THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Arbitration Appeal No. 1 of 2020

1. Sikkim Power Development Corporation Ltd.,
Through its Managing Director,
31 A, National Highway,
Gangtok, Sikkim – 737101.

2. The State of Sikkim,
Through its Secretary,
Power Department,
Government of Sikkim,
Kazi Road,
Gangtok, Sikkim – 737101. ….. Appellants

versus

M/s Amalgamated Transpower (India) Ltd.,
Through its Managing Director,
Having its office at E-10/8,
Vasant Vihar,
New Delhi. ….. Respondent

Appeal under section 37 of the Arbitration & Conciliation Act, 1996

[Against the judgment dated 26.12.2019 passed by the Commercial Court, East Sikkim, Gangtok, in Arbitration Case No. 05 of 2017]

Appearance:

Mr. Jishnu Saha, Senior Advocate with Mr. Tarun Johri, Mr. Aarohi Bhalla, Ms. Tamanna Chhetri, Mr. Tenzing Thinlay Lepcha, Mr. Vidhan Vyas, Mr. Tanish Ganeriwala and Mr. Vishwajeet Tyagi, Advocates for the appellants.

Mr. Prasanna Kumar Das, appearing in-person, as representative of the respondent.

---

and

Arbitration Appeal No. 1 of 2021

Amalgamated Transpower (India) Ltd.,
Through its Chief Executive Officer
and Authorised Representative,
E-10/8, Vasant Vihar,
New Delhi 110057. ….. Appellant

versus

1. M/s Sikkim Power Development Corporation Ltd.,
Through its Managing Director,
31 A, National Highway,
Gangtok, Sikkim – 737101.

2. The State of Sikkim,
Through its Principal Chief Engineer-cum- Secretary,
Power Department,
Government of Sikkim,
Kazi Road,
Gangtok, Sikkim – 737101. ….. Respondents

Appeal under section 37 of the Arbitration & Conciliation Act, 1996 read with section 96 of the Code of Civil Procedure, 1908.

Appearance:

Mr. Prasanna Kumar Das, appearing in-person, as representative of the appellant.

Mr. Jishnu Saha, Senior Advocate with Mr. Tarun Johri, Mr. Aarohi Bhalla, Ms. Tamanna Chhetri, Mr. Tenzing Thinlay Lepcha, Mr. Vidhan Vyas, Mr. Tanish Ganeriwala and Mr. Vishwajeet Tyagi, Advocates for the respondents.

Date of hearing: 10.03.2023, 13.03.2023, 14.03.2023, 15.03.2023, 16.03.2023, 20.03.2023, 21.03.2023, 22.03.2023, 23.03.2023, 29.03.2023 & 19.04.2023
Date of judgment : 10.05.2023

J U D G M E N T

Scope of the two appeals:

(1) Arbitration Appeal No. 1 of 2020 filed by Sikkim Power Development Corporation Limited (SPDC) and the State of Sikkim (SoS)

(2) Arbitration Appeal No. 1 of 2021 filed by Amalgamated Transpower (India) Limited (ATPL)

1.(i) This judgment shall dispose of the two appeals as stated above, both preferred under section 37 of the Arbitration and

Conciliation Act, 1996 (Arbitration Act), against the judgment dated 26.12.2019 (impugned judgment) passed by the learned Commercial Court, East Sikkim, at Gangtok (the Commercial Court) in Arbitration Case No. 05 of 2017, preferred under section 34 of the Arbitration Act by Sikkim Power Development Corporation Ltd. (SPDC) and the State of Sikkim (SoS) – the appellants in Arbitration Appeal No. 1 of 2020.

1.(ii) On 30.09.2017, the Sole Arbitrator had passed the Award (the Award) on all the 35 issues framed by it. The Sole Arbitrator granted all the prayers, except prayer [H] in favour of Amalgamated Transpower (India) Limited (ATPL). The total amount awarded against prayers [F], [G] & [I] is ₹4,40,55,44,212/- (Rupees four hundred and forty crores, fifty-five lakhs, forty-four thousand, two hundred and twelve only) along with prayers [A], [B] and [C] and alternatively, if prayers [A], [B] and [C] are not discharged by the respondents, an award of ₹10,95,22,00,945/- (Rupees one thousand ninety-five crores, twenty-two lakhs, nine hundred and forty-five only) as against prayers [D] & [G]. The Sole Arbitrator has awarded the aforesaid sums along with interest thereon @15% till the pronouncement of Award, i.e., 30.09.2017. The Sole Arbitrator further awarded simple interest @18% per annum from the date of award till the date of payment. The Sole Arbitrator further awarded a sum of ₹41.07 lakhs towards costs along with interest @15% per annum from the date of award till date of payment.

1.(iii) In Arbitration Appeal No.1 of 2020, SPDC and the SoS have challenged the impugned judgment of the Commercial Court to the extent it upheld the Award and prayed for setting it aside.

1.(iv) Amalgamated Transpower (India) Limited (ATPL) — the appellant in Arbitration Appeal No. 1 of 2021 — is also aggrieved by the impugned judgment. ATPL has challenged the impugned judgment to the extent it has set aside the findings of the Sole Arbitrator with respect to issues no. 9, 20 and 11.

1.(v) Issue no.9 was whether ATPL, in the alternative to prayers [A], [B] and [C] was entitled to an award of damages in its favour for a sum of ₹418.50 crores.

1.(vi) Issue no.20 was whether prayer [D] could be maintained without sufficient pleading.

1.(vii) Issue no.11 was whether ATPL was entitled to damages for a sum of ₹49.66 crores, as claimed in prayer [F].

1.(viii) The Sole Arbitrator held that prayer [D] was a claim for compensation for damages to be paid by SPDC and the SoS for non-adherence to prayers [A], [B] and [C] and allowed the same to have effect upon their failure to adhere to the said prayers. The Sole Arbitrator also held issues nos.20 and 11 in favour of ATPL.

1.(ix) On 28.12.2017, SPDC and the SoS filed an application under section 34 of the Arbitration Act against ATPL aggrieved by the Award. ATPL didn't challenge the Award although it did not grant prayer [H].

Genesis of the dispute

2.(i) On 22.12.1998, a tender was floated by SPDC inviting bids for construction of Hydro Electric Power Projects (HEPs) on 100 percent debt financing basis. ATPL submitted its bid on 05.01.1999, which was accepted. SPDC issued letter of intent on 11.03.1999 for

setting up the HEPS of different capacities for a total cost of ₹275 crores on 100 percent debt financing basis.

2.(ii) An Agreement dated 18.04.1999 (the First Agreement) was entered between SPDC, the SoS and ATPL, to initially develop four HEPs (Rolep-I - proposed to be 9 MW capacity, Rolep-II - proposed to be 12 MW capacity, Ralong - proposed to be 16 MW capacity and Chakungchu - proposed to be 24 MW capacity) of varying capacities through debt financing and implementation schemes in the State of Sikkim as run of the river schemes. A significant clause in the First Agreement, being clause 10, reads as follows:-

> "***10.*** *Any variation in this Agreement or to any of the Appendices can be done subject to the parties duly signing any supplementary Agreement to be referred as addendum to this Agreement*."

2.(iii) On 03.07.1999, the SoS gave an unconditional and irrevocable guarantee for repayment of the principal amount and interest thereon and raised an amount of ₹50.01 crores as bond amount against the guarantee.

2.(iv) On 22.01.2002, SPDC and the SoS moved a proposal for allotment of the projects to ATPL on Build Own Operate and Transfer (BOOT) basis for an initial period of 35 years to be renewed on mutually agreed terms and conditions. ATPL was required to give Bank Guarantee to take over the borrowings made by SPDC.

2.(v) On 21.12.2002, another agreement (the Second Agreement) was executed which superseded the First Agreement. This Agreement also contained a similar and significant clause, as

stated in paragraph **2(ii)** hereinabove. This clause, being clause 25, reads as follows:-

> "***25.*** *Any variation or amendment to this Agreement can be done subject to the parties duly signing any Supplementary Agreement to be referred as addendum to this Agreement*."

2.(vi) Admittedly, simultaneously with the execution of the Second Agreement, ownership of all the three (now revised) HEPs (Rolep – 36 MW, Ralong – 40 MW and Chakungchu-50 MW) were transferred to ATPL. On 19.02.2003, reconciliation of accounts in terms of the Second Agreement took place. It reflects that the SoS had paid interest of ₹21,37,77,543/- (Rupees twenty-one crores, thirty-seven lakhs, seventy-seven thousand, five hundred and forty-three only), on the bonds.

2.(vii) The reconciliation of accounts signed by the parties also accepts the fact that expenditure incurred by SPDC as per the Second Agreement was verified by the parties. It endorsed and accepted that the reconciliation of accounts in terms of the Second Agreement would be an addendum to it.

2.(viii) SPDC gave their confirmation of the expenditure incurred by SPDC and the SoS towards the three HEPs on 02.09.2003 amounting to ₹85.35 crores as per details attached therewith.

2.(ix) Admittedly and significantly, however, no Detailed Project Reports (DPRs) were submitted by ATPL for any of the three HEPs, namely, Rolep, Ralong and Chakungchu within a period of 6 (six) months, as per agreement entered into by and between the parties. Subsequently, it transpires that ATPL submitted a single DPR for Rolep HEP for 36 MW after which techno-economic

clearance was granted by the SoS on 06.05.2003 with a clear understanding that the proposed capacity could be modified based on bankable final optimization study. Admittedly, the estimated installed capacity was later enhanced to 60 MW. However, no fresh DPR for the enhanced capacity of Rolep was ever submitted by ATPL at any subsequent point of time. Nor was any DPR ever submitted subsequently in respect of the two other HEPs, namely, Ralong HEP and Chakungchu HEP. On the basis of the preliminary DPR of Rolep HEP, as submitted by ATPL, the SoS granted lease of 10.796 hectares of land at the Rolep site vide lease deed dated 29.05.2004. However, admittedly again, the lease rent of ₹10,000/- per annum has not been paid by ATPL, till date.

