* IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Judgment reserved on: 31.08.2026**
Judgment pronounced on:

CNR No. DLHC010518952023

+ O.M.P. (COMM) 503/2023

ISGEC HEAVY ENGINEERING LIMITED .....Petitioner

Through: Mr. Shambhu Sharan & Mr. Kashish Bansal, Advs.

versus

PRAKASH INDUSTRIES LIMITED .....Respondents

Through: Mr. Manish Vashisht, Sr. Adv. with Mr. Alok Singh, Mr. Kishore Bhandari & Mr. Jai Brata Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN

J U D G M E N T

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') against the arbitral award dated 17.08.2023 (for brevity 'the award').

Brief Facts

2. The brief facts are that the petitioner/ISGEC Heavy Engineering Limited (hereinafter 'ISGEC') is a public limited company engaged in the business of engineering, manufacture and execution of power and industrial projects. The respondent/Prakash Industries Limited (hereinafter 'PIL') is a public limited company engaged in the

manufacture of sponge iron, steel and generation of power and operates an integrated steel plant at Champa, Chhattisgarh.

2.1 On 18.11.2017, PIL placed a Purchase Order (for short 'PO') on ISGEC for the supply, supervision of erection and commissioning of two Waste Heat Recovery Boilers (for short 'WHRB') for kiln nos. 6 & 7 each valued at Rs.13,71,00,000/- including the related Induced Draft Fans (for short 'ID fans'). Under the PO, the WHRBs for kiln nos. 6 & 7 were to be commissioned within twelve months and fifteen months respectively, from the date of the PO.

2.2 The PO was amended on 27.12.2017, 06.06.2018 and 30.06.2018. The WHRB no.7 was withdrawn pursuant to a settlement between the parties. ISGEC in compliance with the terms, furnished a Performance Bank Guarantee (for short 'PBG') dated 24.04.2019 for Rs.1,47,10,000/- equivalent to 10% of the basic order value.

2.3 Disputes arose between the parties regarding delay in the supply, installation, commissioning of the WHRB and the performance of the equipment. A Commissioning Protocol Certificate dated 25.08.2019 was issued in respect of WHRB no.6.

2.4 The two ID fans stopped functioning on 16.09.2019 and 22.09.2019 respectively resulting in the shutdown of kiln no.6 from 22.09.2019 to 16.11.2019 (hereinafter 'the claim period'). PIL purchased replacement ID fans from M/s Reitz India Limited at an additional cost of Rs.65.92 lakhs and were commissioned on 17.11.2019.

2.5 PIL invoked the PBG *vide* letter dated 18.11.2019 and on

06.12.2019, under clause 13 of annexure-IX to the PO invoked arbitration.

2.6 PIL raised five claims aggregating to Rs.12,34,40,887/- under the following heads: Rs.3,13,00,209/- towards purchase of sponge iron from other manufacturers; Rs.2,26,39,678/- for loss arising from shortfall in sponge iron; Rs.5,96,09,000/- for loss of power production and purchase of power from the grid; Rs.65,92,000/- towards replacement of the ID Fans; and Rs.33,00,000/- for loss arising from non-production of coal char. Interest at 18% per annum and arbitration costs were also claimed. ISGEC raised five counter-claims on 26.08.2020 totalling Rs.5,81,73,614/- including claims relating to wrongful invocation of the PBG, cost incurred for replacement of the ID fans, extended stay of the site engineer, engineering rework and cancellation charges in respect of WHRB nos. 7, 8, 9 and 10.

2.7 The Arbitral Tribunal (for brevity 'the tribunal') by the impugned award allowed the claim of PIL of Rs.65,92,000/- towards replacement of the ID fans and rejected the remaining claims. Pre-award interest was awarded at 7.5% per annum from 06.12.2019 till the date of the award with post-award interest at 8% per annum in case of non-payment within eight weeks. The tribunal also awarded Rs.20,00,000/- towards costs. All five counter-claims raised by ISGEC were rejected.

2.8 The challenge in the present petition is only to the rejection of counter-claim no.1 relating to the PBG and the award of costs. The award of Rs.65,92,000/- towards the cost of replacement of the ID fans is not under challenge.

