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

\+ O.M.P. (COMM) 366/2017

Reserved on: 7th March, 2018
Date of decision : 1st June, 2018

INDIAN OIL CORPORATION LTD ..... Petitioner
Through Mr.V.N. Koura, Ms.Paramjeet Benipal and Mr.Abhinav Tandon, Advs.

versus

LARSEN & TOUBRO LIMITED ..... Respondent
Through Mr.Rajiv Nayar and Mr.Ravindra Shrivastava, Sr. Advs. with Mr.Dhirendra Negi, Mr.Ananya Kumar and Ms.Pragya Chauhan, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed challenging the Arbitral Award dated 18th May 2017 read with the correction Order dated 23rd June 2017, passed by the Arbitral Tribunal comprising of three Arbitrators (hereinafter referred to as the 'Impugned Award'). The Impugned Award holds the petitioner's claim for Price Discount on account of alleged delay by the respondent in completion of Contract as unjustified and contrary to the terms of the Agreement and directs the petitioner to pay the withheld/ deducted amount of Rs.115,11,28,129/- to the respondent, along with pre-award as well as future interest.

2. The petitioner, so as to set up a 238.35 MW Captive (Cogeneration) Power Plant (hereinafter referred to as "CPP") within its Naptha Cracker Plant at Panipat ("NCPP"),to supply steam and power for testing, commissioning and operating other units within the NCPP, issued a tender for Project Management, Design, Detailed Engineering Procurement, Manufacturing, Supply, Transportation, Storage, Fabrication, Construction, Installation, Testing, Pre-commissioning and Commissioning and Performance Guarantee Test Runs of the CPP. The respondent, being the lowest eligible bidder, was awarded the aforesaid work under the Turnkey Package 'EPCC 4' vide Fax of Acceptance dated 31st August 2006 and detailed Letter of Acceptance dated 15th September 2006. The parties herein, accordingly, entered into Contract No.HQ/PJ/PNCP/2006-07/EPCC-4/01 dated 22nd September, 2006. The conditions governing the parties were contained in various documents. The contract price as per the detailed Letter of Acceptance was Rs. 1,143,07,66,500/-. The CPP included setting up of fifteen steam/power generating units along with equipments, facilities and controls required to connect and distribute fuels, utilities, power, and steam, and connect various operating systems of the CPP, collectively referred to as the Balance of Plants ("BOP"). The 'Electrical Control System' ("ECS") was an integral component of such BOP.

3. The work to be executed was divided into three distinct Modules, to be completed within a specified time as set out in Clause 5 of the detailed Letter of Acceptance. The scope of work and schedule under different modules provided in Clause 5 is mentioned hereinbelow:

*"**5.0 <u>TIME SCHEDULE</u>***

Module – 1 : 27 (Twenty Seven) Months upto Commissioning

Module – 2 : 29 (Twenty Nine)Months upto Commissioning

Module – 3 : 30(Thirty) Months upto Mechanical Completion of the complete captive power plant (CPP) plus two months for commissioning of the complete CPP.

Module-1,2 & 3 shall be as follows:

- *Module-1 : One UB + One STG + Balance of Plant (BOP)*
- *Module-2 : One STG + 50% of GTGs & HRSGs (Min. 2 nos. each, in case 50% is a number in decimals, then the next whole number shall be considered i.e. 2.5 shall mean 3)*
- *Module-3 : Complete Captive Power Plant including all associated facilities as per the provisions of the Bidding Document.*

The Time Schedule shall be reckoned from the date of Fax of Acceptance i.e. 31.08.2006."

4. The aforesaid Letter of Acceptance also mentions the price adjustment to be made/weightage to be given to each Module in cases of delay as below:

*"8.0 <u>**PRICE DISCOUNT DUE TO DELAY**</u>*
In case of delay, Owner shall be entitled to a discount as specified vide clause 4.4.0.0 of GCC including its modifications in the Amendment(s).

Price Adjustment as per provisions of this clause shall be applicable separately to each Module i.e. Module-1, Module-2, and Module-3 for delays in completion of the relevant Module. The percentage weightage of the total Contract Price to be considered for application of Price Adjustment for each Module shall be as follows:

- *Module-1: 30%*
- *Module-2: 30%*
- *Module-3: 40%*

Price Adjustment as per above clause shall be applicable on delays in achieving Commissioning for Module-1 and/or Module-2, as applicable, considering the above weightages, based on the schedule defined in Sr.No.5 above.
However, for Module-3, Price Adjustment shall be applicable on delays in achieving Mechanical Completion, considering the above weightage forModule-3, as per original clause 4.4.2.0 of GCC."

5. Clause 4.4.2.0 of the General Conditions of Contract provides for levy of price discount on the contract price by the petitioner in the case of delay in achieving completion of work as per schedule. Clauses 4.3.5.0 and 4.3.6.0 therein provide for extension of time in cases of delay.

6. As per Clause 2.10.3.0 of the GCC, the respondent was to give notice to the petitioner and Engineer-in-Charge incase a work front/job site was not made available to the respondent to execute the work.

7. The Special Conditions of Contract, in Clause 18 as amended vide Commercial Amendment No.6556/EPCC-4/C-02, place responsibility on the petitioner to provide certain fuels to the respondent for pre-commissioning and commissioning activities. Out of the fuels to be supplied, certain fuels were identified by the petitioner as main and alternate fuels. Clause 18 as amended is quoted as under:

"Following is added as clause 18.0 to SCC:

"UTILITIES & FUELS"

OWNER shall provide main fuels for firing GTGs, HRSGs & UBs and utilities for pre-commissioning and commissioning activities free of cost to the CONTRACTOR. All other consumables & chemicals, as required, shall be provided by the CONTRACTOR as per the provisions of the Bidding Document."

8. The Contract provided for a procedure to be followed towards signifying completion of each Module by the respondent which contained different stages. The stages were prescribed as : Format-I : intimation regarding system completion, Format-II : defects/ deficiencies observed in the work in the form of a checklist, Format-III : readiness for pre-commissioning, Format-IV : certificate for readiness for commissioning and Format-V : completion of commissioning.

9. The respondent prepared a Detailed Progress Schedule ("L2 Schedule") dated 27th January, 2007 for timely completion of the work, which was approved by the Engineer-in-Charge. It is the case of the petitioner that as per the said Schedule, Module 1 was to be commissioned by 30.11.2008, Module 2 was to be commissioned by 31st January, 2009 and Module 3 was to be mechanically completed by 28th February, 2009 and commissioning thereof was to be completed by another two months. The said dates were however, not adhered to by the respondent and accordingly, extension of time was sought vide letter dated 21st April, 2010. The said letter listed the reasons for the delay

inter-alia delay by the petitioner in supplying main fuel RLNG and inputs for ECS.