2.(x) There were several review meetings held by the then Chief Secretary from time to time. During the course of hearing of this matter, our attention was drawn to the minutes of the meetings held on 21.08.2003, 14.11.2003, 09.03.2004, 26.04.2004, 23.07.2004, and 15.10.2004. These meetings discussed the progress of the project and sought to clear the bottlenecks. None of the minutes of the meetings records the intention of the parties to amend the Second Agreement nor was the Second Agreement ever amended in terms of clause 25. The minutes of the meeting held on 09.03.2004 and 15.10.2004 also records the presence of a third party, namely, Larsen and Toubro Limited (L&T), who was never made a party before the Sole Arbitrator at any point of time.

2.(xi) The record reveals that an attempt was made to work out an addendum to amend and restate the Second Agreement. Although correspondences were exchanged between the parties, no

such addendum was ever signed by and between the parties in terms of clause 25 of the Second Agreement.

2.(xii) On 22.06.2006, SoS issued a final notice to ATPL. The notice stated that the delay and the mounting pressure from bond holders had compelled the SoS to take certain decisions. ATPL was thus required to redeem the bond liability of Rs.50.01 crores, including interest, by 31.07.2006. The notice also sought response from ATPL confirming the redemption to be communicated to the Managing Director, SPDC, by 10.07.2006. The notice informed ATPL that failure to redeem the bond liability would lead to termination of the Second Agreement and all three HEPs awarded to ATPL would stand withdrawn without any further notice, leaving the SoS free to award the projects to interested developers. The notice further sought for refund of the excess payment drawn by ATPL against raising of bonds and the advance drawn by ATPL towards construction of roads for Rolep HEP. The notice also sought a written confirmation from ATPL agreeing to the redemption of the bonds to reach SPDC by 10.07.2006, to be followed by total redemption of Rs.50.01 crores by 31.07.2006 to the bond holders. It would be an assumed indicator of ATPL's seriousness in developing the projects.

2.(xiii) On 02.05.2008, the SoS wrote to ATPL terminating the Second Agreement considering the failure of ATPL to abide by its terms and conditions and the delay in the implementation of the project. Finally, the dispute was referred to arbitration. The Hon'ble Supreme Court appointed the Sole Arbitrator on 05.12.2011.

The proceedings before the Sole Arbitrator and the Commercial Court

3. ATPL filed its statement of claims on 08.06.2012. On 09.09.2012, SPDC and SoS filed their statement of defence and counter claim. ATPL filed its rejoinder on 24.11.2012. SPDC and the SoS filed their replication on 08.06.2013 and ATPL its sur-rejoinder on 24.08.2013. The Award was passed on 13.09.2017. SPDC and SoS, thereafter, filed an application under section 34 of the Arbitration Act challenging the Award before the Commercial Court. The Commercial Court passed the impugned judgment on 26.12.2019.

The Award

4.(i) The Sole Arbitrator granted all the prayers in favour of ATPL, except prayer [H]. While granting prayer [A], the Sole Arbitrator directed SPDC and the SoS to perform all its obligations under the Second Agreement in a time bound manner. It further directed SPDC and the SoS, as agreed in the meeting dated 15.10.2004, to provide land, required access roads and bridges for the three HEPs within a specific time-frame. The Sole Arbitrator awarded perpetual injunction against SPDC and the SoS and directed them not to deal with the three HEPs contrary to the Second Agreement in terms of prayer [B]. The Sole Arbitrator awarded mandatory injunction in favour of ATPL directing SPDC and the SoS to allow the three HEPs to be implemented by ATPL in terms of prayer [C]. Having granted all the three prayers [A], [B] and [C] in favour of ATPL, the Sole Arbitrator went on to award the alternative prayer [D] on the condition that it shall have effect upon

failure of the respondent to adhere to prayers [A], [B] and [C]. ATPL, however, had specifically prayed for grant of damages under prayer [D] ***only if*** the Sole Arbitrator did not grant prayers [A], [B] and [C].

4.(ii) The Sole Arbitrator while deciding issue no.2 found that there was no provision under the Second Agreement permitting its termination unilaterally by the SoS; that SPDC, which was a separate legal entity, had not taken a decision to terminate the Second Agreement; that SoS had not issued any show cause notice before issuance of letter dated 02.05.2008, in violation of the rules of natural justice; that the ground of delay by ATPL was not justified as it was SPDC and SoS who had continuously deferred the performance of its obligation to provide land and access road without which the construction work of the projects could not start; that the letter dated 02.05.2008 was issued with *mala fide* intention and ulterior motive.

4.(iii) While deciding issues nos. 3, 22 and 23, the Sole Arbitrator held that the Second Agreement regarding submission of bank guarantee by ATPL was modified by the minutes of the meeting dated 09.03.2004 and 26.04.2004. Sole Arbitrator also held that in the minutes of the meeting dated 15.10.2004, further major changes took place in terms of the Second Agreement. It was held that the parties to the joint meeting dated 09.03.2004, 26.04.2004 and 15.10.2004 decided to modify their respective obligations and SPDC and the SoS had signed these minutes on their own free will. The Sole Arbitrator found that SPDC and the SoS had the right to modify the terms of the agreement under section 63 of the Indian

Contract Act, 1872. The Sole Arbitrator held that ATPL was no longer required to provide bank guarantee till SPDC and the SoS provided entire land record for Rolep and Chakungchu project in view of the agreement between the parties in the meeting held on 09.03.2004 and 26.04.2004. It was further held that since the land was not provided by SPDC and the SoS, the feasibility of submitting any bank guarantee by ATPL did not arise and subsequently after the decision of the parties in the meeting held on 15.10.2004, the responsibility to repay the bond holder was taken over by the SoS and consequently, the question of ATPL providing bank guarantee did not arise.

4.(iv) While deciding issues nos. 4 and 28, the Sole Arbitrator concluded that it was not necessary to decide whether the Second Agreement was in the nature of BOO or BOOT arrangement. It also held that the SoS had transferred the ownership of the three HEPs to ATPL.

The impugned judgment rendered by the Commercial Court

5.(i) The opinion of the Sole Arbitrator that M/s Rolep Hydro Electric Power Co. Ltd. and Velankani Renewable Energy Pvt. Ltd. were not necessary parties was upheld by the Commercial Court.

5.(ii) The opinion of the Sole Arbitrator that neither the letter dated 22.06.2006 nor the letter dated 02.05.2008 had the effect of terminating the Second Agreement was also upheld.

5.(iii) The Commercial Court upheld the view of the Sole Arbitrator that the minutes of meeting dated 09.03.2004, 26.04.2004 and 15.10.2004 modified the Second Agreement and

they were in the nature of addendum and supplemental to the Second Agreement. It was held that clause 25 of the Second Agreement did not disentitle the parties to amend it.

5.(iv) Contrary to the findings of the Sole Arbitrator, it was held that the recital in the Second Agreement makes it clear that the parties had in fact agreed to do the project on BOOT basis and the terms of the Second Agreement was clear and unambiguous.

5.(v) The Commercial Court also upheld the view of the Sole Arbitrator that SPDC and SoS had failed to perform their part of the promise as per the minutes of the meeting dated 09.03.2004, 26.04.2004 and 15.10.2004 and relinquished their claim for bank guarantee from ATPL; as such there was no question of breach on the part of ATPL.

5.(vi) The Commercial Court upheld the grant of specific performance in favour of ATPL by the Sole Arbitrator. However, it was held that since ATPL had itself sought damages in the alternative to specific performance, the Sole Arbitrator exceeded the scope of its jurisdiction in awarding both damages as well as specific performance of the Second Agreement. It was also held that the Sole Arbitrator had committed patent illegality while doing so. It was held that when a party claims specific performance or damages in the alternative, it is always entitled to elect between the two remedies.

5.(vii) The Commercial Court set aside the Sole Arbitrator's finding on issues no. 9 and 20 while maintaining the findings on issue no.6. The Award, to the extent it granted damages, was set aside, being patently illegal and unjust.

5.(viii) The Commercial Court also set aside the reasoning and findings of the Sole Arbitrator on issue no.11, which awarded further damages even for the expenses incurred in executing various works by ATPL in performance of its obligation to develop the project prior to the issuance of letter dated 02.05.2008 by the SoS as being patently illegal and unjust. It was held that those expenses incurred by ATPL were incurred in performance of its part of the Second Agreement. Since SPDC and SoS are required to now perform their part of the Second Agreement they could not be obliged to incur the expenses which ATPL was required to incur under the Second Agreement.

5.(ix) Accordingly, the Commercial Court partly allowed the petition under section 34 of the Arbitration Act preferred by SPDC and SoS.

The Second Agreement

6.(i) The Second Agreement signed between SPDC, the SoS and ATPL on 21.12.2002, acknowledged that subsequent to the First Agreement, parties performed various obligations and responsibilities and that it was understood that the ownership of the projects was to be transferred to ATPL, who would develop, own and operate the projects on BOOT basis and not on debt financing and implementation scheme as agreed earlier.

6.(ii) SPDC, the SoS and ATPL agreed that the Second Agreement would supersede the First Agreement.

6.(iii) They also agreed that the project would consist of Rolep, Ralong and Chakungchu with 36 MW, 40 MW and 50 MW,

respectively, as estimated installed capacity. They agreed that ATPL shall operate these projects on BOOT basis for a period of 35 years to be renewed for another 35 years on mutually agreed terms.

6.(iv) They agreed under clause 25 that any variation or amendment to the Second Agreement could be done subject to the parties duly signing any supplementary agreement, which was to be referred as addendum to the Second Agreement. For convenience, clause 25 is again reproduced hereinbelow:-

> "**25.** *Any variation or amendment to this Agreement can be done subject to the parties duly signing any Supplementary Agreement to be referred as addendum to this Agreement*."

6.(v) They made it clear that the Second Agreement sets forth the entire understanding between the parties relating to the subject matter and superseded all other prior agreements and understanding.

6.(vi) ATPL clearly agreed to take over the responsibilities of payment of bond amount to the extent of ₹50.01 crores; interest already paid @ 13.75%; and interest @12.45% to be paid half yearly after reconciliation of accounts. ATPL also agreed to furnish bank guarantee for the said amounts within a period of 12 months of signing of the Second Agreement.

