2026:DHC:9459-DB

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

% **Judgment reserved on: 05.10.2026**
Judgment pronounced on: 28.10.2026

CNR No. DLHC010375712023

\+ FAO(OS) (COMM) 210/2023

MMTC LIMITED .....Petitioner

Through: Mr. Arun Bharadwaj, Sr. Adv. with Mr. Praveen Kumar Jain, Ms. Rashmi Kuniari & Mr. Aditya Rathi, Advs. with Mr. Abhay Kumar, GM, Mr. Parthsarthi Gosh, Sr. Manager & Mr. Dinesh Dangi, Dy. Mgr Law.

versus

AUST GRAIN EXPORTS PTY LTD .....Respondent

Through: Mr. Puneet Dutt Tyagi, Mr. Sanjay Bansal, Ms. Swati Bansal, Ms. Vaishali Gupta, Mr. Shobhit Garg, Mr. Manoj Pandey & Ms. Ayushi Bansal, Advs.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN
HON'BLE MS. JUSTICE SHAIL JAIN

J U D G M E N T

AVNEESH JHINGAN, J.:

1. This appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') against the judgment dated 12.06.2023 passed by the learned Single Judge dismissing the petition

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under Section 34 of the Act (hereinafter 'the petition').

Brief facts

2. The brief facts are that the appellant, M/s MMTC Ltd. (hereinafter 'MMTC') is a public sector undertaking. The respondent, M/s Aust Grain Exports Pty. Ltd. (hereinafter 'the respondent') is an Australian company engaged in the export of agricultural commodities. On 30.03.2009, MMTC floated a tender for the supply of yellow peas. The respondent was the successful bidder and the parties entered into a contract on 16.04.2009 for the supply of 35,000 metric tonnes (MTs) (+/-10%) of yellow peas at USD 259 per MT. The shipment period under the contract was September-October 2009.

2.1 The respondent initially nominated vessel MV Geeta. On 08.10.2009, the vessel was cancelled and the respondent thereafter nominated vessel MV Star Lily. The respondent sought extension of the shipment period. MMTC subject to the contractual terms and applicable penalty extended the period up to 15.11.2009 and thereafter up to 30.11.2009.

2.2 The vessel started loading on 23.11.2009 after a delay due to weather and port congestion. The goods were shipped on 27.11.2009 and arrived on 01.01.2010. MMTC under clause 20 of the contract sought compensation for the delayed shipment and claimed USD 14 per MT on 31,924.572 MTs amounting to USD 446,943.98. The respondent disputed the claim and invoked *force majeure*. On 24.12.2009, MMTC released the payment of USD 8,268,464.15 in favour of the respondent. On 12.01.2010, MMTC invoked the performance bank guarantee (for short 'PBG') and

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appropriated USD 271,950.

2.3 Disputes arose between the parties regarding the delayed shipment and the amount appropriated under the PBG. MMTC invoked arbitration under clause 23 of the contract and the disputes were referred to arbitration under the aegis of the Indian Council of Arbitration (ICA), before a three-member arbitral tribunal (for brevity 'the tribunal').

2.4 The majority award was signed on 05.03.2021, the dissenting opinion was signed on 16.06.2021 and both were sent on 22.06.2021 to the parties by the ICA.

2.5 The majority award rejected claim no.1 of MMTC for compensation for delayed shipment amounting to USD 861,963. Claim no.2 relating to despatch money under clause 10(20) was allowed to the tune of USD 30,620 along with interest at 9% per annum from 18.01.2010 till the date of award. Counter-claim no.1 of the respondent seeking refund of the PBG of USD 271,950 was allowed with interest at 9% per annum from 12.01.2010 till the date of the award. Counter-claim no.2 for interest on the PBG was rejected in view of clause 13(2) of the contract. Counter-claim no.3 for interest on delayed payment of the invoice was allowed to the tune of USD 42,815.

2.6 The petition filed by MMTC on 04.10.2021 challenging the award was dismissed on 12.06.2023. It was held that the procedural irregularities pointed out by MMTC including the absence of a member on certain dates and non-signing of certain order sheets were not material and had not affected the decision-making process of the tribunal. Further that the majority award dated 05.03.2021 and the dissenting opinion dated

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16.06.2021 received by MMTC on 05.07.2021 were in accordance with Section 31 of the Act and the view taken by the tribunal was plausible.