Submissions of the Parties

3. Learned counsel for ISGEC submits that the tribunal erred in rejecting counter-claim no.1 seeking refund of the PBG amount of Rs.1,47,10,000/-. The contention is that the tribunal while interpreting clause 17 of the amended PO, held that the parties excluded liability for loss of production, loss of profit, loss of use and other indirect or consequential damages. Having so held, the tribunal could not have permitted PIL to retain the encashed PBG towards losses when the claims founded on such losses were rejected and no separate loss corresponding to the PBG amount was established. The submission is that the finding is contrary to the express terms of the amended PO.

3.1 The contention is that PIL has not proved loss corresponding to the PBG amount. Reliance is on the decision of Supreme Court in ***Uni Bros. v. All India Radio***, 2023 SCC OnLine SC 1366 to contend that damages cannot be awarded without proof of actual loss suffered. The decisions in ***Delhi Metro Rail Corporation v. Delhi Airport Metro Express Pvt. Ltd.,*** (2024) 6 SCC 357, ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India,*** (2019) 15 SCC 131 and ***Union of India v. Santosh Dodrajka,*** 2023 SCC OnLine Jhar 2680 are relied upon to fortify the contention that an award based on no evidence and contrary to the contractual terms suffers from patent illegality. Reliance is on ***Associated Engineering Co. v. Government of Andhra Pradesh,*** (1991) 4 SCC 93 to contend that an arbitrator derives authority from the contract and cannot decide a matter contrary to the agreement.

3.2 The grievance is that award of Rs.20,00,000/- towards costs is excessive considering that the amount of claim ultimately awarded to PIL was Rs.65,92,000/-.

4. *Per contra,* the scope of interference under Section 34 of the Act is limited. The submission is that the award should not be interfered with unless the conclusion arrived at is perverse. Remedy under Section 34 cannot be equated with appellate jurisdiction and the court cannot re-appreciate evidence.

4.1 It is submitted that clause 17 of the amended PO excludes liability for loss of production, profit, use and other indirect or consequential damages but not the direct loss suffered by PIL on account of defective equipment and failure of ISGEC to take corrective steps. The tribunal, after examining the evidence, noted that the non-functioning of the ID fans was attributable to the defective hub design supplied by ISGEC. In the Minutes of Meetings dated 24.09.2019 and 27.09.2019, ISGEC and its vendor - M/s EVG Engicon Airtech Pvt. Ltd. admitted defects in design of hubs. The tribunal took into consideration that the failure of the ID fans resulted in stoppage of kiln no. 6 and that the PBG was liable to be invoked for failure in performance of the contract.

4.2 The tribunal for upholding the invocation of the PBG duly examined the defect in the equipment, the breach on the part of ISGEC, the failure of commissioning and the resulting consequences. The submission is that the cost of replacement of the defective ID fans awarded is not under challenge.

4.3 The contention is that the award of cost of Rs.20,00,000/- was within the discretion and powers of the tribunal and both parties placed their statements of costs. The tribunal having considered the circumstances including the expenses incurred by PIL in pursuing legitimate dues awarded a reasonable amount of costs. PIL claimed Rs.3,29,43,584/- whereas only Rs.20,00,000/- was awarded. Reliance is on ***OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions India (P) Ltd. & Anr.,*** 2024 INSC 711 to defend the costs.

5. Before proceeding further, it would be apposite to quote the relevant clause of the amended PO and the PBG furnished by ISGEC:

> "**Clause no. 17: Other terms & conditions**
>
> PIL shall provide required space for site office and will also provide facilities of telephone, fax and Internet etc, also suitable accommodation for supplier or its engineers/supervisory staff will be provided by. PIL at site during supervision of erection and Commissioning and PG Tests.
>
> The codes and standards applicable on the date of submission of offer shall be applicable. Any change in codes and standard required, subsequent to submission of our offer, if any will be finalised based on mutual discussion and agreement.
>
> Notwithstanding anything in this contract to the contrary, it is agreed that neither the supplier nor the purchaser shall be held liable to the other party for loss of production, loss of profit, loss of use or any other indirect or consequential damage.
>
> All other terms and conditions of the order will remain unchanged."