6.(vii) The Second Agreement recorded that ATPL had taken over the responsibility of repayment of the bond and interest thereon on the understanding that the ownership of the projects was transferred to ATPL.

6.(viii) It was agreed that the balance amount of the money raised (₹50.01 crores) lying with SPDC and the SoS was to be

released to ATPL against equal amount of bank guarantee to be submitted by ATPL.

6.(ix) SoS was required to provide land on lease of 99 years to ATPL immediately upon identification of such land jointly by ATPL and SoS. The annual lease rent was quantified at ₹10,000/- per annum, till the projects were with ATPL.

6.(x) SPDC and the SoS, at their cost, were to provide access roads to the major structures of the project as required by ATPL.

6.(xi) SPDC and the SoS were required to complete land acquisition, transfer it to ATPL and also construct access roads to major structures of the projects after confirmation by ATPL regarding required roads and bridges.

6.(xii) ATPL was required to give their confirmation (details of roads and bridges) within six months of signing of the agreement.

6.(xiii) In case SPDC and the SoS gave consent to ATPL to bear the cost of roads and bridges and committed to complete them within reasonable specified time to enable ATPL to complete the projects on time, only then ATPL was required to submit the DPRs for these projects within six months thereafter.

6.(xiv) ATPL was to obtain clearances and approvals from various agencies and organisations of the Government of Sikkim including clearances from the State Forest, Environment and Pollution Control Boards, etc., which were to be facilitated by SPDC and the SoS. Similarly, ATPL was also required to obtain clearances and approvals from Government of India and other agencies outside Sikkim, and SPDC and SoS were to provide the necessary assistance.

6.(xv) ATPL was to provide the SoS 12% of total electricity generated, after deduction of auxiliary consumption and transformation losses free of cost for the first 15(fifteen) years from the date of commencement of commercial production and thereafter from the 16th year, 15% of the total electricity generated after deduction of auxiliary consumption and transformation losses from each of the projects or money equivalent thereof.

6.(xvi) ATPL was also required to give SoS from the year following one year of commencement of commercial production, 2% from their annual net profit of each of these projects, which could be enhanced commensurate with higher power generation and increased profit.

6.(xvii) Clause 24 of the Second Agreement is reproduced hereinbelow:-

> *"**24.** The First Party and the Second Party shall have the right to carry out the survey and investigation/explore/execute any river valley schemes in the upstream as well as downstream of the projects, except those permitted under this agreement, without detriment to the Projects mentioned in this Agreement including their operation, generation, etc. The Third Party shall not have any claim over generation from any other projects existing and being envisaged in the upstream/downstream of the three projects, except those permitted under this Agreement. In case, construction of approach roads including bridges to major structures of Ralong and/or Chakungchu HEPs involve very long time and high cost; or get resistance from Forest and Environment Department of the State/Central Governments; and if their clearances take considerable time; or these two projects, after detail geo-technical investigation, are found to be techno-economically unviable to make the arrangements under this Agreement viable the First Party and the Second party shall immediately allot one or more projects of similar sizes downstream of Ralong and Rolep Projects to be selected by the Third Party, where such road works will involve less time and cost, in favour of the Third Party on the similar terms and conditions as mentioned in this Agreement."*

Submission of the parties

7. Mr. Jishnu Saha, learned Senior Advocate, representing SPDC and the SoS, relying upon the provisions of sections 34 and

37 of the Arbitration Act and the opinions expressed by the Hon'ble Supreme Court on those provisions from time to time submitted that the learned Commercial Court had failed to appreciate that the Award was vitiated on various other grounds besides those which were upheld by the Commercial Court holding that it amounted to the Sole Arbitrator committing patent illegality. He submitted that the Sole Arbitrator went beyond the terms of the Second Agreement and granted reliefs which were not even sought for by ATPL; that the Award was in conflict with the public policy of India as it was in contravention to the fundamental policy of Indian law and also in conflict with the most basic notions of morality or justice; that the Award was vitiated by patent illegality appearing in the face of the Award. Mr. Saha pointed out that the Award reflects non-application of judicial mind inasmuch as the Sole Arbitrator passed the Award beyond what was even claimed by ATPL. It was argued that the Sole Arbitrator had passed the Award in violation of sections 16, 21(1) and (2) of the Specific Relief Act, 1963. He also submitted that in respect of the three (3) HEPs, not a brick or a stone was laid by ATPL and as such, the Award carrying a fantastic sum, will shock the conscience of the Court.

8. Mr. P. K. Das, as representative of ATPL, sought to defend the Award and challenge that part of the impugned judgment rendered by the Commercial Court, which held that some parts of the Award were patently illegal. He argued that in view of the admission of SPDC and the SoS, in reply to the claim petition regarding the relevant time for submission of DPRs, no issue was framed by the Sole Arbitrator. It is the case of ATPL that there is no

statutory provision to support the submission of SPDC and the SoS that until DPRs were submitted by ATPL, their obligation to provide land, access roads and bridges would not commence. The finding of the Sole Arbitrator regarding issues no. 21, 30 and 31 remained unassailed. He argued that the reason for not laying a single brick or stone for any of the HEPs is attributable to the failures of SPDC and the SoS and not ATPL. He argued that SPDC and the SoS had clearly admitted in their appeal that the Second Agreement was not determinable in response to the finding in the Award that their counter claim was barred by limitation. He submitted that the finding of the Sole Arbitrator on issues nos. 26 and 27 has been upheld in the impugned judgment which has not been challenged in their appeal by SPDC and SoS. Various grounds taken in the appeal preferred by SPDC and the SoS were neither taken before the Sole Arbitrator nor before the Commercial Court. The terms of the Second Agreement were modified by the minutes of the meeting dated 09.03.2004, 26.04.2004 and 15.10.2004. The Award is not patently illegal as the Sole Arbitrator had examined each of the issues and rendered his findings on each of them, most of which remains unassailed. The appeal of SPDC and the SoS is an assortment of contradictory pleas which are liable to be rejected. With regard to the grant of ₹265.10 crores by the Sole Arbitrator in the claim of ATPL for damages of ₹120 crores only, Mr. Das submitted that the Sole Arbitrator had considered the cost escalation from the date of termination, i.e., 02.05.2008, till the filing of the claim petition, i.e., 02.05.2012, on civil costs as per CEA/CWC norms. It was further argued that the calculation of price

escalation as provided by ATPL as annexure 'A' to their replication remain unassailed by SPDC and the SoS. Thus, SPDC and the SoS were precluded from challenging it before this Court. With regard to the Sole Arbitrator awarding more than what was claimed for, Mr. Das submitted that even if the Award is considered as perverse on that ground, the same did not go to the root of the matter and therefore the entire Award could not be set aside.

The relevant provisions of the Arbitration & Conciliation Act, 1996

9. Sections 34 and 37 of the Arbitration Act, to the extent relevant, are set out hereunder:-

> *"**34. Application for setting aside arbitral award.** — (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
> *(2) An arbitral award may be set aside by the Court only if —*
> *(a) the party making the application furnishes proof that—*
> *……..*
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration:*
> *Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or*
> *……*
> *(b) the Court finds that —*
> *……..*
> *(ii) the arbitral award is in conflict with the public policy of India.*
>
> *[Explanation 1.- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, —*
> *(i)The making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or*
> *(ii)it is in contravention with the fundamental policy of Indian law; or*
> *(iii)it is in conflict with the most basic notions of morality or justice.]*
>
> *[Explanation 2. – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]*
> *(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the fact of the award:*

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or buy reappreciation of evidence.]
……

x x x

37. Appealable orders.- *(1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:-*

…….
(c) setting aside or refusing to set aside an arbitral award under section 34.
……..."

Law laid down by the Hon'ble Supreme Court

Renusagar Judgment

10.(i) The Hon'ble Supreme Court in ***Renusagar Power Co. Ltd. vs. General Electric Co.***[1], construed the term "public policy" under section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, and held that an award contrary to (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality; would be set aside on the ground that it would be contrary to the public policy of India.

Scope of Section 34 of the Arbitration & Conciliation Act, 1996

10.(ii) In ***Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.***[2], the Hon'ble Supreme Court construed the expression, "the public policy of India" contained in section 34(2)(b)(ii) of the Arbitration Act, 1996 and held that award could be set aside if it is contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. It

[1] (1994) Supp (1) SCC 644

[2] (2003) 5 SCC 705

was also held that the illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.

10.(iii) The Hon'ble Supreme Court in ***McDermott International Inc. vs. Burn Standard Co. Ltd. & Others***[3] held that the Arbitration Act makes provision for the supervisory role of Courts for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only; like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The Court cannot correct errors of arbitrators. It can only quash the award leaving the parties free to begin arbitration if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the Court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. The Hon'ble Supreme Court also examined judgments of various High Courts and thereafter concluded that there can be no doubt that given the law laid down by it, section 34 of the Arbitration Act cannot be held to include within it a power to modify an award. The jurisdiction of the Court and the scope of Section 34 of the Arbitration Act is thus sufficiently clear.