Submissions of MMTC

3. Learned counsel for MMTC submits that the arbitral proceedings suffered from procedural irregularities and the majority award was contrary to Section 31 of the Act and it was not signed by all the members of the tribunal. The contention is that material proceedings were conducted in the absence of one or more members of the tribunal and certain order sheets were not signed by all the arbitrators. Reliance is on ***Faze Three Exports Ltd. v. Pankaj Trading Co. & Ors.,*** 2003 SCC OnLine Bom 1024 to contend that all the members of a multi-member arbitral tribunal must participate in the material proceedings. It is further submitted that the majority award was signed on 05.03.2021 but the dissenting opinion was signed after a gap of 103 days. Reliance is on ***Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd.,*** (2021) 7 SCC 657 to contend that the dissenting opinion must be delivered contemporaneously with the final award and cannot be delivered subsequently after the tribunal has become *functus officio*. The argument is that this has resulted in two separate awards, one by the two members constituting the majority and the other by the third member.

3.1 *Qua* claim no.1 relating to compensation for delayed shipment the submission is that the tribunal erred in treating the claim under clause 20 of the contract as a claim under Section 73 of the Indian Contract Act, 1872 (hereinafter 'Contract Act'). Clause 20 provides for a 'rebate' for delay whereas clause 21 deals with 'damages'. The submission is that the 'rebate'

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under clause 20 is not dependent upon proof of actual loss. The grievance is that the tribunal ignored that the extension of the shipment period was subject to the contractual terms and applicable penalty. Reliance is on the decision of the Supreme Court in ***South East Asia Marine Engineering and Constructions Ltd. v. Oil India Ltd.,*** (2020) 5 SCC 164 to fortify that the award contrary to the terms of the contract is unsustainable.

3.2 It is canvassed that there is a contradiction in the award. Counter-claim no.1 for refund of the PBG of USD 271,950 was allowed but counter-claim no.2 for interest on the PBG was rejected relying upon clause 13(2) of the contract. However, while concluding the award interest at 9% was granted on the PBG amount from 12.01.2010 till the date of the award.

3.3 Lastly, the contention is that the inordinate and unexplained delay along with the other defects in the arbitral proceedings renders the award liable to be set aside. Reliance is on ***CRPF v. Fibroplast Marine (P) Ltd.,*** 2022 SCC OnLine Del 1335.

Submissions of the Respondent

4. *Per contra,* the scope of interference under Section 37 of the Act is limited and does not permit re-appreciation of the findings of the tribunal. The submission is that the award is reasoned and the view taken is plausible. Reliance is on ***Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.,*** 2019 INSC 1292, ***Delhi Airport Metro Express Pvt. Ltd. v. DMRC,*** (2022) 1 SCC 131, ***Power Grid Corporation of India Ltd. v. SAP Circle,*** (2018) 19 SCC 20, ***MMTC Ltd. v. Vedanta Ltd.,*** 2019 INSC 218 and ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI,***

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(2019) 15 SCC 131.

4.1 Learned counsel for the respondent submits that the objections regarding the functioning of the tribunal are an afterthought. The contention is that MMTC participated in the proceedings with knowledge of the alleged irregularities, raised no objection and therefore waived the right to object under rule 58 of the ICA Rules of Arbitration (hereinafter 'ICA Rules'). It is submitted that it is not a case of one member of the tribunal not signing the award. The majority award was signed by the presiding arbitrator and a co-arbitrator. Under rule 61 of the ICA Rules, the decision of the majority prevails and is taken as the decision of the tribunal. The submission is that the ICA notified the parties regarding the award on 22.06.2021 and delivered the signed copy on 05.07.2021. It is contended that the dissenting opinion being only an opinion, the gap of 103 days does not affect the validity of the majority award.