5.1 The relevant portion of the PBG dated 24.04.2019 for Rs.1,47,10,000/- in relation to the guaranteed performance and defect liability obligations of ISGEC is extracted as under:

> " xxxx
>
> Now we YES BANK Limited, a company incorporated under the Companies Act, 1956 and a Banking Company within the meaning of Banking Regulation Act, 1949 and having Registered Office at YES BANK Tower, IF C-2, 75th Floor, Senapati Bapat Marg, Elphinstone OM, Mumbai 400 013, India and one of its branches at Community Center, New Friends Colony, New Delhi - 110065 (hereinafter referred to as the Bank) do hereby agree and undertake to indemnify & keep indemnified the Purchaser for a sum not exceeding INR 1,47,10,000.00 (Indian Rupees One Crore Forty Seven Lakh Ten Thousand only) against any damage or loss that may be suffered by the Purchaser in relation to the above mentioned payment made by the Purchaser for nonfulfillment of any of the terms and conditions of the order by the Supplier relating to guaranteed performance and defect liability obligations.
>
> We Yes Bank Limited hereby further agree that the decision of the Purchaser as to whether the Supplier has committed breach of any such terms & conditions of the Order or supplies/services from the supplier, has not performed, as concluded by the purchaser or not and the amount of damage or loss assessed by the Purchaser whether with or without our knowledge or consent or by reason of Purchaser on account of such breach would be final and binding on us subject to a maximum limit as aforesaid. Our liability hereunder shall not in any manner whatsoever be affected by reason of any dispute or difference including court cases if any between you and the seller or by liquidation/winding up or insolvency of seller our

liability hereunder shall be absolute binding and irrevocable. We further agree that we will make the payment to the beneficiary i.e. M/s Prakash Industries Ltd., immediately on receipt of claim without reference to the Supplier.

xxxx"

6. The amended PO dated 27.12.2017 has a provision relating to "Performance Guarantee" and provides for the conduct of Performance Guarantee Tests. In the event of failure to achieve the guaranteed parameters, the supplier was to rectify the equipment and thereafter the test was to be repeated. Clause 13(f) provided that the maximum liquidated damages (for short 'LD') payable for shortfall/non-performance shall not exceed 5% of the basic contract price but this clause was not invoked by PIL.

7. The challenge in this petition is to the retention of the proceeds of the PBG furnished by ISGEC. It would be relevant to note that the tribunal while dealing with claim no.4 made by PIL, concluded that the non-functioning of the ID fans was attributed to the defect in the hub design of the ID fans supplied by ISGEC and PIL had to replace the fans. The cost of replacement of the ID fans was allowed. Clause 17 of the amended PO stipulating that "neither the supplier nor the purchaser shall be held liable to the other party for loss of production, loss of profit, loss of use or any other indirect or consequential damage" was considered and the claims made by PIL other than claim no.4 were rejected. Neither the finding regarding the defective ID fans and the award of Rs.65,92,000/- towards their replacement nor the rejection of other claims of PIL is under

challenge.

8. The counter claim no.1 was that the PBG was wrongly invoked and the amount is to be refunded along with interest. The tribunal took note of the clause of the PBG that it was liable to be invoked and that the proceeds were to be appropriated towards losses and damages suffered owing to non-performance. It would be apposite to note that the cost of replacement of the ID fans was awarded and no other loss or damage sustained by PIL was accepted. Another angle is that clause 13(f) providing for LD due to non-performance was not invoked.

9. The reliance by the tribunal on the contents of the PBG does not advance the case of PIL for appropriation of the PBG amount. The guarantee was against damage or loss suffered by PIL for non-fulfilment of terms and conditions by ISGEC. The appropriation of the proceeds of the PBG is directly relatable to the loss or damage to be established which was not done.

10. The invocation of the PBG is one aspect related to non-fulfilment of terms and conditions of the order whereas appropriation of the proceeds received would be dependent upon the loss suffered established and quantified. The PBG was furnished to secure the damage or loss suffered by PIL on account of non-fulfilment of the terms and conditions relating to guaranteed performance and defect liability obligations. PIL was required to establish the loss or damage for which the proceeds were sought to be retained and this limb was missing and the tribunal erred in rejecting the counter claim no.1.