10. In the meantime, the respondent completed Module 1 on 28th August, 2010 and Module 2 on 29th September, 2010. Module 3 was mechanically completed by the respondent on 30th June, 2010.

11. In response to the letter dated 21st April, 2010, Engineers India Limited ("EIL"), appointed as the Engineer-in-Charge by the petitioner, submitted their recommendations dated 19th March, 2012 to the petitioner, providing for levy of price discount of 3%, 3% and 4% in respect of delays of 557 days, 495 days and 436 days attributable to the respondent towards completion of each module respectively.

12. It is submitted by the petitioner that the analysis and recommendations submitted by EIL were considered by the petitioner, culminating into a Note dated 26th March, 2012, which contained its 'decision' wherein it accepted the recommendations given by EIL and accordingly, noted as hereinunder:

> *"Therefore, as per contract GCC clause 4.4.0.0, the price discount levied on module-3 commissioning is 10% but as per DLOA clause No-8.0, the weightage for the module is given as 40% which shall be applicable while considering the price adjustment. Hence, based on the weightage the price discount levied for the module-3 commissioning is 4%.*
> *Based on above module wise conclusions, it is proposed to levy the price discount on EPCC-4 package (M/s L&T) in the tune of 10% of contract value in line with terms & condition of contract."*

13. The decision in terms of the Note of the petitioner was communicated to the respondent on 5th April, 2012 vide letter by EIL,

which enumerated the levy of price discount of 10% by the petitioner as hereinbelow:

> *"This is in reference to your letter No.CPP/EPCC-4/6556/LH/ES/L/FA/1750 dated 21.04.2010 and presentation given by you on 16.11.2009 at EIL-HO on the subject matter.*
> *As advised by IOCL, the time extension of EPCC-4 has been granted by competent authority as under with price reduction of 10% of contract value as per GCC clause no.4.4.0.0:*

Sl. No.	***Module***	***Date of MC***	***Date of Commissioning***
1	*Module -1*	*NA*	*28.08.2010*
2	*Module-2*	*NA*	*29.09.2010*
3	*Module-3*	*30.06.2010*	*NA*

> *This is for your information & record please."*

14. In response to the EIL's communication, the respondent sought clarification of the contents thereof as also release of the withheld amount on account of price discount. Upon exchange of correspondence, the EIL clarified the position in terms of letter dated 28th August, 2012, stating that the request for extension of time without imposition of price adjustment had been rejected by the petitioner and discount as mentioned above had been imposed for the delay caused. The contents of the letter are reproduced below:

> *"Dear Sir,*
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> *This is in reference to your letter No.CPP/EPPC-4/6556/LH/ES/L/FA/1913 dated 02.07.2012. Please note that while considering your request for extension of time without applying the*

Price Discount Clause, M/s IOCL have rejected your request for extension of time from scheduled commissioning of Module-1, Module-2 and Mechanical Completion of Module-3 on 30.11.2008, 31.01.2009 & 28.02.2009 respectively to 28.08.2010, 29.09.2010 & 30.06.2010 in achieving commissioning of Module-1, Module-2 and mechanical completion of Module-3 for the project and have invoked and imposed Price Discount of 10% of the total contractual value. This is without prejudice to IOCL's other right and contentions under the contract and provisions of law.

Thanking you"

15. The parties were divided as to the meaning of the contents of letters granting extension subject to levy of price adjustment, with the petitioner claiming to have 'denied' the extension of time and the respondent claiming to have been 'granted' the extension of time till the actual dates of completion and consequently, claiming that no question of levy of any discount arose. The respondent relies upon letters dated 5th April, 2012 and 10th April, 2012 from ElL and yet another letter dated 23rd November, 2013 in support of its contention.

16. There were disputes between the parties with respect to the date of and default of the petitioner in supplying the main fuel RLNG, alternate fuels HSD and BFO, as well as ECS inputs to the respondent, which allegedly led to a delay in completion of the Modules by the respondent. As per the Schedule, the petitioner was required to supply to the respondent HSD fuel on 1st May, 2008; BFO fuel on 1st May, 2008 and RLNG on 1st June, 2008, however, HSD was actually supplied on 6th June, 2009 and BFO on/about 2nd November, 2009. As regards RLNG, the petitioner herein has asserted that it was ready to provide the same in

April 2010, however, the respondent has contended that the petitioner provided the fuel only on 4th August, 2010. As RLNG was required by the respondent for commissioning of Modules 1 and 2, the respondent attributed the delay in completion on the petitioner in this regard.

17. As regards other inputs, ECS inputs were to be supplied by the petitioner by 15th December, 2006, however, as per the case of the respondent, there were delays in provision of the same by the petitioner.

18. Upon raising of the final bill by the respondent, disputing the release of amount minus the discount of Rs.115,11,28,129/- due to price discount by the petitioner, the respondent invoked the Arbitration Agreement contained in Clause 9.1.0.0 of General Conditions of Contract vide notice dated 27th February, 2015. The Arbitral Tribunal having entered reference on 18th August, 2015, passed the Impugned Award on 18th May, 2017, corrected by order dated 23rd June, 2017.

19. The Arbitral Tribunal has given its detailed findings on the issues raised between the parties. The relevant findings are quoted for reference hereinunder:

> *"208. Moreover, in light of law laid by the Hon'ble Supreme Court in the case of Sethi Auto Service Station, in the Tribunal's view the recommendation of EIL dated 19.03.2012 and the Office Noting dated 26.03.2012 would not be an effective order. For the above Recommendation/Noting, to culminate into an executable/effective/enforceable order, ought to have been communicated to L&T which was admittedly never done. In other words, the recommendations of EIL dated 19.03.2012 and the Office Noting dated 26.03.2012 are no order in the eye of law on the application for EoT made by L&T.*

209. In this view of the matter, the Tribunal records its finding that the communication dated 05.04.2012 has to be treated as truly reflecting the decision made by the competent authority under the Contract on the application for EoT whereby L&T was granted extension of time till the actual dates of commissioning of Modules 1 and 2 and of mechanical completion of Module 3 of CPP. Of course, the extension of time so granted was subject to price discount. In the Tribunal's view once extension of time was granted till the actual date of commissioning of Modules 1 and 2 and of mechanical completion of Module 3, by virtue of Clause 4.3.9.0, the extended date of completion shall be deemed to be the relative date of completion in the Progress Schedule.