---

[3] (2006) 11 SCC 181

10.(iv) In ***Associate Builders vs. Delhi Development Authority***[4], the Hon'ble Supreme Court examined section 34 of the Arbitration Act and the various judgments rendered and went on to explain the various grounds available in interfering with arbitral awards. Disregarding orders of Superior Courts in India as well as the binding effect of the judgment of the Superior Court was considered as being contrary to the fundamental policy of Indian law. It was also held that equally important and fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Non-application of mind is a defect that is fatal to any adjudication. A decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Judicial approach ensures that authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults and can render the decision of a Court, tribunal or authority vulnerable to challenge. It was held that the juristic principle of a judicial approach demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective. It was also held that it was neither necessary nor proper to attempt an exhaustive

[4] (2015) 3 SCC 49

enumeration of what constitutes the fundamental policy of Indian law nor is it possible to place the expression in the straightjacket of a definition. The Hon'ble Supreme Court also explained the next ground on which an award may be set aside, i.e., that it is contrary to the interest of India and held that this ground is to evolve on a case to case basis. The Hon'ble Supreme Court held that the third ground of public policy is, if an award is against justice or morality. The fourth ground available according to the Hon'ble Supreme Court was patent illegality. It was held that contravention of substantive law of India would result in the death knell of an arbitral award. It was explained that such illegality must go to the root of the matter and cannot be of trivial nature. A contravention of the Arbitration Act itself would be regarded as patent illegality. Contravention of section 28(3) of the Arbitration Act was also held to be the third subhead of patent illegality. The Arbitral Tribunal is required to decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. A caveat, however, cautioned that 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 the 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 would do. It is settled law that where a finding is based on no evidence, or an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or ignores vital evidence in arriving at his decision, such decision would necessarily be perverse. The next

ground on which an award may be set aside is that it is contrary to the interest of India which concerns itself with India as a member of the world community in its relation with foreign power. The third ground of public policy is, if an award is against justice or morality. An award can be said to be against justice only when it shocks the conscience of the Court. It was also held patent illegality as a principle contains three sub-heads, i.e., contravention of substantive law of India, contravention of the Arbitration Act and contravention of the terms of the contract.

10.(v) In ***Maharashtra State Electricity Distribution Co. Ltd. vs. Datar Switch Gear Ltd. & Others***[5], the Hon'ble Supreme Court had held that a Court hearing a section 34 petition does not sit in appeal.

10.(vi) In ***Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)*** [6], the Hon'ble Supreme Court explained that under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Courts cannot intervene on the merits of the award. It also clarified that violation of principles of natural justice would continue to be a ground for challenge of an award. The Hon'ble Supreme Court explained that the ground for interference on the basis that the award is in conflict with justice and morality is to be understood as a conflict with the *"**most basic notions of morality or justice and it is only such arbitral award that shocks the conscience of the Court that can be set aside on this ground**."* It was also opined that patent illegality appearing on the face of the award

[5] (2018) 3 SCC 133
[6] (2019) 15 SCC 131

which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law may also be a ground of challenge. Re-appreciation of evidence was held not permissible under the ground of patent illegality appearing on the face of the award. A mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. However, if the arbitrator gives no reason for an award and contravenes section 31(3) of the Arbitration Act, that would certainly amount to patent illegality on the face of the award. It was held that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under section 34(2-A). A finding based on no evidence at all or an award which ignores vital evidence in arriving at his decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence in as much as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

10.(vii) The Hon'ble Supreme Court in ***MMTC Ltd. vs. Vedanta Ltd***.[7] held that a section 34 proceedings does not contain any challenge on the merits of the award.

10.(viii) In ***PSA Sical Terminals Pvt. Ltd. Vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others***[8], the Hon'ble Supreme Court held that it is more than settled legal position that in an application under section 34, the Court is not expected to act as an Appellate Court and re-appreciate the evidence. The scope of interference will be limited to grounds provided under section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "*public policy of India*", which has been held to mean, "*the fundamental policy of Indian law*". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "***most basic notions of morality or justice***". It is only such arbitral award that shocks the conscience of the Court that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, re-appreciation of evidence would

---

[7] (2019) 4 SCC 163
[8] 2021 SCC Online SC 508

not be permissible on the ground of patent illegality appearing on the face of the award. A decision which is perverse, though, would not be a ground for challenge under "*public policy of India*", would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. It was also held that to understand the test of perversity it would be relevant to refer to paragraphs 31 and 32 from the judgment in ***Associate Builders*** (supra).

10.(ix) In ***State of Chhattisgarh & Another vs. Sal Udyog Private Limited***[9], the Hon'ble Supreme Court explained what constitutes patent illegality and held that when the arbitrator fails to decide matters in accordance with the terms of contract governing the parties, it would attract patent illegality thereon.

10.(x) In ***Indian Oil Corporation Ltd. vs. Shree Ganesh Petroleum Rajgurunagar***[10] and ***Delhi Airport Metro Express Private Limited vs. Delhi Metro Rail Corporation Limited***[11], the Hon'ble Supreme Court reiterated the restricted grounds on which only an award may be interfered with and set aside.

Scope of section 37 of the Arbitration & Conciliation Act, 1996

11.(i) We shall now examine the jurisdiction and scope of section 37 of the Arbitration Act. In ***Punjab State Civil Supplies Corporation Ltd. and Another vs. Ramesh Kumar and Company and***

---

[9] (2022) 2 SCC 275
[10] (2022) 4 SCC 463
[11] (2022) 1 SCC 131

Others[12], the Hon'ble Supreme Court held that the jurisdiction in a first appeal arising out of a decree in a civil suit is distinct from the jurisdiction of the High Court under section 37 of the Arbitration Act arising from the disposal of a petition challenging an arbitral award under section 34. It was held that the High Court was required to determine as to whether the District Judge had acted contrary to the provisions of section 34 of the Arbitration Act in rejecting the challenge to the arbitral award.

11.(ii) In ***Haryana Tourism Ltd. vs. Kandhari Beverages Ltd.***[13], the Hon'ble Supreme Court held that the award can be set aside under section 34/37 of the Arbitration Act, if the award is found to be contrary to (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. It also held that the High Court while deciding an appeal under section 37 cannot enter into the merits of the claim.

11.(iii) In ***Dr. A. Parthasarathy and Others vs. E. Springs Avenues Pvt. Ltd. and others***[14], the Hon'ble Supreme Court reiterated that under section 37 of the Arbitration Act, the Court cannot remand the matter to arbitrator for fresh decision unless it is consented by both the parties following the law laid down in ***Kinnari Mullick vs. Ghanshyam Das Damani***[15] and ***I-Pay Clearing Services Pvt. Ltd. vs. ICICI Bank Ltd***.[16]. It held that only two options are available to the Court considering the appeal under section 37 of the Arbitration Act. The High Court may either relegate the parties for fresh arbitration or to

---

[12] 2021 SCC OnLine SC 1056
[13] (2022) 3 SCC 237
[14] (2022) SCC OnLine SC 719
[15] (2018) 11 SCC 328
[16] (2022) SCC OnLine SC 4

consider the appeal on merits on the basis of the material available on record within the scope and ambit of the jurisdiction under section 37 of the Arbitration Act.

Consideration

12. ATPL had, in their claim petition, sought for the following reliefs:-

> ***"A]*** *Pass an Award of Specific Performance in favour of the Claimant Company and against the Opposite Parties thereby enforcing the Terms of the Agreement dated 21.12.2002 and thereby directing the Opposite parties to perform all their obligations under the said Agreement in a time bound manner; and*
>
> ***B]*** *Pass an Award of Perpetual Injunction in favour of the Claimant Company and against the Opposite Parties thereby restraining the Opposite parties from dealing with the 3 Hydro Electric Projects contrary to Agreement dated 21.12.2002; and*
>
> ***C]*** *Pass an Award of Mandatory Injunction in favour of the Claimant Company and against the Opposite parties thereby directing the Opposite parties to implement the 3 Hydro Electric Projects in terms of the Agreement dated 21.12.2002; or*
>
> ***D]*** *In the alternative to prayer [A], [B] and [C], pass an Award of Damages in favour of the Claimant Company and against the Opposite Parties for a sum of ₹418.50 Crores; and*
>
> ***E]*** *Pass an Award of Declaration in favour of the Claimant Company and against the Opposite Parties declaring that the letter of termination dated 02.05.2008 is illegal, malafide and void and has no legal effect; and*
>
> ***F]*** *Pass an Award of Damages in favour of the Claimant Company and against the Opposite Parties for a sum of ₹496,689,279/- (Rupees Forty Nine Crores Sixty Six Lakhs Eighty Nine Thousand Two Hundred and Seventy Nine only) in terms of Paragraph 76 of the Claim Petition; and*
>
> ***G]*** *Pass an Award of Damages in favour of the Claimant Company and against the Opposite Parties for a sum of ₹471,353,405/- (Rupees Forty Seven Crores Thirteen Lakhs Fifty Three Thousand Four Hundred and Five only) in terms of Paragraph 77 of the Claim Petition; and*
>
> ***H]*** *Pass an Award of Damages in favour of the Claimant Company and against the Opposite Parties for a sum of ₹1,080,000,000/- (Rupees One Hundred and Eight Crores) in terms of Paragraph 78 of the Claim Petition; and*
>
> ***I]*** *Award of Damages in favour of the Claimant Company and against the Opposite Parties for a sum of ₹1,200,000,000/- (Rupees One Hundred and Twenty Crores) in terms of paragraph 79 of the Claim Petition; and*

> ***J]*** *Pass an Award of interest in favour of the Claimant Company and against the Opposite Parties from the date of breach at the rate of 18 per cent per annum; and*
>
> ***K]*** *Pass an Award of cost of the instant arbitral proceedings in favour of the claimant company and against the opposite parties; and*
>
> ***L]*** *Pass such other and further Award(s)/order(s) in favour of the claimant company and against the opposite parties as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."*

13. The award of a fantastic sum as damages by the Sole Arbitrator has caught our attention. That apart and in any event, the conscience of this Court has been rudely shaken upon going through the entire facts and circumstances of the instant case. Admittedly, although the Second Agreement was signed in the year 2002, till date, not a single brick or stone has been laid by ATPL for any of the three HEPs. It is ATPL's case that because of the defaults of SPDC and the SoS, they had not been able to do so. A cursory glance of the prayers quoted above reflects, however, that only prayer [F] for damages for a sum of ₹496,689,279/- (Rupees forty-nine crores, sixty-six lakhs, eighty-nine thousand, two hundred and seventy-nine only), was the claim for actual expenditure. The claim of ATPL, however, was that they had incurred total expenditure of ₹220,278,098/- (Rupees twenty-two crores, two lakhs, seventy-eight thousand and ninety-eight only), for field investigation and survey, preparation of DPR, environmental studies, geo-technical and geo-physical investigation, construction of temporary structures, drilling on the river, gauge and discharge system and cost of establishment, cost of site establishment and cost of consultancy. This will appear from ATPL's claim petition itself. Evidently, ATPL's claim as actual expenditure was only for

preliminary works. As against the actual expenditure, admittedly incurred by ATPL, the Sole Arbitrator has awarded ₹4,40,55,44,212/- (Rupees four hundred and forty crores, fifty-five lakhs, forty-four thousand, two hundred and twelve only), as award of claim in prayer [F], [G] and [I] along with interest thereon and ₹10,95,22,00,945/- (Rupees one thousand ninety-five crores, twenty-two lakhs, nine hundred and forty-five only), in the alternative, if award [A], [B] and [C] are not discharged by SPDCL and the SoS in favour of ATPL. Admittedly and significantly, all this in the absence of any DPRs, save and except one DPR for the Rolep HEP and that too, at the initial stage and limited to 36 MW.