11. Another aspect is that the PBG was furnished as per the terms of the PO. The contents of the PBG are that the bank shall indemnify PIL for a sum not exceeding Rs.1,47,10,000/- for damage or loss suffered in relation to non-compliance with the terms and conditions of the order by ISGEC. Clause 17 of the amended PO starts with a non-obstante clause and the parties agreed that neither party would be liable to the other for loss of production, loss of profit, loss of use or any other indirect or consequential damage. The interplay between the PBG and clause 17 was not considered by the tribunal and the relevant clause was ignored. It is trite law that the tribunal cannot travel beyond the terms and conditions agreed between the parties and in doing so committed a jurisdictional error. Reference in this regard be made to the decision of the Supreme Court:

11.1 In ***Ssangyong Engineering and Construction Co. Ltd. v. NHAI,*** (2019) 15 SCC 131, it was held:

> "40. .... <u>if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction.</u> This ground of challenge will now fall within the new ground added under Section 34(2-A).

11.2 In ***PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambaranar Port Trust Tuticorin,*** 2021 SCC OnLine SC 508, it was held:

> "89. .....<u>the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference."</u>

11.3 In ***Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum Rajgurunagar,*** (2022) 4 SCC 463, it was held:

> "43. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract."
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> (emphasis supplied)

12. The tribunal permitting appropriation of the PBG proceeds towards the unproved losses and damages is without any basis and is consequently perverse. To that extent the award suffers from patent illegality.

13. As regards costs, the challenge is unsustainable. The arbitrator under Section 31A(3) of the Act has a discretion to award costs considering the circumstances mentioned therein. The discretion exercised suffers from no factual or legal error calling for interference under Section 34 of the Act.

14. The contention that the costs as compared to the amount of claim allowed in favour of PIL is excessive, lacks merit. The costs are not solely dependent upon the success percentage but it has to be considered having regard to the conduct of the parties: whether there was a partial success; whether frivolous counter-claims were made leading to delay in disposal of arbitration; and lastly whether a reasonable offer to settle the dispute made by the party was refused by the other party. The proceedings under Section 34 of the Act are not

akin to a regular first appeal. The awarding of costs is upheld.

15. The Supreme Court in ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd.**,* (2025) 7 SCC 1 held that while the court exercising jurisdiction under Section 34 cannot modify the arbitral award, a severable part of the award may be set aside. The relevant paragraphs are quoted below:

> "32. In the present controversy, the proviso to Section 34(2)(a)(iv) is particularly relevant. It states that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the arbitral award which contains decisions on matters non-submitted may be set aside. The proviso, therefore, permits courts to sever the non-arbitrable portions of an award from arbitrable ones. This serves a twofold purpose. First, it aligns with Section 16 of the 1996 Act, which affirms the principle of *kompetenz-kompetenz*, that is, the arbitrators' competence to determine their own jurisdiction. Secondly, it enables the Court to sever and preserve the "valid" part(s) of the award while setting aside the "invalid" ones.[27] Indeed, before us, none of the parties have argued that the Court is not empowered to undertake such a segregation.
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> 33. We hold that the power conferred under the proviso to Section 34(2)(a)(iv) is clarificatory in nature. The authority to sever the "invalid" portion of an arbitral award from the "valid" portion, while remaining within the narrow confines of Section 34, is inherent in the Court's jurisdiction when setting aside an award.
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> 34. To this extent, the doctrine of *omne majus continet in se minus*—the greater power includes the lesser—applies squarely. The authority to set aside an arbitral award necessarily encompasses the power to set it aside in part, rather than in its entirety. This

interpretation is practical and pragmatic. It would be incongruous to hold that power to set aside would only mean power to set aside the award in its entirety and not in part. A contrary interpretation would not only be inconsistent with the statutory framework but may also result in valid determinations being unnecessarily nullified."

(emphasis supplied)

16. The rejection of the counter claim no.1 is severable and is not intricately interconnected with the other claims. Consequently, the award to the extent of rejecting of counter claim no.1 is set aside.

17. The petition is allowed to the aforesaid extent.

AVNEESH JHINGAN, J

SEPTEMBER 08, 2026
'ha'

Reportable:- Yes