding it to be squarely applicable when the reciprocal promises contained in the same contract are indeed being performed, to my mind, indeed is responsive to such requirement of reconciling the clauses. It is not the Learned Arbitral Tribunal's case that Clause 4.1.5 has no role whatsoever. What the Learned Arbitral Tribunal has held is that Clause 4.1.5 would indeed run its course if, in the wider context of how the parties entered into the bargain, its application would lead to the terms of the contract, including the terms of Clause 4.1.5 being seen as a logical and reasonable extrapolation of the operation of the rest of the contract.

39. The PWD was meant to provide 90% of ROW within 15 days of receipt of the performance security. The timelines in the matter were linked to the provision of the ROW. Evidently, the contract continued without any termination with KTIPL being mobilised throughout the period all the way up

to October 25, 2018, when termination was effected after arbitration was invoked. In terms of PWD's own case, the Appointed Date under the contract for completion of the work would have been January 27, 2015, resulting in the scheduled completion date being July 26, 2016 i.e. completion within 18 months or 545 days. Such completion not being achieved only because even the initial handing over of 90% of the ROW, which indeed had also been an integral part of the contract between the parties cannot be wished away.

40. That KTIPL was mobilised for 45 months cannot be wished away. If one were to read Clause 4.1.5 without regard to Clause 4.1.3(a), one would be reading the clause in isolation without examining the commercial and logical interlinkage between these two vital clauses. If the very basis on which performance is claimed and the very basis on which the alleged lack of performance is said to lead to the termination are undermined, it would follow that the limit on damages cannot be without regard to time. If PWD's contention were to be accepted, it would follow that PWD would be entitled to keep KTIPL deployed for an infinite time or even for another five years or 10 years for that matter, and take its own time to provide the ROW with no scope for damages for such delay ever crossing 1% of the contract value.

41. Such a proposition is absurd to say the least and therefore, in my opinion, the attack on the Impugned Award on the premise that the contract

has been rewritten is not sustainable. The Learned Arbitral Tribunal, far from re-writing the terms of the contract has restricted itself to reconciling in a cohesive manner, the multiple provisions of the contract and giving them a logical meaning, because not doing so would have led to an ambiguity and absurdity in the interpretation of the terms of the contract. This is precisely the ambiguity that led to the application of the business efficacy test and therefore, in my opinion, no case would be made out for accepting the contention that the Impugned Award is patently illegal for having ignored the specific provisions of the contract, namely, Clause 4.1.5.

42. Therefore, in my opinion, no case has been made out to accept the contention made on behalf of PWD that the interpretation contained in paragraphs 6.2.22 to 6.2.36 of the Impugned Award would warrant any interference.

Award of Interest:

43. This brings me to the issue of interest awarded by the Learned Arbitral Tribunal at 18% per annum compounded quarterly. The award of interest is assailed by PWD on the premise that the interest awarded is directly in conflict with interest stipulated in multiple clauses of the Agreement.

44. The provisions of Section 31(7) bear extraction:

Ashwini Vallakati

31. Form and contents of arbitral award. —

(7) (a) ***Unless otherwise agreed by the parties****, where and in so far as an arbitral award is for the payment of money,* ***the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.***

(b) ***A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment****.*

Explanation.—The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).

[Emphasis Supplied]

45. From a plain reading of the foregoing, it would be seen that where the award is for payment of a sum of money and the parties have an agreement on payment of interest on such amount, then the Arbitral Tribunal would be bound by the agreement already made between the parties. This is why the phrase "*unless otherwise agreed by the parties*" is used in this provision to fetter the Tribunal's power to assess interest and award the same "*at such rate as it deems reasonable*".

46. Therefore, it is to be seen whether the finding by the Learned Arbitral Tribunal in its assessment of the applicable interest rate is logical and in conformity with what has been agreed between the parties. Towards this end, when one carefully analyses the content of the arbitral award in Paragraph 6.21 and its sub-paragraphs, it would be clear that the Learned Arbitral Tribunal has again looked at the relevant case law on the point and has analysed the two provisions, namely, Clause 19.9.2 and Clause 19.2.7 and set out its interpretation of the same. Bearing that in mind, the Learned Arbitral Tribunal has computed interest at the rate of 18% per annum with quarterly compounding on all the amounts awarded.

47. Clause 19.9.2 of the Agreement, according to PWD, would point out that the interest rate would be at a base rate plus 2% calculated at quarterly rests, with the base rate being the floor rate of interest announced by the State Bank of India on all its lending operations.