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254. It is clear from the record that the timelines as per L2 Schedule for supply of all the three fuels namely HSD, BFO and RLNG were not maintained by IOCL. It also appears from the record that L&T was also not ready to receive HSD, BFO and RLNG on the dates IOCL was supposed to supply these fuels as per L2 Schedule.

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283. That L&T has raised Formats is not in dispute. The question is, whether the date of raising the Formats can be taken as the only date for readiness of the System/Sub-System/Equipment with regard to which such Format(s) has/have been issued. In Tribunal's view, in order to decide such controversy, Article 7 and Article 8.17.1.0 have no application at all. How can a procedural formality, particularly the date of submission of Format-III be treated as the date of commissioning of a System/Sub-System/Equipment when in fact such System/Sub-System/Equipment has been commissioned earlier to that date. The date of submission of such Format-III, in our view, for the reasons already noted above would not be conclusive when actually and factually the System/Sub-System/Equipment relating thereto has

been commissioned earlier in point of time and had become operational prior to that date.

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285. That IOCL supplied RLNG to the Claimant on 04.08.2010 is established by documentary as well as oral evidence. The letters dated 04.08.2010 and 05.08.2010 by IOCL to L&T record this fact. The oral testimony of CW-1 as well as RW-1 also establishes this fact. The letter dated 19.03.2012 from ElL to IOCL shows that ElL has also taken 04.08.2010 as the date on which RLNG was made available.

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316. The Tribunal finds merit in the submission of L&T that only partial ECS inputs had been made available till 03.10.2008. This is fortified by the Minutes of the Meeting dated 20-22.10.2008. In the said meeting, it is recorded that all inputs were already provided to L&T, except for three sub-stations for which L&T was advised to proceed for engineering treating the available data as final.

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328. The aforesaid clearly shows that IOCL was to make available the ECS data. The L&T rightly submitted that ECS data inputs were provided in piece meal and belated manner. We have come to the conclusion that supply of ECS data was critical for mechanical completion of Module 3. According to the contract, L&T was to achieve mechanical completion of Module 3 (in accordance with L2 Schedule) within 806 days from the availability of ECS inputs. Even if it is taken that ECS data was made available on 03.10.2008, the revised date of Mechanical completion of Module 3 would be 18.12.2010. L&T had achieved Mechanical completion of Module 3 on 30.06.2010.

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333. Third, the necessity of supply of fuel for firing UB for commissioning Module 1 and supply of fuel for firing GTGs or HRSGs for commissioning of Module 2 cannot be overlooked. A condition cannot be read into the contract which does not exist. There is no stipulation in the Contract that unless and until the

Claimant had completed all obligation of Module 1 and Module 2 upto the stage of commissioning, the obligation of IOCL to supply fuel would not arise. How can the stage of commissioning of Module 1 or Module 2 be reached without completion of pre-commissioning activities which necessarily required making available fuel by IOCL to L&T.

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338. In light of the above discussion, the Tribunal holds that although there was delay on the part of L&T in performance of its obligations under the Contract, IOCL did contribute to the extra time taken in completion of the Project and is responsible for delay in supply of ECS data as well as supply of fuels. The Tribunal further holds that both parties contributed to delay and delay is not solely attributable to the Claimant.

339. In this view of ·the matter, even if it be assumed (although the Tribunal has recorded its finding on Issue No.1 that L&T was granted extension of time upto the actual date of commissioning Module 1 and Module 2 and Mechanical Completion of Module 3 of the CPP) that there was no extension of time granted by IOCL, the Tribunal holds that L&T is entitled to extension of time till the actual dates of commissioning of Modules 1 and 2 and for Mechanical Completion of Module 3. As a result of this finding, Clause 4.3.9.0 comes into operation."

20. It is firstly submitted by the counsel for the petitioner that the Arbitral Tribunal has erred in holding that the communication dated 5th April, 2012, has to be treated as a decision granting extension of time and, therefore, by virtue of clause 4.3.9.0, the extended date of completion shall be deemed to be the relative date of completion in the Progress Schedule and that the petitioner was not entitled to impose the price discount. He submits that the petitioner had in fact denied respondent's request for extension of time by the communication dated

5th April, 2012 from the EIL. This had been further clarified by the EIL in its letter dated 28th August, 2012, which has been reproduced above.

21. On the other hand, learned senior counsel for the respondent submits that the EIL, in terms of clause 4.3.5.0 was empowered to consider respondent's application for extension of time even after the stage of completion of work, notwithstanding the fact that the application may have been made prior to completion of work. Such extension of time had been granted by way of letter dated 5th April, 2012. The internal note dated 26th March, 2012 relied upon by the petitioner as its decision to levy price discount of 10% cannot be taken into consideration as the same was never communicated to the respondent. It is, therefore, urged that the Arbitral Tribunal has rightly considered that once there is extension of time granted by the petitioner/EIL, price discount could not be levied by the petitioner.

22. I have considered the submissions made by the learned counsels for the parties.

23. It would be useful to first quote the relevant clauses of the contract as under:-

> *"4.3.5.0 Within 7 (Seven) days of the occurrence of any act, event of omission which, in the opinion of the CONTRACTOR, is likely to lead to delay in the commencement or completion of any particular work(s) or operation(s) or the entire work at any job site(s) and is such as would entitle the CONTRACTOR to an extension of time specified in this behalf in the Progress Schedule(s), the CONTRACTOR shall inform the OWNER and the Engineer-In-Charge, in writing, of the occurrence of the act, event or omission and the date of commencement of such occurrence.*

Thereafter, if even upon the cessation of such act or event or the fulfillment of the omission, the CONTRACTOR is of the opinion that an extension of the time specified in the Progress Schedule relative to particular operation(s) or item(s) or works or the entire work at the job site(s) is necessary, the CONTRACTOR shall, within 7 (Seven) days after the cessation or fulfillment as aforesaid, make a request to the Engineer-in-Charge for extension of the relative time specified in the Progress Schedule. The Engineer-in-Charge may on such request at any time prior to completion of the works extend the relative time of completion in the Progress Schedule for such period(s) as he considers necessary, if he is of opinion that such act, event, or omission constitutes a ground for extension of time in terms of the Contract and that such act, event, or omission has in fact resulted in insurmountable delay to the CONTRACTOR. The opinion/decision of the Engineer-in-Charge in this behalf and as to the extension necessary shall subject to the provisions of clause 4.3.6.0 hereof, be final and binding upon the CONTRACTOR.

