

Ntpc vs.siemens Atiengesellschaft

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Court : Delhi

Decided On : Dec-23-2016

Appellant : Ntpc

Respondent : Siemens Atiengesellschaft

Judgement :

* + + IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

25. 04.2016 Pronounced on:

23. 12.2016 FAO (OS) 371/2012 FAO (OS) 372/2012 NATIONAL THERMAL POWER CORPORATION LTD. Appellant Through: Dr. Ashwani Kumar, Sr. Advocate with Ms. Ruchi Gour Narula and Ms. Smitakshi Talukdar, Advocates, for appellant. versus SIEMENS ATIENGESELLSCHAFT Through: Respondent Sh. Parag. P. Tripathi, Sr. Advocate with Sh. Anil Bhatnagar, Sh. Amit Dhindra, Sh. Aman Leekha, Sh. Amandeep Bawa and Sh. Shikhar Khare, Advocates, for respondent. CORAM: HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MS. JUSTICE DEEPA SHARMA MR. JUSTICE S. RAVINDRA BHAT % 1. These two appeals under Section 37 of the Arbitration & Conciliation Act, 1996 ('Act') impugn a common judgment, dismissing two petitions (O.M.P. Nos. 229 and 230/ 2009) under Section 34 of the Act. The appellant, National Thermal Power Corporation Limited ('NTPC' hereafter) challenged the partial Award dated 31st July 2002 and the final Award dated 6th January 2009 passed of the International Court of Arbitration ('Tribunal') of the International Chamber of Commerce (ICC).

NTPC was directed to pay to Siemens Aktiengesellschaft ('Siemens') a sum of 17,158,557 (principal amount) on account of Claims C-2 to C-8, (Claim C-9 being rejected). NTPC was also directed to pay Siemens 7,604,296.38 simple interest @ 6% simple per annum on the principal amount for the period from 20th August 2001 till the date of the Award i.e. 6th January 2009 and FAO (OS) 371/2012 & 372/2012 Page 1 post award interest at 6% simple per annum. NTPC was also directed to bear the cost of arbitration i.e. US \$ 877,000 excluding US \$ 30,000 set aside for stamp duty and 989,100 towards attorneys' fees, expert fees and related expenses.

2. NTPC awarded Siemens, on 30th September 1989, an 817 MW Gas Based Combined Cycle Power Project at Dadri, Uttar Pradesh. The contract was entered into on 6th December 1989 and the General Terms and Conditions of the Contract ('GCC') formed part of the contract. The project comprised two stages: in the first, "the open cycle" stage, was construction of four Gas Turbine Generators (Unit Nos. 1-4) for power generation by use of natural gas, with waste gas escaping into the atmosphere. The second was construction of two Combined Cycle Modules, (Modules-1 and 2) combining open cycle Unit Nos. 1-2 and Units 3-4 respectively. Waste gases from the open cycle were combined and utilized in the further generation of power. Each stage had specific time schedules.

3. The completion of the project was delayed by 55 months. Gas Turbine 1 was commissioned with a delay of 13 months, the Gas Turbine 2 with a delay of 12 months, the combined cycle No.1 with a delay of 51 months. Gas Turbine 3 and Gas Turbine 4 were commissioned with a delay of 11 and 14 months respectively. The Combined Cycle 2 completed successful trial operation only on 8th March 1997 with a delay of 55 months. NTPC claimed that despite the above difficulties it made all out efforts and obtained part import license in July 1990 and the balance import license in November 1990. The import license for the remaining electrical items was issued on 9th March 1991. LCs were, thereafter, correspondingly established.

4. Disputes arose between parties about the delay in the opening of Letters of credit (LCs) by NTPC, which in turn led to delays during the execution of the first

open cycle. Under Clause 20.2 of the Contract, the dates- by which items of the first combined cycle were to be readied for shipment and the corresponding dates by which LCs had to be opened the NTPC- were specified. For instance, the emergency DG generator was expected to be shipped on 1st February 1990 and the LC had to be established one month FAO (OS) 371/2012 & 372/2012 Page 2 prior to that i.e. by 1st January 1990. The electrical items (Item Nos.83, 86, 88 and 90) had to be shipped by 1st May 1990. Correspondingly, the LC had to be opened on 1st April 1990. In fact, the LC for both these sets of equipment was established on 24th November 1990 and the dispatch took place on 22nd December 1990. The LC for the gas turbine was established on 9th August 1990; (a delay of 100 days) and was ultimately shipped on 30th August 1990. The LC for the generator was established on 24th November 1990, (a delay of 207 days) and was ultimately shipped on 22nd December 1990. It may be mentioned here that the actual dates of LC opening by NTPC is not in dispute; it attributed its difficulties firstly to delay in respect of the loan agreement between Government of India and German Government (i.e. KFW) which could not be signed in time leading to delay in the Import License (I/L) and consequently delay in establishing Letter of Credit, which is 'act of Government beyond the control of the parties. The second ground stated by NTPC was that DGTD did not clear a few electrical items, which were subsequently cleared only in February 1991, and I/L of these electrical items could, therefore be obtained in March 1991 and L/C was established on 8th April 1991.