4.2 With regard to claim no.1, the submission is that the tribunal rightly rejected the claim under clause 20 as MMTC sold the consignment at a higher price and failed to prove the actual loss suffered on account of the delayed shipment. Reliance is on ***Fateh Chand v. Balkishan Das,*** 1963 SCC OnLine SC 49, ***Maula Bux v. Union of India***, (1969) 2 SCC 554, ***ONGC v. Saw Pipes Ltd.,*** (2003) 5 SCC 705 and ***Kailash Nath Associates v. DDA,*** (2015) 4 SCC 136. It is further submitted that the shipment period was extended by mutual consent and the goods were shipped within the extended period. The finding of the tribunal was based on the terms of the contract and the evidence adduced and calls for no interference.

4.3 The contention is that there is no inconsistency in the award

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regarding the PBG. Counter-claim no.1 for refund of the PBG was allowed but counter-claim no.2 was a separate claim for interest on the PBG and was rejected. The submission is that the interest awarded in the operative part was consequential to the amount awarded under counter-claim no.1 and is distinct from the interest claim rejected under counter-claim no.2.

4.4 As regards the delay in rendering the award, the submission is that the tribunal was reconstituted and consequently the proceedings continued over several years and were delayed due to the COVID-19 pandemic.

5. Heard learned counsel for the parties at length and perused the record with their able assistance. No submissions other than those noted above were pressed.

6. Before proceeding further, it would be apposite to reproduce the relevant clauses of the contract, the relevant ICA Rules and the applicable provisions of Section 31 of the Act:

Clause No.13	**Forfeiture of Performance Guarantee**	1. The Buyer reserves the right to forfeit the Performance Guarantee if the Seller- a) Fails to supply the goods within the specified period. b) Commits any breach of Contract or fails to fulfil any term(s) or condition(s) of the Contract. 2. The Performance Guarantee will be released to the Seller on successful and satisfactory execution of the Contract. No claim shall be admissible against the Buyer in respect of interest on Performance Guarantee regardless

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		of the time of the release.
Clause No.20	**Liquidated Damages**	In the event seller fails to effect shipment as per agreed delivery schedule the buyer is entitled to a rebate or ***US$ 1.00 PMT per day*** subject to a ***maximum of two weeks***. Thereafter buyer will be free to take legal actions as deemed fit. In addition, Bid Guarantee/Performance Guarantee will be invoked and forfeited.
Clause No.21	**Damages**	If the goods are not shipped within the contracted period of shipment, the seller shall be liable to pay to the Buyer on demand without any question whatsoever, damages on account of extra expenditure, loss of revenue or loss of industrial Production in the Buyer's country and loss of other benefits to the buyer. The quantum of such damages will be determined at the sole discretion of Buyer.
Clause No. 23	**Arbitration & Governing Law**	Any dispute or difference what so ever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitrators in accordance with the rules of arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties. Venue of the arbitration shall be New Delhi. The contract shall be

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		governed by Indian Laws.

"**ICA RULES**

WAIVER OF RULES
Rule 58
Any party who proceeds with the arbitration with the knowledge that any provision or requirement of these rules has not been complied with and who fails to state his objection thereto in writing, shall be deemed to have waived his right to object.

Rule 61
Whenever there is more than one arbitrator, the award of the majority shall prevail and be taken as the decision of arbitral tribunal. Failing a majority, the Presiding Arbitrator of the arbitral tribunal alone shall make the award.

Rule 67
The arbitrators constituting the arbitral tribunal or the Presiding Arbitrator where Rule 61 is applicable, shall sign the award and the Registrar shall give notice in writing to the Parties of the making and signing thereof and of the amount of fees & charges payable in respect of the arbitration and the award. The arbitrators fee shall be payable by the Council on receipt of the award and requisite deposit made by the parties."

"**Section 31 of the Act**

Form and contents of arbitral award.

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal

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shall be sufficient so long as the reason for any omitted signature is stated.

*** *** ***

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

*** *** ***

(7) (a) Unless otherwise agreed by the parties, where and insofar 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."