Prayer [D]

14. The Commercial Court has held that the Sole Arbitrator has committed patent illegality by awarding damages in terms of prayer [D] of Rs.418.50 crores when ATPL itself has sought for it ***only in the event*** the Sole Arbitrator did not award prayers [A], [B] and [C] in his favour. Prayer [A] was for specific performance of the Second Agreement. Prayer [B] was for award for perpetual injunction restraining SPDC and the SoS from dealing with the three HEPs contrary to the Second Agreement. Prayer [C] was for award of mandatory injunction directing SPDC and the SoS to implement the three HEPs in terms of the Second Agreement. The Sole Arbitrator granted all the three prayers [A], [B] and [C] and thereafter also decided to examine prayer [D] and granted it against SPDC and the SoS, in case they failed to adhere to prayers [A], [B] and [C]. In ***Associate Builders*** (supra), the Hon'ble Supreme Court

has held that an award can be said to be against justice only when it shocks the conscience of the Court. The Hon'ble Supreme Court illustrated it by giving an example of a claimant being content with restricting his claim to a particular amount in a statement of claim before the arbitrator and at no point seeking anything more. The arbitral award, however, awarded him much more than his claim without any acceptable reason or justification. In the present case as well, although the claim was precisely for grant of prayers [A], [B] and [C] and if the Sole Arbitrator did not grant those prayers, ATPL had sought for damages as claimed in prayer [D] as an alternative, the Sole Arbitrator nevertheless went beyond the scope of the prayers made by ATPL and granted prayer [D] without any acceptable reason or justification even after granting prayers [A], [B] and [C].

15. This part of the Award is also against section 21 of the Specific Relief Act, 1963. When the Sole Arbitrator awarded specific performance in terms of prayer [A], compensation could be granted only on a finding that it was not sufficient to satisfy the justice of the case. There was no such finding recorded by the Sole Arbitrator. Further, the Sole Arbitrator could not have awarded compensation unless ATPL had claimed such compensation in its claim petition. When, therefore, ATPL had sought for damages in terms of prayer [D] as an alternative to non-grant of prayers [A], [B] and [C], the Sole Arbitrator was not authorised or competent to even determine the compensation sought for in prayer [D], leave alone grant the same in the manner he did.

16. Further, section 36 of the Arbitration Act provides for enforcement of arbitral award in accordance with the provisions of the Code of Civil Procedure, 1908, as if it were a decree of a Court. When, thus, the Sole Arbitrator granted prayer [A] for specific performance of Second Agreement — obviously, on the conclusion that it could have been specifically performed — there was no need for the Sole Arbitrator to ignore section 36 of the Arbitration Act. The presumption that at some future stage, SPDC and SoS would not be able to specifically perform and based on such presumption, proceeding not only to determine the compensation payable on such failure — but even going ahead to grant it — was grossly and patently erroneous on part of the Sole Arbitrator.

17. The sole ground of determining prayer [D] that SPDC and the SoS may not, in the future, specifically perform the contract, therefore, is not an acceptable reason or justification. It is held that the award of damages in terms of prayer [D] by the Sole Arbitrator would squarely fall as one which is contrary to justice and which shocks the conscience of this Court. The conclusion of the Commercial Court setting the Award in terms of prayer [D] aside is upheld.

Prayer [I]

18. Prayer [I] was a claim for damages for a sum of ₹120 crores for loss suffered towards cost escalation in the cost of three HEPs with effect from 02.05.2008. The basis of this claim was that if ATPL had to complete the project in accordance with the Second Agreement, it would have been completed by 02.05.2008. According

to ATPL, the cost of civil construction of the project was ₹4 crores per MW which had escalated by 6% per annum from 02.05.2008 till the date of construction. ATPL claimed that as on the date of the claim, the total cost escalation caused due to failure of SPDC and the SoS was ₹120 crores for 126 MW of the three HEPs. The Sole Arbitrator granted ₹265.10 crores to ATPL for cost escalation instead. The Sole Arbitrator completely ignored or lost complete sight of the crucial fact that ATPL had not even laid a single brick or stone for any of the projects or submitted the fundamental requirement of DPRs for Chakungchu and Ralong HEPs till date for the project to see even the light of day. By the same reasoning, as held above, the grant of an award of damages of the sum of ₹265.10 crores, when ATPIL had sought for a specific sum of ₹120 crores only — in prayer [I] — as their claim for cost escalation, necessarily requires to be set aside, being against the most basic notions of justice and which shocks the conscience of the Court.

Prayer [A] – *on the issue of specific performance*

19. Prayer [A] sought specific performance of the Second Agreement directing SPDC and the SoS to perform their obligations under it. This prayer was not amended by ATPL. The Sole Arbitrator framed issue no.6 to the effect whether ATPL is entitled to an award of specific performance in its favour for enforcement of the Second Agreement. Thus, it is certain that ATPL had not sought for specific performance of those minutes of the meetings. The Sole Arbitrator had held that ATPL sought direction upon SPDC and the SoS to perform their obligations under the Second Agreement and what

was decided on 15.10.2004. The Sole Arbitrator infers this from paragraph 82 of the claim petition. Contrarily, in paragraph 82 of the claim petition, ATPL has not sought so. The Sole Arbitrator, therefore, clearly went beyond the pleadings and the prayer of ATPL in order to hold as above.

On minutes of the meeting held on 15.10.2004

20. While answering issue no.6, the Sole Arbitrator has also referred to issue no.3. Issue no.3 framed by the Sole Arbitrator was whether the terms of the Second Agreement stood modified, as pleaded by ATPL. The Sole Arbitrator refers to the contention of ATPL with regard to issues no. 3, 22 and 23 in paragraphs 276 to 278 of the Award. In paragraph 278, the Sole Arbitrator records that "*.....thereafter another joint meeting was held on 15.10.2004 which resulted in clear modification of the agreement dated 21.12.2002*." Besides that sentence, the Sole Arbitrator has not set out any contention of ATPL that the Second Agreement stood modified by subsequent minutes of the meetings between the parties.

21. Issues are framed based on the pleadings of the parties. The claim petition does not assert that the Second Agreement stood modified by minutes of any meetings held between the parties. Even if the Sole Arbitrator was of the opinion that ATPL had, in fact, pleaded that the minutes of the meeting dated 15.10.2004 had modified the Second Agreement, it was clearly contrary to the record of the said minutes. The minutes of the meeting dated 15.10.2004 was entered between the SoS, ATPL and Larsen & Toubro (L&T) and not between the parties to the Second

Agreement. On a cursory glance of the minutes of the meeting, it is clear that L&T had reconfirmed their interest in developing the three HEPs and that their consortium would be the single largest shareholder in the Special Purpose Vehicle (SPV) in which ATPL would also be a shareholder. L&T also wanted the confirmation by the SoS that the projects had been allotted to ATPL on competitive bidding and they had no objection in joining the SPV as the single largest shareholder for implementation of the projects. L&T also informed that the SPV would develop Rolep followed by Chakungchu and Ralong HEPs. The said minutes also record that if the SoS fulfil their commitments on the five points therein, SPV agreed to release ₹50.01 crores by February 2007 which would be utilised by SoS towards repayment of the principle bond amount and the balance principle amount lying in the bank along with ₹5 crores advanced to ATPL (who, in turn, have advanced ₹1.85 crores to L&T) shall be utilised for servicing the interest. In order to implement the project on time, the SoS committed to provide all infrastructure and State level clearances as detailed therein. Further, the minutes of the meeting dated 15.10.2004 clearly records that it would be formalised by a detailed agreement between the SoS, SPDC, ATPL and L&T, which was never done. The claim petition asserts an agreement entered between ATPL and L&T. It is thus clear that the minutes recorded the broad understanding if L&T came forward and took over the projects from ATPL by forming an SPV with them as the single largest party and ATPL as a shareholder only. Admittedly, this did not happen. Unfortunately, the Sole Arbitrator not only completely ignored this crucial fact and sought to impose the

obligation under the minutes of 15.10.2004 on SPDC and the SoS in favour of ATPL — in a manner which is in gross ignorance of the record before him — he also lost sight of the fact that L&T was never made a party before the Arbitral Tribunal by ATPL at any point of time. The subsequent minutes also do not dwell on this crucial aspect.

On minutes of the meeting held on 09.03.2004

22. The minutes of the meeting dated 09.03.2004 also records clearly that it was chaired by the then Chief Secretary for review of progress of the three HEPs. It also records that the presence of L&T and ATPL was required to forward copy of specification issued by them to L&T to SPDC. Again, certain steps contemplated to be taken by the parties in the review meeting held by the then Chief Secretary in the presence of L&T which ultimately did not take over the project could not have firstly modified the Second Agreement, as held by the Sole Arbitrator and the Commercial Court and secondly, could not have bound SPDCL and the SoS, especially in the absence of L&T as a party to the Arbitral proceeding.

On minutes of the meeting held on 26.4.2004

23. The minutes of the meetings held on 26.04.2004 also reveal that it was held by the then Chief Secretary to take stock of the progress of the three HEPs, clear bottlenecks and never intended to modify the Second Agreement.