5. On 13th May 1991, Siemens claimed DM375 million (for a delay of 12.5 months calculated at the rate of DM3million per month) from NTPC under Clause 22.2 of the GCC; NTPC by letter dated 2nd July 1991 denied claiming that the delay in the execution of the contract was due to Siemens' fault. Siemens reiterated its claim on 30th April 1992, which was rejected by NTPC on 22nd July 1992. NTPC claims to have asked Siemens to submit necessary documentary proof to substantiate its claim that delay had occurred due to its fault and substantiate the additional cost claimed on account of such delay. By a letter dated 16th August 2001, the NTPC's Engineer rejected the claim as untenable. Siemens, on this rejection, approached the ICC-Paris, under Clause 27 GCC and filed its claims C-2 to C-9 for a total

amount of DM44111,949. By a letter dated 24th August 2001, the ICC informed NTPC of the lodging of the Siemens claims against it. NTPC resisted the claims and counter claimed 210,307. Among other counter claims by NTPC one was on account of Siemens' failure to fulfill its obligations under the contract, in FAO (OS) 371/2012 & 372/2012 Page 3 regard to supply of spares, critical components, special tools, plants the losses suffered by NTPC due to delays caused by the SIEMENS in timely work completion. Partial award

6. The ICC Tribunal decided to hold preliminary hearings on the issue of limitation and jurisdiction. Its record showed that arguments on the preliminary issues were addressed on 3rd, 4th and 5th May 2002 at Delhi. By a partial Award dated 31st July 2002, the Tribunal rejected the NTPC's contentions that SIEMENS's claims were barred by limitation and held that the claims were arbitrable. The tribunal further held that in view of the settlement between the parties, dated 6th/7th April 2000 NTPC's counter claims were neither admissible nor arbitrable. Previous challenge to the partial award- culminating in the Supreme Court judgment

7. NTPC appealed against the partial Award under Section 37

(2) contending that the Tribunal's order was practically a decision under Section 16

(2) of the Act accepting the plea of lack of jurisdiction. The appeal, (OMP No.462/2003), was dismissed by this Court in National Thermal Power Corporation Ltd v Siemens Atiengesellschaft 121 (2005) DLT36 NTPC's further appeal to the Supreme Court was dismissed by the judgment reported as National Thermal Power Corporation Ltd v Siemens Atiengesellschaft (2007) 4 SCC451

8. NTPC argued before the Supreme Court that since the partial award rejected its counter claim, the Tribunal had really failed to exercise jurisdiction; consequently its order was one under Section 16

(2) or

(3) of the Act against which an appeal lay to the High Court under Section

37. This plea was rejected. The court held that the Tribunal had ruled, in the partial Award that in view of the MOM dated 6th/7th April 2000, "the various claims of either party were thrashed out and settled, NTPC could not pursue most of the claims set out in the counter claim."

This, stated the court, was the tribunal's finding on the merits of NTPC's counter claims; findings of the High Court to this effect were FAO (OS) 371/2012 & 372/2012 Page 4 upheld. On the dismissal of the appeal by the Supreme Court, NTPC filed O.M.P. No.230/ 2009 questioning the rejecting of its counter claims by the partial Award. Further proceedings: the Final Award 9. The Tribunal proceeded with the final arguments on 12th, 13th and 14th May 2008 and passed the impugned final Award on 6th January 2009. The claims of SIEMENS allowed by the Tribunal were as under: Sl. No.1.

2.

3. Claim No.C-2 Particulars Amount awarded (DM) of account On disruption Project Engineering, management and coordination increased delay for 3,314,106/- costs and of C-3 On account of increased costs for acceleration 877,497/- C-4 of Project EPC Increased cost of additional travel 425,955/

C-5 5.

6. 7.