ANALYSIS

7. Section 2(1)(f) of the Act defines 'international commercial arbitration' and includes a commercial legal relationship where at least one of the parties is a body corporate incorporated in a country other than India. In the case in hand, the respondent is a company incorporated under the laws of Australia and the arbitration is an international commercial arbitration. Clause 23 of the contract provides that the venue of arbitration shall be New Delhi and the contract shall be governed by Indian laws. Section 2(2) of the Act provides that Part I shall apply where the place of arbitration is in India. Reference in this regard may be made to the following judgments of the Supreme Court:

7.1 In ***Balaji Steel Trade v. Fludor Benin S.A.***, (2026) 5 SCC 802 it was held:

"25.Section 2(1)(f) of the 1996 Act defines 'international commercial arbitration' as arbitration relating to disputes

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> arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is a foreign national, whether that party is an individual, a body corporate, an association or body of individuals or a foreign Government. Respondent 1 being a company incorporated under the laws of Benin, the present dispute squarely falls within the ambit of international commercial arbitration. Once this characterisation is made, Section 2(2) of the Act becomes immediately relevant, for it stipulates that Part I shall apply only where the place of arbitration is in India, thereby mandating that Part I stands excluded where the parties have chosen a foreign seat."

7.2 In ***Amway (India) Enterprises (P) Ltd. v. Ravindranath Rao Sindhia***, (2021) 8 SCC 465 held:

> "In this view of the matter, the argument that there is no international flavour to the transaction between the parties has no legs to stand on. Indeed, an analysis of Section 2(1)(f) would show that whatever be the transaction between the parties, if it happens to be entered into between persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by a body corporate which is incorporated in any country other than India; or by the Government of a foreign country, the arbitration becomes an international commercial arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country referred to in Section 2(1)(f) carry on business in India through a business office in India….."
>
> (emphasis supplied)

8. The scope of interference with an arbitral award in an international commercial arbitration is limited. The 2015 amendment to Section 34 of the Act is to the effect that the ground of patent illegality under Section 34(2-A) is not available for setting aside an award in an international

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commercial arbitration seated in India. Reference in this regard be made to the following decisions of the Supreme Court:

8.1 In ***Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd.***, (2020) 7 SCC 167 it was held:

> "18. The Law Commission in its 246th Report recommended the insertion of the ground of "patent illegality" for setting aside a domestic award by the insertion of sub-section (2-A) in Section 34 of the Act. The relevant extract from the Report of the Law Commission is extracted hereinbelow:
>
> > *"35. It is for this reason that the Commission has recommended the addition of Section 34(2-A) to deal with purely domestic awards, which may also be set aside by the court if the court finds that such award is vitiated by "patent illegality appearing on the face of the award". In order to provide a balance and to avoid excessive intervention, it is clarified in the proposed proviso to the proposed Section 34(2-A) that such "an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciating evidence". The Commission believes that this will go a long way to assuage the fears of the judiciary as well as the other users of arbitration law who expect, and given the circumstances prevalent in our country, legitimately so, greater redress against purely domestic awards. This would also do away with the unintended consequences of the decision of the Supreme Court in ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705], which, although in the context of a purely domestic award, had the unfortunate effect of being extended to apply equally to both awards arising out of international commercial arbitrations as well as foreign awards, given the statutory language of the Act."*

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(emphasis supplied)

To give effect to the said recommendation, it was suggested that:

> "*18. ... (iii) After the Explanation* in sub-section (2), insert sub-section "(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court if the court finds that the award is vitiated by patent illegality appearing on the face of the award:
>
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciating evidence".
>
> [*Note*.—The proposed Section 34(2-A) provides an additional, albeit carefully limited, ground for setting aside an award arising out of a domestic arbitration (and not an international commercial arbitration). The scope of review is based on the patent illegality standard set out by the Supreme Court in ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] The proviso creates exceptions for erroneous application of the law and reappreciation of evidence, which cannot be the basis for setting aside awards.]"
>
> (emphasis supplied)

19. Pursuant to the recommendations of the Law Commission, the 1996 Act was amended by Act 3 of 2016, which came into force w.e.f. 23-10-2015. The ground of "patent illegality" for setting aside a domestic award has been given statutory force in Section 34(2-A) of the 1996 Act. The ground of "patent illegality" cannot be invoked in international commercial arbitrations seated in India. Even in the case of a foreign award under the New York Convention, the ground of "patent illegality" cannot be raised as a ground to resist enforcement, since this ground

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is absent in Section 48 of the 1996 Act. The newly inserted sub-section (2-A) in Section 34, reads as follows:

> "34. (2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:
>
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."