4.3.6.0 Notwithstanding the provisions of clause 4.3.5.0 hereof, the OWNER may at any time after final completion of the Unit or works in all respects of its own initiative consider a request for extension of time made by the CONTRACTOR to the Engineer-in-Charge under Clause 4.3.5.0 or at the request of the CONTRACTOR made by way of appeal either against the decision of the Engineer-in-Charge taken under clause 4.3.5.0 or against the Engineer-in-Charge's failure to take a decision under the said clause, if satisfied of the existence of any ground(s) justifying the delay, extend the date for completion of the work or any item or operation thereof for such period(s) as the OWNER may consider necessary, and the decision of OWNER as to the existence or otherwise of any grounds justifying the extension and as to the period(s) of extension necessary shall be final and binding upon the CONTRACTOR.

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4.3.9.0 Upon an extension of the time for completion of the work or any part of the work or any operation(s) involved therein,

the extended date of completion shall be deemed to be the relative date of completion in the Progress Schedule.

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4.4.0.0 PRICE ADJUSTMENT FOR SLIPPAGE IN COMPLETION

4.4.1.0 The Lumpsum Price specified in the Contract is based (i) On the Mechanical Completion of the Unit(s) by the CONTRACTOR; and (ii) On Mechanical Completion of the Unit(s) within the time for Mechanical Completion of the Unit(s) specified in the Time Schedule. The Lumpsum Price shall be subject to adjustment by way of discount as hereinafter specified, if the Unit(s) is/are not mechanically completed by the CONTRACTOR or if the Unit(s) is/are mechanically completed subsequent to the date of Mechanical Completion specified in the Time Schedule.

4.4.2.0 If Mechanical Completion of the Unit(s) is/are not achieved by the date of Mechanical Completion of the Unit(s) specified in the Time Schedule or if any works for which a separate Progress Schedule has been established is/are not achieved by the date of completion thereof specified in the relevant Progress Schedule (each of the said date(s) is hereinafter referred to as the ‘‘starting date for discount calculation"), the OWNER shall be entitled to a discount in the Lumpsum Price in a sum equivalent to the Lumpsum Price specified below for each week or part thereof that the work remains incomplete beyond the starting date for discount calculation, namely:

(i) For Mechanical Completion of the Unit(s) or completion of the works as the case may be, achieved within 1(one) week of the starting date for discount calculation-1/4 %(one quarter percent) of the Lumpsum Price.

(ii) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 2 (two) weeks of the starting date for discount calculation- ½ % (one half percent) of the Lumpsum Price.

(iii) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 3 (three) weeks of the starting date for discount calculation-3/4% (three quarter percent) of the Lumpsum Price.

(iv) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 4 (four) weeks of the starting date for discount calculation - 1% (one percent) of the Lumpsum Price. -

(v) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 5(five) weeks of the starting date for discount calculation -1½%(one and one-half percent) of the Lumpsum Price.

(vi) For Mechanical Completion of the Unit(s) or completion of the works, as the case maybe, achieved within 6(six) weeks of the starting date for discount calculation – 2½% (two percent) of the Lumpsum Price.

(vii) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 7 (seven) weeks of the starting date for discount calculation – 2½% (two and one half percent) of the Lumpsum Price.

(viii) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 8 (eight) weeks of the starting date for discount calculation - 3% (three percent) of the Lumpsum Price.

(ix) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 9 (nine) weeks of the starting date for discount calculation- 4% (four percent) of the Lumpsum Price.

(x) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 10 (ten) weeks of the starting date for discount calculation- 5% (five percent) of the Lumpsum Price.

(xi) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 11 (eleven) weeks of the starting date for discount calculation - 6% (six percent) of the Lumpsum Price.

(xii) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 12 (twelve) weeks of the starting date for discount calculation - 7% (seven percent) of the Lumpsum Price.

(xiii) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 13 (thirteen) weeks of the starting date for discount calculation - 8% (eight percent) of the Lumpsum Price.

(xiv) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 14(fourteen) weeks of the starting date for discount calculation - 9% (nine percent) of the Lumpsum Price.

(xv) For Mechanical Completion of the Unit(s) or completion of the works, as the case may be, achieved within 15 (fifteen) weeks of the starting date for discount calculation - 10% (ten percent) of the Lumpsum Price.

4.4.2.1 The starting date for discount calculation shall be subject to variation upon extension of the date for Mechanical Completion of the Unit(s) or final completion of the works as the case may be by the Engineer-in-Charge under Clause 4.3.5.0 or by the OWNER under Clause 4.3.6.0, with a view that upon any such extension there shall be an equivalent extension in the starting date for discount calculation under Clause 4.4.2.0 hereof."

24. A reading of the above clauses would show that in terms of clause 4.4.1.0, the lumpsum price specified in the contract was subject to adjustment by way of discount if the unit(s) is not mechanically completed within the specified time schedule. The formula for

calculating the discount is contained in clause 4.4.2.0 and is dependent upon the period of the delay. Clause 4.4.2.1 provides that the starting date for discount calculation shall be subject to variation upon extension of the date for mechanical completion of the unit(s) or final completion of the works by EIL under clause 4.3.5.0 or by the petitioner under clause 4.3.6.0. Clause 4.3.5.0 empowers the Engineer-in-Charge to extend the relative time of completion in the Progress Schedule, if he is of the opinion that due to occurrence of any act, event or omission, the respondent/contractor is entitled to such extension of time. The opinion/decision of the Engineer-in-Charge is subject to the provisions of clause 4.3.6.0.

25. Clause 4.3.6.0 empowers the petitioner as an owner to, at any time after final completion of the unit or works, consider a request for extension of time made by the contractor and extend the date for completion of the work or any item or operation thereof for such period (s) as it may consider necessary.

26. In the present case, the respondent prayed for extension of time by way of its letter dated 21st April, 2010, that is, during the period of completion of works. EIL, in turn communicated the decision on such application vide its letter dated 5th April, 2012, which clearly records that the extension of time has been granted with price reduction of 10% of contract value as per clause 4.4.0.0. This communication cannot be said to be an unconditional extension of time granted by the Engineer-in-Charge in terms of clause 4.3.5.0.

27. Upon a clarification being sought by the respondent, EIL reiterated this stand vide its letter dated 28th August, 2012, this time stating that the application for extension of time without applying price discount had been rejected and the petitioner as an owner has invoked and imposed price discount of 10%.

28. The Arbitral Tribunal has treated the letter dated 5th April, 2012 as a decision to extend the time for completion of the work and has rejected the arguments of the petitioner that the reference to extension of time in the said letter was merely a misnomer and it was actually a communication of the decision to levy price discount. It further held that as the recommendations made by the EIL and the decision taken thereon by the petitioner in its noting dated 26th March, 2012 were not communicated to the respondent, they were ineffective and that once the extension of time was granted, the extended date of completion shall be deemed to be the relative date of completion in the Progress Schedule, and therefore, price discount cannot be applied.