48. This facet has been discussed by the Learned Arbitral Tribunal in Paragraph 6.21 and its various sub-paragraphs. According to PWD, the Learned Arbitral Tribunal's reasoning with reliance upon allegedly inapplicable judgements has resulted in interest being awarded at a quarterly compounded rate of 18% per annum throughout the course of the contract,

Ashwini Vallakati

pre-arbitration, *pendente lite* and post-arbitration, rendering the Impugned Award patently illegal.

49. It would be appropriate to extract the clauses relied upon namely, Clause 19.9.2 and Clause 19.2.7 from the Agreement:

> *19.9.2* ***In the event of the failure of the Authority to make payment to the Contractor within the time period stated in this Clause 19.9, the Authority shall be liable to pay to the Contractor interest at the Base Rate plus 2% (two percent), calculated at quarterly rests, on all sums remaining unpaid*** *from the date on which the same should have been paid, calculated in accordance with the provisions of Clause19.9.1(a) and (b) and till the date of actual payment.*
>
> *19.2.7* ***The Contractor shall repay each installment of the Advance Payment on or before the due date of repayment.*** *In the event of the Contractor's failure to make the repayment on time, the Authority shall be entitled to encash the Bank guarantee for Advance Payment.* ***The Parties expressly agree that for any delay in repayment of the Advance Payment, the Contractor shall pay interest to the Authority for each day of delay, such interest to be calculated at the rate of 18% (eighteen per cent) per annum.***"
>
> ***[Emphasis Supplied]***

50. The interest rate applicable under Clause 19.9.2 is a rate that is payable in the event of failure by PWD to make a payment within the stipulated time. On the other hand, under Clause 19.2.7, KTIPL is required to repay each instalment of the advance payment on or before the due date of repayment

Ashwini Vallakati

and in the event of such failure the bank guarantee towards the advance payment could be encashed by PWD.

51. It is in this context that the parties have agreed that for any delay in repayment of the advance payment, the interest payable by KTIPL to PWD for each day of delay would be calculated at the rate of 18% per annum.

52. It is apparent that each of these provisions is specific in its terms. These clauses would apply only in the case of events covered by them. In the instant case, evidently work has been delayed way beyond the scheduled completion date i.e. 18 months. The additional time taken is another 27 months, in which period, the Arbitral Tribunal noticed that KTIPL had borrowed funds from banks and was incurring interest at the rate of 13.8% per annum compounded monthly. The breach in servicing of the loans taken by KTIPL led to a further escalation in KTIPL having to bear a burden of interest, resulting in an effective rate of 18.8% per annum, that too compounded monthly. When one examines this analysis, it is apparent that with the interest element, the Learned Arbitral Tribunal has effectively awarded damages rather than assessed the appropriate interest rate.

53. The Tribunal held that Clause 19.9.2 is not applicable to the instant case and instead that Clause 19.2.7 would point to the rate at which interest was payable by KTIPL. While it may be tempting to hold that this too falls in the

realm of the Learned Arbitral Tribunal's entitlement to interpret the contract reasonably having regard to its terms, I find it difficult to accept the reasons for which interest has been granted in this manner. If anything, the parties had indicated guidance in the two clauses above as to what rate of interest would be payable by the respective party in the situations specified. The parties have consciously agreed to different rates of interest and this conscious choice cannot be wished away.

54. This facet of the matter is quite different from the rigid fixed limit on damages that is contained in Clause 4.1.5, which has been dealt with in detail above. There is nothing rigid and limiting of the ordinary flow of contract law principles in relation to the aforesaid two clauses on interest. Therefore, the Learned Arbitral Tribunal ought to have been mindful that the 18% rate of interest being adopted from the clause containing KTIPL's potential obligation to pay interest and varying even that to compounding at quarterly rests, and justifying it by reference to the rate of interest borne by KTIPL with its lenders, to my mind is, a perverse and patently illegal approach, by turning the bargain on interest in the contract on its head and further extrapolating from it to change simple interest to compound interest and that too at quarterly rests.