8. C-6 C-7 C-8 C-9 for cost storage Increased 192,198/- materials, equipment and machinery Increased cost performance guarantee Delayed payments incurring financial charges for extension of contract 305,783/- 10,308,337/- of Head Office overheads and profits 18,135,345/- Costs of preparing the claim were rejected REJECTED Total amounts awarded were 17,158,557. The Tribunal awarded simple interest at 6% per annum from the date of the request for arbitration i.e. 20th August 2001 till the date of the Award. Post Award interest was directed at the same rate till the date of payment. Issues finally decided by the Partial Award- as held by the final award 10. The finality of the partial Award was considered by the Tribunal, in its final award. NTPC argued that in terms of the reference under

the ICC Rules, together with the agreement and Section 19 (2) , the parties had agreed on the procedure to be followed by FAO (OS) 371/2012 & 372/2012 Page 5 the Tribunal in conducting its proceedings. Reference was made to the issue Nos. 5.12 to 5.15, which were formulated by the Tribunal. Under issue No.5.16 the Tribunal had to determine whether, in the event of NTPC having committed breach of the contract, SIEMENS was entitled to receive damages. Under issue Nos. 5.17 to 5.20 the Tribunal was to ascertain the quantum of damages and costs payable to SIEMENS and whether NTPC was entitled to any of its counter claims. It was urged that despite formulating the procedure and observing that it was at that stage refraining from expressing views on merits and only referring to "a limited series of quotations from the relevant documentation" and further that "the first mention of limitation does not arise until the arbitration is commenced."

Nevertheless, the Tribunal in Para 38 of the final Award presented a fait accompli in observing that "the intention of the Tribunal was to decide the issue of limitation definitively and finally unless the parties agreed, or it became clear that further evidence and submissions were required."

It was submitted that under the terms of reference read with Article 20 of the ICC Rules, it was incumbent on the Tribunal to proceed with "establishing the facts of the case by all appropriate means" and thereupon make an Award in terms of Article 25 of the ICC Rules. It was submitted that the Tribunal, in fact, totally failed to determine the issues "on merits" in terms of the reference.

11. In arbitration, NTPC urged a preliminary objection that SIEMENS's claims were time barred. On its part, SIEMENS raised a preliminary objection that a majority of the counter claims of NTPC were subject to a settlement agreement between the parties recorded in the Minutes of the Meeting ('MOM') dated 6th/7th April 2000 and that certain other counter claims were time barred. Consequently, the Tribunal at the stage of the Partial Award, after due notice to the parties, decided the above two preliminary issues, viz. (i) whether the claims of SIEMENS were time barred; (ii) Whether the counter claims of the NTPC were admissible.

12. In its Award (hereafter the final award) dated 6 January 2009, the Tribunal noted the submissions of NTPC and first dealt with the issue concerning the

jurisdiction. Considering the exchange of correspondence and the partial award as well as other FAO (OS) 371/2012 & 372/2012 Page 6 material, it ruled that NTPC's plea that the limitation period began to run sometime between 1990 and 1992 was untenable. In the partial Award, the Tribunal had in Para 3.9 observed that the parties had agreed, as noted by NTPC in its letter dated 11th September 1998, to a nine month extension of time (EOT) for the schedule for gas turbine and combined cycle modules and, therefore, they were "only in dispute as to the resulting extra costs, if any, due to the Claimant (SIEMENS)."

The Tribunal referred to the exchange of correspondence between 1997- 2000. The question was whether within a period of three years prior to the date of reference of the disputes for arbitration i.e. 20th August 2001, the cause of action survived as far as SIEMENS's claims were concerned. It was held that there was an agreement by the parties upon a nine-month EOT reached on 11th September 1998 and this was within the period of three years prior to the request for arbitration, received by the ICC in Paris on 23rd August 2001. The counter claims of NTPC were found covered by the MOM dated 6th/7th April 2000 and had been earlier rejected in the partial award. The tribunal rejected the argument with respect to limitation, after considering the previous findings on the issue as well as judgments of the court. Thereafter it proceeded with the individual claims and awarded the amounts in question, in favour of Siemens, and against NTPC. Challenge to the final award & Findings of the single judge 13. The two petitions preferred by NTPC under Sections were OMP No 299/2009 and 230/2009. The first- OMP2292009 (subject matter of FAO3722009) challenged the final award of the Tribunal dated 6 January 2009. The other petition (OMP2302009 and subject matter of FAO3712009) under Section 34 of the Arbitration and Conciliation Act, challenged the partial award dated 31 July 2002. SIEMENS urged before the single judge that NTPC did not apply under Section 34, of the Act challenging the partial Award within time. It urged that the Supreme Court's decision was handed down in February 2007 whereas the challenge to the award (both final and partial) was filed in April 2009 beyond the permissible period of limitation in terms of Section 34 (3) of the Act. Siemen relied on *Mc Dermott International Inc v Burn Standard Co. Ltd* (2006) 11 SCC181. The single judge held that while *Mc Dermott International* held that a partial Award could be FAO (OS) 371/2012 & 372/2012