29. In my view, this is a complete mis-reading of the letter dated 5th April, 2012 addressed by EIL to the respondent. The said letter in no ambiguous words states that the competent authority has taken a decision to levy the price discount of 10% on the contract value in terms of clause 4.4.0.0. The said clause is applicable, as noted above, only where the contractor is unable to complete the work within the specified time schedule. Whether the decision to levy price discount on the respondent was justified or not is an issue distinct from stating that the decision of the competent authority was to grant extension of time unconditionally

and, therefore, there can be no levy of price discount by the petitioner. Therefore, the finding of the Arbitral Tribunal on this issue cannot be sustained.

30. However, the above finding is not sufficient to set aside the Impugned Award as the Impugned Award considers the question whether the respondent would be entitled to an extension of time on its own merit. Paragraphs 338 and 339 of the Impugned Award record such decision of the Arbitral Tribunal and are reproduced hereinunder:-

> *"338. In light of the above discussion, the Tribunal holds that although there was delay on the part of L&T in performance of its obligations under the Contract, IOCL did contribute to the extra time taken in completion of the Project and is responsible for delay in supply of ECS data as well as supply of fuels. The Tribunal further holds that both parties contributed to delay and delay is not solely attributable to the Claimant.*
>
> ***L&T entitled for extension of time till the actual dates of commissioning of Modules 1 and 2 and for Mechanical Completion of Module 3.***
>
> *339. In this view of the matter, even if it be assumed (although the Tribunal has recorded its finding on Issue No.1 that L&T was granted extension of time upto the actual date of commissioning Module 1 and Module 2 and Mechanical Completion of Module 3 of the CPP) that there was no extension of time granted by IOCL, the Tribunal holds that L&T is entitled to extension of time till the actual dates of commissioning of Modules 1 and 2 and for Mechanical Completion of Module 3. As a result of this finding, Clause 4.3.9.0 comes into operation."*

31. As far as merits of the claim of the respondent to seek extension of time are concerned, the Arbitral Tribunal has placed reliance on the

agreed L2 Schedule being the detailed Progress Schedule for the CPP. The said Progress Schedule gives the schedule of milestones to be achieved by the respondent as also the dates of the 'owner's input'. A summary of the same is given by the Arbitral Tribunal in para 211 of the Impugned Award, which is reproduced hereinunder:-

> *"211. The following facts are not disputed:*
>
> *(i) As per the agreed L2 Schedule (being the Progress Schedule for the CPP), IOCL was required to supply to L&T the fuels namely HSD on 01.05.2008; BFO on 01.05.2008 and RLNG on 01.06.2008,*
>
> *(ii) On supply of RLNG on 01.06.2008, L&T would have 182 days (till 30.11.2008) to complete commissioning of Module 1 and 244 days (till 31.01.2009) to complete commissioning of Module 2.*
>
> *(iii) HSD and BFO were supplied by IOCL to L&T on 06.06.2009 and 03.11.2009 respectively."*

32. The Arbitral Tribunal further takes note of certain undisputed facts which have a vital bearing on its decision. These are stated in para 214 of the Impugned Award which is reproduced hereinbelow:

> *"214.It is also not in dispute that:*
>
> *(a) Start up fuel for UBs was HSD,*
>
> *(b) The main and alternate fuels for GTG, HRSG and UB was RLNG,*
>
> *(c) HSD was identified as alternate fuel for GTG and HRSG,*
>
> *(d) BFO was identified as alternate fuel for UBs, and*
>
> (e) *After completion of CPP, GTGs, HRSGs and UBs were to be operated on main and alternate fuels as identified in the contract documents.*"

33. After considering the oral and documentary evidence led by the parties as also considering the relevant terms and conditions of the contract, the Arbitral Tribunal found that the petitioner had failed to maintain timelines as per the L2 schedule for the supply of HSD, BFO and RLNG. Though the respondent was ready to receive the HSD in April 2009, the petitioner supplied HSD to the respondent on 6th June, 2009. Further, RLNG was supplied to the respondent only on 4th August, 2010 and upon receipt of the same, the respondent completed all commissioning activities in respect of Modules 1 and 2 on 28th August, 2010 and 29th September, 2010, respectively.

34. Counsel for the petitioner relying upon clause(s) 1.0.60.0, 3.0.1.0 of the GCC and clause 18 of the SCC, submits that the primary liability to provide source of energy was on the respondent. The petitioner was to supply the main fuels only to fire the generating equipment. He further submitted that the obligation of the respondent to design, supply, erect or construct, mechanically complete and commission the CPP was not dependent upon the supply of HSD, BFO and RLNG by the petitioner. Counsel for the petitioner further submitted that the L2 Progress Schedule cannot be used to modify the obligations as provided in the main Agreement.

35. On the other hand, learned senior counsel for the respondent submits that in terms of clause 4.3.2.0, L2 Progress Schedule was to be treated as part of the contract and it is only on respondent's failure to commence or complete any work/operation within the prescribed dates

that the respondent was to be treated as having committed breach of the contract.

36. I have considered the submissions made by the counsels for the parties. Clause 4.3.0.0 provides for time for completion. Clause 4.3.2.0 casts an obligation on the contractor to submit for approval a detailed Progress Schedule. The said clause is reproduced hereinunder:-

> *"4.3.2.0 Within 28 (Twenty Eight) days from the date of receipt of notification of acceptance of Bid the CONTRACTOR shall submit to the OWNER for approval a detailed Progress Schedule in graphical or other suitable form, giving dates of starting and finishing of various operations and works within the scope of work, providing sufficient margin to cover for contingencies and for final testing and commissioning and consequential repairation, replacement and/or supply. The Engineer-in-Charge and the CONTRACTOR shall thereafter within another 14 (Fourteen) days settle the Progress Schedule and the Progress Schedule so settled shall be the approved Progress Schedule and shall form part of the contract with attendant obligations upon the CONTRACTOR to commence the various works/operations involved on or before date(s) mentioned in this behalf in the approved Progress Schedule and to conclude the said works/operations on or before date mentioned in this behalf in the approved Progress Schedule and default by CONTRACTOR to commence or complete within prescribed date(s) any work or operation shall be deemed to be a breach by the CONTRACTOR to which the provisions of clause 7.0.1.0 hereof relating to termination of contract shall apply, but without prejudice to any other rights or remedies which the OWNER may have in this behalf. "*

37. Clauses 4.3.5.0 and 4.3.6.0 which provide for extension of time are all related to this Progress Schedule which is duly approved by the owner. Therefore, the contention of the counsel for the petitioner that the

Progress Schedule has no relevance to the issue of extension of time or for levy of price discount cannot be accepted.