55. Therefore, this facet of the matter, in my judgement, would need intervention. I have carefully considered the law on partial modification to see if the Impugned Award can be saved, with particular regard to the law declared in ***Gayatri Balasamy***[22]. I find that the law declared by the Supreme Court would permit the Section 34 Court to modify only the post-award interest awarded by the Arbitral Tribunal and not the *pendente lite* interest. The following extracts are noteworthy:

> *73. **There can be instances of violation of Section 31(7)(a), and the pendente lite interest awarded may be contrary to the contractual provision. We are of the opinion that, in such cases, the court** while examining objections under Section 34 of the 1996 Act **will have two options. First is to set aside the rate of interest or second, recourse may be had to the powers of remand under Section 34(4).***
>
> *74. **For the post award interest in terms of Section 31(7)(b), the courts will retain the power to modify the interest where the facts justify such modification**. This is why the standard rate stipulated in clause (b) applies when the award itself does not specify the applicable post award interest. There can be a situation where the party to be paid money is at fault and is guilty of delay which may require a modification in the rate of interest. **In the absence of grant of post award interest in the award, the court also possesses the power to grant post award interest. Clearly, as per the legislative mandate, it is not the sole prerogative of the arbitrator.***
>
> ***[Emphasis Supplied]***

[22] *Gayatri Balasamy v. ISG Novasoft Technologies Ltd. –* ***(2025) 7 SCC 1***

56. In view of the law so declared, I am unable to save the element of interest as awarded by the Learned Arbitral Tribunal and substitute it with my view on what the interest should be. The Learned Arbitral Tribunal has granted 18% interest compounded at quarterly rests both *pendente lite* as well as post-award. I see no point in modifying the post-award interest rate alone, which would still not solve the issue relating to the interest granted under Section 31(7)(a), which is awarded without regard to the relevant provisions of the contract. The length of time for this component of the interest is also long and is in the realm of facts, and it is the Learned Arbitral Tribunal that is best placed to rectify it.

57. Equally, interference on the facet of grant of interest would not at all undermine the Impugned Award and its validity on all other facets of the matter. Here again, in view of the law declared in ***Gayatri Balasamy***, in my view, it is eminently feasible to excise and segregate just the portion of the Impugned Award that relates to the award of interest at the rate of 18% compounded quarterly without such excision having any impact on the rest of the Impugned Award.

Summary of Conclusions:

58. Therefore, for the aforesaid reasons, my conclusions are summarised as under:

A] The Impugned Award does not deserve to be interfered with on the ground that it is violative of Clause 4.1.5 of the Agreement which fixes a firm absolute limit of 1% of the contract value on damages without regard to the facts as they transpire;

B] In the specific facts of this case, to have such a fixed cap on damages in the context of an abject default and delay in provision of ROW on the part of PWD; keeping KTIPL mobilised for 45 months; with termination being effected upon arbitration being invoked; in totality, lends itself to the invocation by the Learned Arbitral Tribunal, of the law declared by High Courts. The interpretation by the Learned Arbitral Tribunal in this regard falls in the realm of a reasonable application of the law and indeed, giving business efficacy to the Agreement as a whole;

C] The findings of the Learned Arbitral Tribunal have been rendered by taking into account the terms of contract and by applying the law declared by Courts, in a manner that is consistent with the law and reasonable enough for the Section 34 Court to not interfere with the grant of damages in the Impugned Award;

D] On the facet of interest, the grant of interest at 18% compounded at quarterly rests is squarely in conflict with the calibrated bargain

entered into by the parties in the Agreement. That apart, there was no scope to regard the parties as having agreed for compounding of interest at quarterly rests, and the attempt to justify it by reference to the interest burden borne by KTIPL with its lenders, nudges the award of interest from the realm of interest to the realm of assessment of damages;

E] In the result, interference with the Impugned Award is warranted because of the manner of grant of *pendente lite* as well as post-award interest at the rate of 18% compounded quarterly. However, such interference can be eminently restricted to just the element of award of interest without disturbing the rest of the Impugned Award. Therefore, deploying the principles of law declared in ***Gayatri Balasamy***, it would only be appropriate to restrict the intervention to quashing and setting aside the facet of grant of interest as made in the Impugned Award;

F] In the result, the element of interest and the dispute over the rate of interest to be awarded remain arbitrable since the arbitration agreement between the parties subsists on this facet of the matter. The parties are at liberty to have this element referred to arbitration to have it resolved.

Ashwini Vallakati

59. With the aforesaid conclusions, the Petitions are ***partly allowed*** and the Impugned Award is only partially quashed and set aside, while otherwise ***upholding*** it on all aspects of the matter, other than the award of interest.

60. The Petitions are ***finally disposed of*** in the aforesaid terms. In the peculiar circumstances of the case, there shall be no order as to costs.

61. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]