24. Under section 63 of the Indian Contract Act, 1872, there must be a clear intention to relinquish a right that is fully known to a

party, as waiver is an intentional relinquishment of a known right. The minutes of the meetings referred to, does not reflect such clear intention. In view of the specific clause 25 of the Second Agreement, we are also of the considered view that the minutes of the above meetings could not have modified the Second Agreement as held by the Sole Arbitrator and the Commercial Court, ignoring what was clearly written in the said minutes of the meetings, and reading only those paragraphs which would give an impression that SPDC and the SoS had agreed to modify the Second Agreement.

25. The Award of the Sole Arbitrator granting specific performance of the Second Agreement, which was held modified by the minutes of the meeting dated 15.10.2004, is beyond prayer [A] of ATPL's claim petition and thus, wholly contrary to justice and which shocks the conscience of this Court. The finding of the Sole Arbitrator on this aspect is also against the terms of the Second Agreement, which the Sole Arbitrator directed specific performance of. The Sole Arbitrator has clearly committed an error of jurisdiction wandering outside the scope and purview of the Second Agreement.

26. Further, the Second Agreement was in terms of Article 166 and 299 of the Constitution of India and expressed to be made by the Governor of the State of Sikkim. Article 299 specifically provides that contracts made in exercise of executive power of the State shall be expressed to be made by the Governor or other specified authority and shall be executed on behalf of the Governor by such persons and in such manner as he may direct or authorise.

In ***Chatturbhuj Vithaldas Jasani vs. Moreshwar Parashram and others***[17]***,*** the Hon'ble Supreme Court held that Article 299 was not inserted for the sake of mere form and the provision was there to safeguard against unauthorised contracts. It was also held that if, in fact, a contract is unauthorised or in excess of authority, the Government should be safeguarded. The language of Article 299 therefore suggests that any variation in terms of the contract made under it should also be made in accordance with the same procedure as the original contract. The minutes of the meetings referred to above does not comply with the provisions of Article 299 of the Constitution of India as well apart from the crucial fact that it is not even in accordance with the specific clause, being clause 25 of the Second Agreement.

27. While granting specific performance, the Sole Arbitrator directed SPDC and the SoS to make over the required land, access roads and bridges for Rolep, Chakungchu and Ralong HEPs within a specified time-frame in terms of the Second Agreement, as stood modified by the minutes of meeting dated 15.10.2004. It does not, however, spell out what were the required lands, access roads and bridges to be provided by SPDC and the SoS. More importantly, the Second Agreement contains various reciprocal obligations between the parties. The Sole Arbitrator has not directed fulfilling of any of the reciprocal obligations of ATPL except for directing it to make payments of certain amounts for getting land and access roads for

---

[17] A.I.R. 1954 S.C. 263

bridges for Rolep HEP, land and access roads for bridges for Chakungchu HEP and land and access roads for Ralong HEP.

28. The Second Agreement required each of the party to perform certain obligations. As admitted by ATPL in the claim petition itself, the ownership of the three HEPs was transferred to ATPL, which was stipulated under clause one (1). The first clause also stipulated that ATPL was to develop, own, operate these projects on BOOT basis. However, admittedly, none of the projects have been developed with the laying of even one brick or a stone, leave alone being operated by ATPL. By clause two (2), as seen above, ATPL agreed to take over the responsibility of payment of bond amount to the extent of ₹50.01 crores; interest at the rate of 12.45%, payable half yearly; and interest already paid at a higher rate (13.75%) after reconciliation of account which was to be completed within 60 days of signing of the Second Agreement. Admittedly, reconciliation of account was completed on 19.02.2002, within the period of 60 days of signing of the Second Agreement. Thus, ATPL was bound to take over the responsibility of payment of bond amount and interest thereon as aforesaid after reconciliation of account on 19.02.2002. ATPL was to also furnish necessary bank guarantee from a Nationalised Bank for ₹50.01 crores as well as guarantees for payment of interest within a period of 12 months from signing of the Second Agreement. However, admittedly, ATPL has not done so, till date.

29. The Second Agreement clearly records that SPDC and the SoS had under the First Agreement borrowed funds of the said amount of ₹50.01 crores through bonds to finance the

implementation of the three HEPs, which was required to be repaid. The Sole Arbitrator, however, held issues nos.3, 22 and 23 in favour of ATPL and thereby further held that the Second Agreement had been modified in the meeting of the parties dated 09.03.2004, 26.04.2004 and 15.10.2004; that after the meeting of the parties dated 15.10.2004, ATPL was no longer responsible to repay the bond holder; and that SPDC and the SoS had relinquished their claim for bank guarantee.

30. We have already concluded that the minutes of the meetings could not have either modified or amended the Second Agreement for four clear reasons. Firstly, clause 25 of the Second Agreement clearly envisaged a "***supplementary agreement***" to be termed as an "***addendum***" signed by the parties for any variation or amendment thereof, which was never done. Thus, there was a clear bar of doing it in any other manner other than what had been specifically agreed upon by and between the parties under clause 25 of the Second Agreement. It would have been a different scenario had clause 25 specifically allowed the parties to modify and/or vary and/or amend the Second Agreement by means of holding meetings and recording in its minutes of any decision to modify and/or vary and/or amend the Second Agreement. Secondly, the minutes of the meeting held on 15.04.2004 were on the proposal of L&T coming into the picture and taking over the projects, which did not happen. Consequently, SPDC and the SoS cannot be held bound by the minutes of the meeting of 15.04.2004 without L&T taking over the projects. Similarly, as stated earlier, L&T was never made a party. Thirdly, the minutes of the other meetings were only for the purpose

of the then Chief Secretary taking stock of the projects and attempting to clear the bottlenecks and not for the purpose of amending the Second Agreement. Fourthly, Article 299 of the Constitution of India prohibits the amendment of a Government contract like the Second Agreement, without its compliance. Additionally, a holistic reading of the Second Agreement makes it apparent that SPDC and the SoS had clearly transferred their liability under the First Agreement, having borrowed ₹50.01 crores, to ATPL and that ATPL had agreed to take it over. This was the most essential condition of the Second Agreement. However, the Sole Arbitrator, as well as the Commercial Court, completely ignored the record of the case which was most material and held that the minutes of the meeting dated 15.10.2004 with L&T had modified the Second Agreement and that SPDC and the SoS had abandoned their right under the Second Agreement. Although, we would like to exercise caution and restraint, we cannot ignore the fact that the findings of the Sole Arbitrator borders towards perversity.

31. For the above reasons, it is also held that the finding of the Sole Arbitrator that ATPL was no longer required to pay the bond amount or give the bank guarantee in terms of the Second Agreement is patently illegal on the face of the Award and liable to be set aside. Additionally, it is also held that the Sole Arbitrator has construed the contract in a manner that no fair minded or reasonable person would and that his view is not even a possible view to take, even remotely.

32. At this juncture, it would be important to examine the finding of the Sole Arbitrator that SPDC and the SoS had failed to

perform their part of the Second Agreement by providing ATPL with lands and access roads and bridges.

33. The Second Agreement, envisaged ATPL doing the preliminary survey, making the DPRs and identifying specific locations for establishing the major structures of the projects, requiring and confirming the access roads to the major structures from SPDC and the SoS. SPDC and the SoS were then to provide access roads as required and confirmed by ATPL at their cost. Admittedly, land in Rolep was provided on lease to ATPL when ATPL submitted their preliminary and the only DPR. Admittedly, ATPL never submitted any DPR either for Chakungchu or Ralong HEPs. Without the DPRs — being an essential part for the purpose of giving shape to the HEPs under the agreement — there has been no progress at all.

34. Admittedly, ATPL has submitted only one DPR, i.e., for 36 MW Rolep HEP. Quite evidently for development of the three HEPs, as envisaged in the Second Agreement, to be built, owned, operated and subsequently transferred to SPDC and the SoS by ATPL, it was important for ATPL to have prepared and submitted DPRs to provide for a proper road map for all the projects' successful execution. As ATPL was to build, own and operate it, quite obviously, as envisaged in the Second Agreement, ATPL was to provide for details of roads and bridges and require it from SPDC and the SoS. ATPL was also required to submit the DPRs and in case SPDC and the SoS gave their consent to bear the cost of roads and bridges and commit to complete these within reasonable specified time to enable ATPL to complete the projects on time, ATPL was

then required to submit the DPRs of these projects within six months thereafter. SPDC gave the confirmation of the expenditure incurred by SPDC and the SoS in terms of clause 13 of the Second Agreement, towards the three HEPs on 02.09.2003. Thus, ATPL was contractually bound to submit the DPRs for the three HEPs within six months from 02.09.2003. The record, however, clearly reveals that this was not done.

35. The Sole Arbitrator as well as the Commercial Court have completely misread the terms of the Second Agreement to mean that there was no requirement for ATPL to submit DPRs. This finding is not only against the terms of the Second Agreement but also against sheer common sense and logic. The terms of the Second Agreement did not and could not have implied that ATPL, the proposed builder, owner and operator may not submit DPRs for such huge projects. It would be unfathomable that such hydro-electric power projects could be executed without any DPRs that would outline its feasibility, viability and potential. It would be equally absurd to think that without any detailed information about the projects, including its scope, objective, budget, timelines, etc., prepared by experts, such hydro-electric power projects would see the light of day.

36. The fact that ATPL had submitted DPR for 36 MW Rolep HEP in three volumes covering various aspects of the project asserts the indispensible nature of DPRs for the proposed HEPs. We are, therefore, constrained to notice that the Sole Arbitrator has awarded specific performance of the Second Agreement, as held modified by the minutes of the meeting dated 15.10.2004, without the DPRs.

37. It was argued on behalf of ATPL that the Sole Arbitrator did not even frame an issue with regard to the relevant time for submission for DPRs as SPDC and the SoS in their reply to the claim petition filed by ATPL had admitted certain facts. However, to the contrary, SPDC and the SoS took a clear stand that ATPL had failed to submit DPRs, as required, in their reply to the claim petition.

38. We are of the considered view that this approach of the Sole Arbitrator as well as of the Commercial Court is contrary to not only the terms of the Second Agreement but also to common sense and logic. We hold that the Award of specific performance by the Sole Arbitrator, in the manner as aforesaid, amounts to patent illegality on the face of the award and shocks the conscience of this Court as it veers towards perversity.