38. As far as reliance on clauses 1.0.60.0 and 3.0.1.0 of the GCC is concerned, the Tribunal rejects the same observing as under:-

> *"293. However, IOCL has taken the position that L&T could have completed commissioning of Module-1 and 2 using only the alternate fuel for each sub-Unit. This position of IOCL is not supported by its witness RW-l. In answer to question 26 in the cross examination, RW-1 stated that commissioning was actually taking the fuel in and start the equipment. The equipment definitely needed to check its performance with all the three fuels. Also, the answer to the next question immediately following answer given by RW-l to question 26 was apparently contradictory. The Tribunal accordingly sought clarification by putting to her the question, "In answer to Question No. 26, you have stated that the equipment needs to check its performance with all the three fuels while in answer to Question No.27, you have stated that commissioning can be done using any fuel. Can you explain the difference in use of fuel in checking the performance of the equipment and commissioning?" To this question, RW-l answered, "Commissioning means fuel and feed into the equipment and start the equipment with production of the product of the equipment. Hoverer, if there are more than one number of fuels, the equipments requires to be checked with each fuel's each performance so that the equipment performs in all the fuels as per the specification."*
>
> *294. RW-1 has admitted in her cross examination that RLNG Skid/Fuel Conditioning Skid could be commissioned only with the use of RLNG. RW-1 also admitted that BOP could not be commissioned till RLNG was made available to L&T.*
>
> *295. The testimony of RW-1 demolishes IOCL's stand that commissioning could have been completed by L&T using only the alternate fuels. Even otherwise, this stand of IOCL is contrary to the provisions made in the Technical Specifications, particularly*

Clause 15.0, Clause 15.5, Section C1-21 of Technical Specifications.

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No merit in IOCL's argument that unless and until L&T had completed all obligations upto the stage of Module 1 and Module 2, IOCL had no obligation to supply the concerned fuel

330. The Tribunal finds it difficult to accept the argument advanced on behalf of IOCL that unless and until L&T had completed all obligations of Module 1 upto the stage of commissioning, the question of IOCL's obligation to supply fuel to fire the UB for commissioning Module 1 would not arise and likewise until L&T had completed all obligations of Module 2, upto the stage of commissioning, the question of IOCL being obliged to supply fuel to firing the GTGs or the HRSGs for commissioning Module 2 would not arise. This argument cannot be accepted principally for five reasons.

331. First, neither the Contract nor L2 Schedule or any other document forming part of Contract suggests so.

332. Second, a contract, such as the one, under consideration by the Tribunal, before it is entered into by the parties, is preceded by comprehensive submission and exchange of documents touching upon all material aspects and requirements of the project that brings complete clarity on all relevant matters so that parties are well aware of the respective obligations right from the commencement until completion of the project. All requirements are fully envisaged in such contract as both parties being well versed with a subject would not leave anything to chance or scope of interpretation that may make it difficult to maintain timelines resulting the project not being completed on time. Viewed thus, nothing is found in the contract documents that supports the argument of the Respondent that unless and until L&T had completed all its obligations of Module 1 and Module 2 upto the stage of commissioning, IOCL was not obliged to supply for firing UB (for commissioning of Module 1) and for firing of GTGs or HRSGs (for commissioning Module 2).

333. Third, the necessity of supply of fuel for firing UB for commissioning Module 1 and supply of fuel for firing GTGs or HRSGs for commissioning of Module 2 cannot be overlooked. A condition cannot be read into the contract which does not exist. There is no stipulation in the Contract that unless and until the Claimant had completed all obligations of Module 1 and Module 2 upto the stage of commissioning, the obligation of IOCL to supply fuel would not arise. How can the stage of commissioning of Module 1 or Module 2 be reached without completion of pre-commissioning activities which necessarily required making available fuel by IOCL to L&T.

334. Fourth, IOCL having accepted the responsibility of making available the requisite fuel on particular dates cannot dishonor its obligations under the pretext that unless and until L&T had completed its obligation of Module 1 and 2 upto the stage of commissioning, it had no obligation to supply fuel for the purposes of firing UB for commissioning Module 1 and for the purposes of firing GTGs or HRSGs for commissioning of Module 2.

335. Fifth, IOCL had at no time stated or expressed that its acceptance of obligation of making available fuel for commissioning of Module 1 and Module 2 was dependant on completion of all obligations by L&T of Module 1 and Module 2 upto the stage of commissioning.

336. It also appears from the record that steam or condensate was also not made available by IOCL to L&T when requested and that resulted in delay of completion of project."

39. I do not find the above reasoning of the Arbitral Tribunal to be unreasonable or perverse so as to warrant interference of this Court in exercise of its powers under Section 34 of the Act.

40. In ***McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.*** (2006) 11 SCC 181, the Supreme Court had held that once the

Arbitrator has the jurisdiction to entertain the dispute, interpretation of a contract is a matter for the Arbitrator to determine. It was further held as under:-

> *"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law.[See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission and D.D.Sharma v. Union of India.]*
>
> *113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."*

41. In ***Navodaya Mass Entertainment Ltd. v. J.M.Combines*** (2015) 5 SCC 698, the Supreme Court reiterated the limited scope of interference by the Court under Section 34 of the Act in the following words:-

> *"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. [See Bharat Coking Coal Ltd. v. L.K. Ahuja, Ravindra & Associates v. Union of India, Madnani Construction Corpn. (P) Ltd. v. Union of India, Associated Construction v. Pawanhans Helicopters Ltd. and Santna Stone & Lime Co. Ltd. v. Union of India.]"

42. In ***Associate Builders v. DDA*** (2015) 3 SCC 49, the Supreme Court conducted detailed examination of the scope of the words 'public policy of India' and held as under:-

"33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. 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. 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 [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

"General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the

evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

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42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:
42.1 (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

*"**28. Rules applicable to substance of dispute.—**(1) Where the place of arbitration is situated 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;"*

42.2.(b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set asided.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:
***"28. Rules applicable to substance of dispute.** (1)-(2)*
(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."
This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. 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."

43. In ***National Highways Authority of India v. ITD Cementation India Ltd.,*** (2015) 14 SCC 21, the Supreme Court again reiterated the scope of Section 34 of the Act as under:-

"25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do."

44. I do not find any such case warranting an interference with the Impugned Arbitral Award having been made out by the petitioner in the present case.