8.2 In ***Ssangyong Engineering*** (supra) it was held:

> "42. Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(*a*)(*iii*) and (*iv*) as applicable to the facts of the present case."
>
> (emphasis supplied)

9. In ***Ssangyong Engineering*** (supra) it was held that the amended provisions of Section 34 shall apply to petitions filed after 23.10.2015 irrespective of the date of commencement of arbitration. In the present case, the award was passed on 05.03.2021 and the petition under Section 34 was filed after October 2015, on 04.10.2021. The relevant paragraph is as under:

> "19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of "public policy of India" in *ONGC* v. *Saw Pipes Ltd.* [*ONGC* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705] ["*Saw Pipes*"] and *ONGC* v. *Western Geco International Ltd.* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] ["*Western Geco*"] has been done away with, and a new ground of "patent

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> illegality", with inbuilt exceptions, has been introduced. Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date."

10. The challenge that the impugned award is in violation of Section 31 of the Act for not bearing the signatures of all the three members on the majority award, lacks merit. Section 31(1) stipulates that an arbitral award shall be made in writing and signed by the members of the arbitral tribunal. Sub-section (2) contemplates that the signatures of the majority of the members shall suffice so long as the reason for the omitted signature is stated. In the present case, the majority award was signed by two members and the third member signed a separate dissenting opinion. The case is not one of a missing signature of a member.

11. The argument of the learned counsel for MMTC that the minority opinion states that 'I have gone through the majority award' and that there were two awards, is misconceived. The majority and minority views are opinions of the members of the tribunal and a difference of opinion among the members does not tantamount to the passing of two awards. The majority award shall be the award of the arbitral tribunal in terms of Section 29(1) of the Act.

12. Rule 61 of the ICA Rules provides that in case of a multi-member tribunal the award of the majority members shall be the decision of the arbitral tribunal and in the absence of a majority, the presiding arbitrator alone shall make the award. The majority award in the present case bears

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the signatures of two members and is the decision of the tribunal. There is no requirement that the majority award be signed by all three members and the dissenting member is not barred from giving a separate opinion. This position is supported by Russell on Arbitration (21st Edition, page 271, paragraph 6-059) which states:

> "If, however, there is no chairman, then decisions, orders and awards must be made by all or a majority of the tribunal. Any member of the tribunal who does not assent to an award need not sign it and may set out his own views of the case in a 'dissenting opinion'. This is for the parties' information only and does not form part of the award, but it may be useful in terms of adding weight to the arguments of a party wishing to appeal against the award."
>
> (emphasis supplied)

13. The reliance on the decision of the Supreme Court in ***Dakshin Haryana Bijli Vitran Nigam*** (supra) to contend that the dissenting opinion had to be delivered contemporaneously with the majority award, does not enhance the case of MMTC. The decision was rendered in a case governed by Section 29A of the Act, inserted by the 2015 amendment. In the case in hand, the arbitration is an international commercial arbitration and Section 29A (1) by its express terms does not apply to an international commercial arbitration. Moreover, the tribunal would become *functus officio* only upon passing of the award. The opinion of the two members would mature into an award only after the opinion of the third member which would determine whether the award is unanimous or by majority.

14. The majority award was signed by two members on 05.03.2021 and the dissenting opinion was signed by the third member on 16.06.2021. Both

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were sent by the ICA on 22.06.2021 and received by MMTC on 05.07.2021. The opening page of the award records it as the "majority award by two members" indicating that there was a discussion amongst the members and that one member dissented from the other two. There is no period prescribed under the statute for recording a dissenting opinion. A reasonable time is expected to be taken by a member in the minority to give a dissenting opinion.

15. The reliance on the decision of the Division Bench of this court in ***CRPF v. Fibroplast Marine (P) Ltd.,*** (supra) to argue that inordinate delay in making the award renders it liable to be set aside as opposed to public policy, is not applicable to this case. In that case the court was dealing with a matter where a stipulated period was fixed for rendering the award and the proceedings continued thereafter with the parties participating. In the present case, during the arbitral proceedings the tribunal was reconstituted more than once and sittings during the COVID-19 pandemic were conducted through video conferencing with the consent of the parties.