39. The Commercial Court while examining the appeal of SPDC and the SoS against the Award under section 34 of the Arbitration Act, went on to uphold the grant of specific performance in favour of ATPL. However, it is seen that the Commercial Court did not examine the grant of specific performance of the Second Agreement, as held modified by minutes of the meeting dated 15.10.2004. Thus, for the same reason for setting aside the Award of specific performance by the Sole Arbitrator, we set aside the finding of the Commercial Court as well.

40. As we have held that the minutes of the meetings between the parties do not amount to modification of the Second Agreement, it necessarily follows that the parties were bound to carry out their respective obligations. It was ATPL who approached the Sole Arbitrator for arbitration by filing the claim petition seeking

specific performance of the Second Agreement. As held by the Hon'ble Supreme Court in ***C. Haridasan vs. Anappath Parakkattu Vasudeva Kurup & Others***[18], the provisions of section 16 of the Specific Relief Act, 1963, have to be mandatorily complied with by the parties seeking relief of specific performance. The relief of specific performance cannot be granted in favour of a party who has not performed his obligations under the contract. Section 16 provides that specific performance of a contract cannot be enforced in favour of a person, *inter alia*, who has become incapable of performing, or violates any essential term of the contract that on his part remains to be performed, or acts in fraud of a contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

41. If it is the contention of ATPL that by the subsequent minutes of the meetings they were not required to perform an essential term of the contract of taking over the bond amount and interest thereon which had been borrowed by SPDC and the SoS in terms of the First Agreement, quite clearly, ATPL has become incapable of performing and violated the essential term of the Second Agreement and thus, could not have sought its specific performance. Thus, the question of award of compensation under

---

[18] (2023) SCC Online 36

section 21 of the Specific Relief Act, 1963, as argued by ATPL, does not arise. In ***Kanshi Ram vs. Om Prakash Jawal & Others***[19]***,*** the Hon'ble Supreme Court held that it is well settled law that granting decree for specific performance of a contract of immovable property is not automatic. It is one of discretion to be exercised on sound principles.

42. The Sole Arbitrator found that SPDC and the SoS had the right to modify the terms of the agreement under section 63 of the Indian Contract Act, 1872 and therefore, they were bound by the decision taken in those meetings. Section 63 only recognises the right of every promisee to dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit. However, it does not deal with the manner in which a party could dispense with it. This manner was clearly envisaged in clause 25 of the Second Agreement and, therefore it could have been done only in terms of clause 25 and in no other way. The reliance of the Sole Arbitrator to section 63 of the Indian Contract Act, 1872 to validate the theory of modification of the Second Agreement by the subsequent minutes of the meeting was clearly misdirected.

43. It is seen that the Sole Arbitrator has taken in oral deposition of witnesses contrary to the clear language of the terms of the Second Agreement, the minutes of the meetings as well as various exchanges between the parties and by doing so held that

---

[19] (1996) 4 SCC 593

the terms of the Second Agreement had been completely varied so as to even do away with one of the essential obligations of ATPL to take over the responsibility of the payment of bond amount, interest thereon and also provide bank guarantee for the same. It is settled law that a document speaks for itself and no oral evidence can be admitted to contradict, vary, add or subtract from its express terms. The finding of the Sole Arbitrator to that extent is contrary to the fundamental policy of Indian law. It reflects patent illegality appearing on the face of the award, which goes to the root of the matter and not just mere misapplication of the law.

Prayer [E] - *on termination of the Second Agreement*

44. The learned Commercial Court upheld the opinion of the Sole Arbitrator that neither the letter dated 26.02.2006 nor the letter dated 02.05.2008 had the effect of terminating the Second Agreement. It opined that the unilateral decision of the SoS to issue letter dated 02.05.2008 cannot be considered to be the decision of SPDC automatically as it was a separate legal entity. A perusal of the Second Agreement makes it apparent that there were three parties to it. The parties were separate legal entities who had entered the Second Agreement with specific obligations and liabilities. It also reflects that there was a specific provision for serving of notices to each of the parties. Clause 28, which was invoked by ATPL, is the arbitration clause which provided that all matters, questions, disputes or differences whatsoever arising between the parties in respect of construction, meaning, operation or effect of the contract or relating to the contract or relating to

breach thereof shall be settled by way of arbitration. It is contended that the Second Agreement does not contain a termination clause and therefore it could not have been terminated. In ***Rajasthan Breweries Limited vs. The Stroh Brewery Company***[20]**,** a Division Bench of Delhi High Court held that even in the absence of a specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. The Second Agreement was an agreement for developing HEPs. The Second Agreement envisaged ATPL developing, owning and operating these HEPs on BOOT basis for a period of 35 years to be renewed for another 35 years on mutually agreed terms and conditions. 70 years was the outer limit of the total period contemplated by the Second Agreement for ATPL to operate the HEPs. ATPL was to transfer the ownership of the three HEPs after the expiry of the period envisaged therein. The Second Agreement also contains certain essential conditions to be fulfilled within certain timelines. The first of which, as envisaged by the Second Agreement, was for SPDC and the SoS to transfer the ownership of the three HEPs to ATPL as required by clause 1, which was admittedly done. The second essential condition was for ATPL to take over the responsibility of payment of bond amount, interest thereon and also provide bank guarantee for the same within a timeline. Admittedly, ATPL has, till date, not taken

[20] 2000 SCC Online Del 481

over the responsibility of payment of bond amount, interest thereon or provided bank guarantee as envisaged by clause 2 of the Second Agreement. It would be equally absurd to suggest that one of the parties who had substantial stakes in the three HEPs and was therefore a signatory to the Second Agreement as an independent party, could not have terminated it on the failure of the defaulting party to fulfil its essential obligations merely because another party did not sign the termination letter issued by the other. There was no binding clause in the Second Agreement which provided that SPDC and SoS should only act jointly. Failure of any of the parties to the Second Agreement to fulfil their respective essential obligations without which the purpose of the agreement may itself be unachievable should entitle the suffering party to determine the contract although there was no termination clause. The fact that the SoS issued notice dated 22.06.2006 and thereafter, the letter of termination dated 02.05.2008, is not in dispute. The language of the notice as well as the letter of termination makes the intention of the SoS to terminate the Second Agreement, certain. The failure of any of the parties to comply with the terms of the Second Agreement would lead to the dispute being referred to arbitration. SPDC has not protested the termination by the SoS. We are, thus, of the view that the SoS had the right to terminate the Second Agreement on the failure of ATPL to comply with any of its essential terms, even if there was no specific termination clause. The only question is whether the termination by the SoS was justifiable. As we have held that ATPL had failed to take over the responsibility of payment of the bond amount, interest thereon and also provide bank guarantee

for the same, which was an essential term of the Second Agreement, we are of the considered view that ATPL was clearly in default. ATPL was also in default for not submitting the DPRs for Chakungchu and Ralong HEPs and the revised DPR for the revised Rolep HEP. The fact that ATPL had clearly sought to run away from their most essential obligation under the Second Agreement by misleading the Sole Arbitrator into believing that the minutes of the meeting held with L&T on 15.10.2004 had modified the Second Agreement and thereby SPDC and the SoS had abandoned their right has also established beyond reasonable doubt that they were not interested in the three projects as agreed upon. Thus, we are of the considered view that the termination of the Second Agreement by the SoS was justified and we set aside the findings of the Sole Arbitrator as well as the Commercial Court granting prayer [E] in favour of ATPL.

Prayers [B] & [C]

45. In view of what we have held above, the grant of prayer [B] and [C] in favour of ATPL by the Sole Arbitrator as well as the Commercial Court cannot also stand. It is accordingly set aside.

Prayer [F]

46. Prayer [F] was a claim for award of damages for a sum of ₹496,689,279/- (Rupees forty-nine crores, sixty-six lakhs, eighty-nine thousand, two hundred and seventy-nine only), in terms of paragraph 76 of the claim petition. In paragraph 76, ATPL had pleaded that it had spent huge amounts for field investigation and survey, preparation of detailed project report, environmental

studies, geo-technical and geo-physical investigation, construction of temporary structures, drilling on the river, gauze and discharge system and cost of establishment, cost of site establishment and cost of consultancy for which it had spent ₹220,278,098/- (Rupees twenty-two crores, two lakhs, seventy-eight thousand and ninety-eight only), from 21.12.2002 till 02.05.2008. ATPL therefore claimed the said amount along with interest @ 9% compounded annually on year to year basis amounting to ₹496,689,279/- (Rupees forty-nine crores, sixty-six lakhs, eighty-nine thousand, two hundred and seventy-nine only).

47. The Second Agreement was an agreement for implementation of the three HEPs on BOOT basis. The Sole Arbitrator directed the specific performance of the Second Agreement by SPDC and the SoS for implementation of three HEPs. SPDC and the SoS submitted that having sought for Specific Performance, ATPL could not have asked for prayer [F] as well, as those were expenses which ought to have been incurred by ATPL. They further submitted that ATPL having quantified damages in lieu of specific performance in prayer [D], they could not have claimed damages on account of expenses incurred as claimed in prayer [F] as well. The Sole Arbitrator, however, granted prayer [A] for specific performance, the alternative prayer for quantified damages as claimed in prayer [D] and thereafter, also awarded the claim for expenses incurred in terms of prayer [F] without assigning any reason whatsoever for granting them. The direction upon SPDC and SoS to specifically perform the Second Agreement would necessarily presuppose that ATPL would have to fulfil their obligations under it.

This would mean that ATPL would have to incur all the expenses it reflected as their expenses in prayer [F] and sought to claim it from SPDC and the SoS. Thus, having granted specific performance of the Second Agreement, as prayed for in prayer [A] by ATPL, there was no reason for the Sole Arbitrator to grant prayer [F]. Further, ATPL had also claimed damages in prayer [D] at the rate of Rs.1.5 crores per MW for 279 MW for the three projects. This prayer [D] having been granted in favour of ATPL, it would also cover the expenses incurred by ATPL for the implementation of the HEPs as per the Second Agreement as claimed in prayer [F]. There is, however, no cogent or justifiable reason or rationale to grant prayer [F] by the Sole Arbitrator. We, therefore, set aside the Award of prayer [F] in favour of ATPL. The Award, thus, also suffers from non-application of mind. However, as we have not granted specific performance of the Second Agreement in terms of prayer [A] and damages in terms of prayer [D], we leave it to the parties to determine the actual expenses only that may have been incurred by ATPL and whether in the facts and circumstances of the case, it is at all payable to ATPL, by way of arbitration. Needless to say, the issue of any counter-claim by SPDC and SoS to be considered in this regard, is also kept open.