45. Counsel for the petitioner has made further submissions on the alleged delays of the respondent in commissioning Module 1 and 2. He submits that Module 1 includes RLNG's Skid, which was part of the Balance of Plant and was commissioned only on 28th August, 2010. He submits that the delay up to 28th August, 2010 in commissioning Module 1 was, therefore, attributable only to the respondent. Similarly, for mechanical completion of Module 2, as RLNG was not required, delay till the date of completion, that is 30th June, 2010, was attributable solely to the respondent.

46. The Arbitral Tribunal has considered the above submissions of the petitioner and has held that in terms of L2 Progress Schedule, there was an obligation on the petitioner to provide/make available the diverse components/activities and some of the components/activities which the petitioner was to provide were critical components and commissioning of Modules 1 and 2 were dependent on them. The Arbitral Tribunal further found that there was delay on part of the respondent in completion of diverse tasks, however, at the same time, there was delay on part of the petitioner in making available/providing some of the components/activities which led to the delay in commissioning of Modules 1 and 2. The Tribunal holds that the delay therefore, was not

fully attributable to the respondent alone. Paras 311 and 312 of the Impugned Award are relevant and are reproduced hereinbelow:-

> *"311. It is true that under the Contract, the obligation is upon the Contractor (L&T) to design supply and construct CPP. However, from the perusal of the Contract, it is clear that the Contract does comprise of reciprocal promises. L2 Schedule which is part of the Contract, when carefully seen, also indicates the order in which owner (IOCL) is required to make available diverse components. There remains no doubt that IOCL had obligation to provide /make available the diverse components /activities. It goes without saying that some of the components/activities which IOCL was obliged to provide/make available to L&T as per the timelines given in L2 Schedule were critical components and commissioning of Modules 1 and 2 and Mechanical completion of Module 3 were dependent on the tasks to be completed by L&T in time.*
>
> *312. The material on record produced by IOCL does show delay on the part of the L&T in completion of diverse tasks on time as per timelines fixed under L2 Schedule, however, as there was delay on the part of IOCL in making available/providing some of the components/activities noted above, the Claimant-L&T could not commission Modules 1 and 2 in time and Mechanical Completion of Module 3 also could not be achieved in time. Thus, delay is established to be contributory and not attributable to L&T alone."*

47. The above being a finding of fact, this Court in exercise of its powers under Section 34 of the Act cannot sit as a Court of appeal to arrive at a different conclusion. The Arbitral Tribunal further observed as under:-

> *"273. IOCL's witness RW-1 has deposed, that RLNG was made available to L&T upon request on 04.08.2010 and the RLNG Skid/Fuel Gas System at the CPP was commissioned by using it to supply RLNG to various Systems and Sub-Systems which could be fired by RLNG on 28.08.2010 and consequently commissioning certificate for Module-1 was issued showing commissioning of*

Module on 28.08.2010. Thereafter, RLNG Skid/Fuel Gas System and piping was progressively commissioned with respect to the equipments comprised in Module 2 and Module 3. On completion of the commissioning with regard to the equipment covered by Module 2, commissioning certificate for Module 2 was issued to the Claimant as of 29.09.2010.

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293. However, IOCL has taken the position that L&T could have completed commissioning of Module-1 and 2 using only the alternate fuel for each sub-Unit. This position of IOCL is not supported by its witness RW-1. In answer to question 26 in the cross examination, RW-1 stated that commissioning was actually taking the fuel in and start the equipment. The equipment definitely needed to check its performance with all the three fuels. Also, the answer to the next question immediately following answer given by RW-1 to question 26 was apparently contradictory. The Tribunal accordingly sought clarification by putting to her the question, "In answer to Question No.26, you have stated that the equipment needs to check its performance with all the three fuels while in answer to Question No.27, you have stated that commissioning can be done using any fuel. Can you explain the difference in use of fuel in checking the performance of the equipment and commissioning?" To this question, RW-1 answered, "Commissioning means fuel and feed into the equipment and start the equipment with production of the product of the equipment. However, if there are more than one number of fuels, the equipments requires to be checked with each fuel's each performance so that the equipment performs in all the fuels as per the specification."

294. RW-1 has admitted in her cross examination that RLNG Skid/Fuel Conditioning Skid could be commissioned only with the use of RLNG. RW-1 also admitted that BOP could not be commissioned till RLNG was made available to L&T.

295. The testimony of RW-1 demolishes IOCL's stand that commissioning could have been completed by L&T using only the alternate fuels. Even otherwise, this stand of IOCL is contrary to

the provisions made in the Technical Specifications, particularly Clause 15.0, Clause 15.5, Section C1-21 of Technical Specifications."

48. In view of the above, the submission made by the counsel for the petitioner regarding delay in commissioning of Modules 1 and 2 by the respondent cannot be sustained.

49. It is next contended by the counsel for the petitioner that the Arbitral Tribunal has erred in holding that the delay in Mechanical Completion of Module 3 was due to the non availability of ECS data from the petitioner. It is submitted that ECS forms part of BOP, which falls under Module 1 and not Module 3. Relying upon the respondent's letter dated 05.03.2010, it is submitted that even the respondent had agreed that the ECS forms part of Module 1 commissioning and does not in any manner affect the Mechanical Completion of Module 3.

50. I have considered the submission made by the counsel for the petitioner. The Arbitral Tribunal has answered the above submission in paragraph 327 of the Impugned Award as under:-

"327. On Issue Nos. 1, 2 and 3, it was argued that "The ECS system formed part of Module 1 and not Module 3". This submission is without any merit as ECS system consists of a fully equipped ECS control room which receives and displays data obtained from the data collection equipment located in CPP and Sub-stations of the various units comprised in the NCC Complex. The system also monitors and analyzes the data. To receive the data from various Units and Sub-Station of each Unit was to be provided with an RTU Penal. This Unit would at act as the data collection centre for the Unit. The collected data from each Unit

would be transmitted to ECS Control Room. The collection and transmission of data network connected the Sub-stations to the Control Room of the ECS System located in the CPP. This is also evident from the contents of para 3 of the Affidavit of Mr.Ajay Singh RW-2."

51. As Module 3 comprises of "Complete Captive Power Plant including associated facilities as per the provisions of the Bidding Documents", ECS being an important part of the Captive Power Plant, would form part of Module 3 as well. EIL's letter dated 19.03.2012 and the Note dated 26.03.2012 prepared by the petitioner itself also suggest that ECS was an important input considered as a part of Module 3 by the petitioner. The Arbitral Tribunal has further relied upon the L2 Schedule which contemplated 806 days for achieving mechanical completion of Module 3 from the availability of ECS inputs. The Arbitral Tribunal has held that taking this time into consideration, it could not be said that there was any delay on the part of the respondent to achieve mechanical completion of Module 3. I do not find the said finding of the Arbitral Tribunal to be perverse warranting any interference by this Court.