16. The grievance of MMTC that in some of the hearings all members of the tribunal were not present and zimini orders were passed in their absence, was rightly rejected by learned Single Judge in consonance with the limited scope of interference in an international commercial arbitration wherein the ground of patent illegality is not available. Moreover, it was considered that these irregularities had no bearing on the ultimate outcome of the arbitration. The law is well-settled that every procedural irregularity and illegality does not warrant interference.

17. The claim of MMTC for liquidated damages (for short 'LD') under

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clause 20 of the contract on account of a delay of fourteen days in shipping the goods and for damages under clause 21 on account of a delay of thirteen days was rejected by the tribunal. A factual finding was recorded that the shipment period was rescheduled to 30.11.2009 by mutual consent of the parties consequently, no loss or damage was caused by the change in schedule and clause 20 was not triggered. *Vis-à-vis* the claim under clause 21, the tribunal recorded that the claim for damages was neither pleaded nor proved and the terms 'damages/LD' were used vaguely in the statement of claim. Further that in the absence of breach by the respondent no case for LD or rebate was made out. The findings recorded suffer from no legal or factual error, much less perversity though these are not even grounds available in an international commercial arbitration.

18. The counter-claim no.1 of the respondent seeking refund of the PBG was allowed and is not under challenge. The tribunal considered that sub-clause (2) of clause 13 of the contract provided that "no claim shall be admissible against the buyer in respect of interest on the PBG irrespective of the time of release" and rejected the claim for interest on the PBG. The limited grievance of MMTC is that in conclusion the tribunal directed that the PBG be refunded along with interest at the rate of 9% per annum from 12.01.2010 till the date of the award.

19. At this stage, learned counsel for the respondent fairly contended that there was no explanation for this contradiction in the award however, contended that the relief of interest was severable.

20. Section 31(7) of the Act provides that the tribunal may grant *pendente-lite* interest unless the parties have otherwise agreed. It is an

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undisputed fact that under clause 13(2) of the contract, the parties agreed that the amount of the PBG shall not carry interest irrespective of the period of release. The grant of interest on the PBG is not a mere contradiction in the award but is contrary to the statutory provisions and the terms agreed between the parties.

21. The international commercial arbitration award in conflict with the public policy of India can be interfered with. The explanation to Section 34(2)(b)(ii) of the Act clarifies that an award shall be in conflict with the public policy of India only in the three eventualities stipulated therein. The third one is where the award is in conflict with the most basic notions of morality or justice. The Supreme Court in ***Associate Builders v. Delhi Development Authority,*** (2015) 3 SCC 49 held that morality and justice are two different expressions in law and an award can be said to be against justice only when it shocks the conscience of the court. The illustration given therein is an award granting more than the claim made without any reason or justification. The relevant paragraph is reproduced below:

> "36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

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22. In the present case, the tribunal rejected counter-claim no.2 for interest on the PBG but without reason or justification ultimately in concluding part of the award granted interest. In the peculiar facts of this case, without revisiting the facts or re-appreciating the evidence, the award of interest on the PBG is in conflict with the public policy of India and falls within the ambit of Section 34(2)(b)(ii) of the Act.

23. In an international commercial arbitration, Section 34(2-A) is not applicable but the remaining provisions of Section 34 are applicable in the full force. The Supreme Court in ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd.,*** (2025) 7 SCC 1 held that severable portions of an award can be set aside provided that the invalid portion is capable of being severed. 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 two fold 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.
>
> 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

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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.

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)

24. The award of interest on the PBG is not intricately connected with the other claims and counter-claims dealt with by the tribunal and is severable, even from the direction to refund the PBG.

25. In view of the above discussion, the appeal is partly allowed. The impugned award is set aside to the limited extent of awarding interest at 9% per annum on the PBG.

26. All pending applications stand disposed of.

AVNEESH JHINGAN, J

SHAIL JAIN, J

OCTOBER 28, 2026
'TL'

Reportable:- **Yes**

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