Prayer [G]

48. In prayer [G], ATPL had claimed award of damages for a sum of ₹471,353,405/- (Rupees forty-seven crores, thirteen lakhs, fifty-three thousand, four hundred and five only), in terms of paragraph 77 of the claim petition in which it had stated that as per

the reconciliation of the accounts done on 19.02.2003 the SPDC was to pay ATPL a sum of ₹21,22,48,608/- (Rupees twenty-one crores, twenty-two lakhs, forty-eight thousand, six hundred and eight only), which was lying with them. ATPL also sought interest @9% per annum from 19.02.2003, till date of payment and it claimed that the total amount due as on the date of making the claim as ₹471,353,405/- (Rupees forty-seven crores, thirteen lakhs, fifty-three thousand, four hundred and five only). ATPL also stated that the calculation of interest from 19.02.2003 on the said amount was shown in schedule B of the Claim Petition. Clause 2 and clause 3 of the Second Agreement would be relevant to appreciate this claim which is extracted below:-

> "***2.*** *In terms of the superseded Agreement dated 18th April, 1999, the First Party assisted by the Third Party have borrowed funds amounting to Rupees 50.01 crores through bonds to finance the implementation of the said projects which is to be repaid along with the interest by the First Party and the Second Party. The First and the Second Party have given a State Government guarantee to secure the payment of principal and the interest thereof. It has now been agreed that the Third Party shall take over the responsibilities of the payment of Bond Amount upto an amount of Rs.50.01 crores, and interest at the rate of 12.45% payable half-yearly and also interest already paid at a higher rate (13.75%) after reconciliation of account. Reconciliation of accounts shall be completed within a period of sixty days from the date of signing of the Agreement. The Third Party shall furnish necessary Bank Guarantee from a Nationalized Bank totalling upto Rs.50.01 crores, as well as guarantees for payment of interest payable on outstanding principle amount within a period of 12 months of signing of this Agreement. Further, the Third Party and the First Party, with the consent of the lenders, shall release State Govt. Guarantee within 12 months from the date of signing of this Agreement. The Third Party shall also take over the responsibilities of payment of Bond amount upto Rs.50.01 crore together with the interest accrued and also the expenditures incurred on account of Bond registration fees, stamp duty, fees paid to the Trustee Bank and Advocates for Registration of Bond if any.*
>
> ***3.*** *The balance amount of the money raised (Rs.50.01 crores) lying with the First Party and the Second party shall be released to the Third Party against the equal amount of Bank Guarantee from any Nationalized Bank*

to be submitted by the Third Party through the Trustee Bank (Central Bank of India).”

49. A bare perusal of the above two clauses reflects that SPDC assisted by ATPL had borrowed funds amounting to ₹50.01 crores through bonds to finance the implementation of the three projects which was liable to be repaid along with interest by the SPDC and the SoS in terms of the First Agreement. It is also clear that SPDC and the SoS had given State Government Guarantee to secure the payments of principle and interest thereof. Vide clause 2 of the Second Agreement, ATPL agreed to take over the responsibilities of the payment of bond amount up to an amount of ₹50.01 crores; an interest at the rate of 12.45%, payable half yearly and also interest already paid at a higher rate (13.75 %) after reconciliation of accounts. Reconciliation of accounts was to be completed within a period of sixty days from the date of signing of the Second Agreement. ATPL was also required to furnish necessary Bank guarantee from a Nationalised Bank totalling up to ₹50.01 crores, as well as guarantee for payment of interest payable on outstanding principal amount within a period of 12(twelve) months of signing of the Second Agreement. ATPL and SPDC, with the consent of the lenders, was to release State Government Guarantee within 12(twelve) months from the date of signing of the Second Agreement. ATPL was also to take over the responsibility of payment of bond amount up to ₹50.01 crores together with interest accrued and also the expenditures incurred on account of bond registration fee, stamp duty, fees paid to the Trustee Bank and Advocates for registration of bond if any. Importantly, as agreed under clause 3 of the Second Agreement, the balance amount of the

money raised (₹50.01 crores) lying with SPDC and the Government of Sikkim was to be released to ATPL against equal amount of Bank Guarantee from any Nationalised Bank to be submitted by the ATPL through the Trustee Bank (Central Bank of India).

50. Reading clauses 2 and 3 of the Second Agreement together, it is amply clear that by entering upon the Second Agreement, SPDC and the SoS had sought to get out of the financial burden it had incurred under the superseded First Agreement dated 18.04.1999. The balance money in terms of clause 3 of the Second Agreement was clearly payable only upon ATPL taking over the sovereign debt of the SoS and guarantee payment of the same along with the payment of interest and other expenses already borne. The Sole Arbitrator, however, directed the payment of damages in terms of prayer [G] without ATPL taking over the sovereign debt of the SoS and guaranteeing payment of the same along with the payment of interest and other expenses. This was not in terms of the Second Agreement and the Sole Arbitrator by awarding damages as claimed in prayer [G] made out a new contract between the parties, which is impermissible. Further, the Sole Arbitrator proceeded on the basis that the Second Agreement was modified by the minutes of the meeting dated 15.10.2004 with L&T. However, even while doing so, the Sole Arbitrator went beyond even the minutes of the meeting dated 15.10.2004, which contemplated ATPL paying the SoS a sum of ₹50.01 crores in three tranches, which the SoS would use to discharge its sovereign debt. It was also contemplated therein that SPDC need not pay ATPL the balance of the sum of ₹50.01 crores lying with it as it would be used

to service the interest on the debt till the repayment of the same from out of the monies received from ATPL in three tranches. Therefore, the Sole Arbitrator, while awarding prayer [G], seems to have gone not only beyond the terms of the Second Agreement but also beyond the terms of the minutes of the meeting dated 15.10.2004. It reflects complete non-application of mind as well and the decision on this aspect is irrational.

Prayer [H]

51. As ATPL has not challenged the Sole Arbitrator's Award declining to grant damages in terms of prayer [H], we do not interfere with it.

Prayers [J] & [K]

52. Consequently, the Award of interest in terms of prayer [J] and costs in terms of prayer [K] are also set aside. ATPL may claim the actual cost incurred by them, as prayed for in prayer [F] and interest thereon by way of fresh arbitration, if they so desire. SPDC and SoS are at liberty to file their counter-claim in this regard.

Conclusion

53. In conclusion, the impugned judgment — to the extent it declines grant of prayers [D] and [F] in favour of ATPL — is upheld. The finding that Rolep Hydro Electric Power Co. Ltd. and Velankani Renewable Energy Private Limited were not necessary parties is upheld. The finding of the Commercial Court that the recital in Second Agreement makes it clear that the parties had in fact agreed to do the project on BOOT basis is upheld. The setting aside of the

finding of the Sole Arbitrator on Issues No.9, 11 and 20 are also upheld. The finding of the Commercial Court, upholding the reasoning of the Sole Arbitrator that the letter dated 02.05.2008 did not terminate the contract (prayer [E]) and that the ground for termination was unjustified, is set aside. It is found that on the failure of ATPL to fulfil the essential term of the Second Agreement of taking over the responsibility of bond amount, interest thereon as well as provide bank guarantee for the same, SoS had rightly issued the letter dated 02.05.2008 terminating the contract. The finding of the Commercial Court that the petitioners therein (SPDC and SoS) had relinquished their claim for submission of Bank Guarantee in terms of the minutes of the meetings dated 09.03.2004, 26.04.2004 and 15.10.2004, is also set aside. It is held that the Commercial Court's finding that clause 25 of the Second Agreement did not disentitle the parties to amend it is grossly erroneous and against the plain and simple intention of clause 25. The language of clause 25 is clear and unambiguous. It is also held that the finding of the Commercial Court that the minutes of the meetings dated 09.03.2004, 26.04.2004 and 15.10.2004, were in the nature of addendum and supplemental is also grossly erroneous and against the clear and unambiguous language and intention of clause 25 of the Second Agreement. The finding of the Commercial Court, upholding the reasoning of the Sole Arbitrator that since SPDC and SoS had failed to perform their promise as per the minutes of the meetings dated 09.03.2004, 26.04.2004 and 15.10.2004, they had relinquished their claim for Bank Guarantee and therefore there was no question of breach by ATPL, is also set aside. Grant of specific

performance (prayer [A]), perpetual injunction (prayer [B]) and mandatory injunction (prayer [C]) against SPDC and SoS by the Sole Arbitrator in favour of ATPL, which was upheld by the Commercial Court, is set aside. The award of damages in favour of ATPL, in terms of prayers [F], [G], [I] by the Sole Arbitrator are set aside. Grant of interest and cost in terms of prayers [J] and [K], consequently, is also set aside. Non-grant of prayer [H] by the Sole Arbitrator to ATPL is not interfered with. ATPL may, if they so desire, claim the actual cost incurred by them in terms of prayer [F] and interest thereon against SPDC and the SoS by way of fresh arbitration. SPDC and SoS are at liberty to file their counter-claim in this regard. Consequently, Arbitration Appeal No. 1 of 2020 is allowed to the extent above, while Arbitration Appeal No. 1 of 2021 preferred by ATPL stands dismissed.

54. Consequently, the amount deposited by SPDC and SoS in terms of the order of the Hon'ble Supreme Court dated 14.10.2022 in Special Leave Petition (Civil) No. 18211-18212 of 2022, shall be released along with interest accrued thereon.

55. The two Appeals stand disposed of accordingly.

56. Parties to bear their respective cost.

(Biswanath Somadder)
Chief Justice

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes/~~No~~**
Internet : **Yes/~~No~~**
Jk/bp/ak