52. It is further contended by the counsel for the petitioner that the Arbitral Tribunal has not only erred in holding that petitioner was estopped from relying on dates of the Formats being submitted by the respondent as the dates of completion of system but also holding that there was waiver of insistence on Formats being submitted in accordance with the Contract. He submits that the said finding is contrary to the express terms of the Agreement, especially Article 8.17.1.0 of the General Conditions of Contract, which stipulates that no waiver shall be presumed or inferred unless any written communication is made. In this

regard the counsel for the petitioner relied upon the following judgments to contend that the Arbitral Tribunal was bound by the terms of the Agreement and Award passed in ignorance thereof is liable to be set aside:

1. *Associated Engineering Co. v. Government of Andhra Pradesh and another – (1991) 4 SCC 93*
2. *Rajasthan State Mines & Minerals Limited v. Eastern Engineering Enterprises & Anr. – (1999) 9 SCC 283*
3. *New India Civil Erectors (P.) Ltd. v Oil and Natural Gas Corporation – AIR 1997 SC 980*
4. *Ramnath International Construction Pvt. Ltd. v. Union of India and Anr. – (2007) 2 SCC 453*
5. *Oil and Natural Gas Corporation Limited v. Western Geco International Limited – 2014 9 SCC 263.*

53. I have considered the above submission of the counsel for the petitioner. The Contract requires the respondent to raise Formats I to V while carrying out mechanical completion and commissioning activities. The Arbitral Tribunal has considered the issue of submission of Formats as under:-

> *"278. Although the Contract provides the procedure, manner and time of raising Formats, and accordingly the date of readiness of various Systems for commissioning but having regard to the fact that the dates of achieving Format-III of diverse equipment are much later than their respective dates of actual commissioning, it is difficult to hold that the dates on which Format-III were raised would be the date of readiness of the various Systems for commissioning. It is admitted position that Format-III's were submitted in respect of certain Units after commissioning of the CPP. In our view, the dates of submission of Formats would not be decisive.*

279. Moreover, IOCL has not been able to successfully rebut L&T's case that it was at IOCL's instructions that works/Systems be completed by L&T first and Formats issued later. IOCL by its conduct is thus, estopped from now relying upon the dates of Formats as the date of completion/Commissioning of the concerned Systems. This also negates IOCL's contention that the Formatting System under the contract cannot be assumed to have been done away with and in any case IOCL cannot be said to have waived the right of adherence to Formats in terms of the provisions of the contract. It is not a matter of waiver but rather conduct of IOCL that principle of estoppel arises in the fact situation.

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283. That L&T has raised Formats is not in dispute. The question is, whether the date of raising the Formats can be taken as the only date for readiness of the System/Sub-System/Equipment with regard to which sub Format(s) has/have been issued. In Tribunal's view, in order to decide such controversy, Article 7 and Article 8.17.1.0 have no application at all. How can a procedural formality, particularly the date of submission of Format-III be treated as the date of commissioning of a System/Sub-System/Equipment when in fact such System/Sub-System/Equipment has been commissioned earlier to that date. The date of submission of such Format-III, in our view, for the reasons already noted above would not be conclusive when actually and factually the System/Sub-System/Equipment relating thereto has been commissioned earlier in point of time and had become operational prior to that date."

54. A reading of the above would show that the Arbitral Tribunal has taken note of the conduct of the parties during the execution of the work under the Contract. It has also considered the nature of the Formats provided in the Contract. The counsel for the petitioner could not dispute

that the dates of commissioning of various equipments were earlier than the dates of Format III. This itself shows that the parties did not consider the submission of the Formats as having a vital bearing on the dates of commissioning. What was therefore an issue before the Arbitral Tribunal was the actual date of commissioning proved from the records of the case rather than only relying upon the date of submission of the Formats. I do not find the approach of the Arbitral Tribunal to be incorrect or unreasonable. In view of the above, the judgments relied upon by the counsel for the petitioner would be of no avail. It is not in dispute that the Arbitral Tribunal is bound by the terms of the Agreement, however, at the same time, if the Arbitral Tribunal has interpreted the terms of the Agreement, unless it is shown that the same is perverse, the Award cannot be set aside on this ground. It has further been held that the correspondence exchanged between the parties is required to be taken into consideration for the purpose of construction of a Contract. (***McDermott International Inc.*** (supra) and ***MSK Projects India (JV) Ltd. v. State of Rajasthan & Anr.*** (2011) 10 SCC 573).

55. In view of the above, the submission of the counsel for the petitioner cannot be accepted.

56. To the similar effect is the next challenge of the counsel for the petitioner that it was mandatory for the respondent to give notice under Clause 2.10.3.0 of the General Conditions of Contract if it was to seek extension of time for any reason of delay on the part of the petitioner. Though, the said submission of the counsel for the petitioner is correct, at the same time, the Arbitral Tribunal has noted that not only had the

respondent informed the petitioner of the delays in providing the fuels and ECS inputs, but the petitioner itself considered the application filed by the respondent seeking extension of time on its own merit and without insistence on the formality of notice as required under Clause 2.10.3.0. The relevant finding of the Arbitral Tribunal in this regard is as under:-

> *"159. It is true that the 16 documents (letter/emails) sent by L&T between 23.04.2007 and 05.03.2010 which have been noted above do not strictly satisfy the manner in which notice(s) was/were required to be given under Clause 2.10.3.0. however, no such objection was raised by EIL in its response to these letters/emails. As a matter of fact until filing of Statement of defense at no point of time objection was raised that the above emails/letters were not in conformity with the contractual provisions. Even while considering the Application for EoT, neither IOCL nor Engineer-in-Charge has raised any objection that the letters/emails received from L&T were not in the nature of notice(s) contemplated under Clause 2.10.3.0 read with 4.2.5.0."*

57. The Arbitral Tribunal has further considered the effect of not giving notice in strict compliance with Clause 2.10.3.0 on the application for extension of time under Clause 4.3.5.0 and has held that even if it is to be assumed that the Contractor has not given notice in terms of Clause 2.10.3.0, Clause 4.3.5.0 shall still be attracted. This again being a matter of interpretation of the Agreement, which cannot be said to be totally perverse, does not merit any interference by this Court in exercise of its power under Section 34 of the Act.

58. In view of the above, I find no merit in the present petition and to the challenge made by the petitioner to the Arbitral Award dated

18.05.2017. The petition is accordingly dismissed, however, with no order as to cost.

NAVIN CHAWLA, J

JUNE 01, 2018
RN/vp