Page 7 a final Award on matters decided therein "but made at an interim stage."

and further that a partial Award "is final in all respects with regard to disputes referred to the arbitrator which are the subject matter of such award..both the partial award and the final award are subject matter of challenge under Section 34 of the Act."

The tribunal also referred to other decisions. The single judge also referred to a statement of NTPCs Senior counsel before the Tribunal recorded by it in Para 18.7 of the final Award:

"7. The second issue disposed of by the Partial Award, was that of the Respondent's counterclaims as referred to in the Partial Award at paragraph 4, paragraphs 4.1 to 4.67:

"The first counter claim is not admissible both in its original form and as amended. The second, third, fourth, fifth, sixth, eighth and ninth counterclaims which have been the subject of a prior binding settlement are not admissible. And the seventh counterclaim is not admissible, there being no dispute."

It was expressly accepted by Mr. Dave that it was not open to the Respondent to seek to go behind this finding in the Partial Award. Accordingly, it was common ground that the finding of the Tribunal barring the Respondent's counterclaims was final. No issue arises on this finding."

In para 19, the Tribunal recorded what the position of NTPC was in regard to the partial Award. It reads as under:

"19. As the Transcript record (Day 1, pages 16-17), Mr. Dave said that his position with respect to the Partial Award was:

"Dushyant Dave: So far as the question of time bar is concerned, it has been held against us. But undoubtedly it is our stand that we have never agreed, we have only agreed to consider if it is possible and we are going to take a stand that by virtue of acquiescence they would not, be entitled to raise these claims now. So, it is our stand that we have never agreed to give it. Dushyant Dave: We have ...

there are two things, Sir, here. One is, it is for them to show that there was an agreement on our part that 9 months extension is granted. I think none of the documentary evidence adduced by them establish that. But, be that as it may, we have specifically averred in our reply to the statement of claim that we have never agreed. That's our stand. And the witness only fortifies that in his evidence. FAO (OS) 371/2012 & 372/2012 Page 8 Chairman: I understand that ... but the question I think or the point that I think Mr. Gupta will or is raising, is that it is not open to you to take these points at this stage of the proceedings, having regard to the terms of the Final Partial Award. If that's right, it will be helpful to know why you say... or given that, that is an argument, you are plainly going to have to meet. It would be helpful to know why you say that this is open to you?. Dushyant Dave: Because the findings in Partial Award were in respect of two specific issues. And in my respectful submission, those issues, decision on those issues, certainly would disentitle me from now arguing on limitation. But it certainly does entitle me to show that there was no agreement and therefore the Claimant has to prove that it is entitled to damages on account of any delay. That there was a delay and that therefore it is entitled to ... that will have to be established because those are part of the other issues which now are before the Hon'ble Tribunal for decision. A number of issues were framed and only two issues came to be decided in the Partial Award."

(emphasis added)"

14. The single judge upheld the interpretation of the tribunal on Article 20 of the ICC rules and rejected that of NTPC that it was obliged to make an award on the merits. The single judge ruled that under the 1996 Act, the arbitral award has been defined under Section 2 (c) to include an interim Award. Under Section 31 (6) of the Act, the Tribunal can at any time make an interim award "on any matter with respect to which it may make a final arbitral award."

On the issue of nine-month EOT the single judge noticed that the Tribunal in the final Award referred to the procedural history and recorded its conclusions that given that hearings took place in May 2002, the tribunals intention was to decide the issue of limitation decisively and finally unless the parties agreed or it became

clear that further evidence and submissions were required. The final award also noted that whether a nine-month EOT was given was an issue of fact squarely within the scope of the limitation issue. Neither party suggested in the hearings or in the post hearing briefs, that the issue of limitation including whether or not a nine month EOT had been given could not be decided finally on the basis of the evidence and submissions made in the May hearings. On this record, it is simply not open to the

... RESPONDENTS

to suggest that the Partial Award was other than final. However, having regard to the different positions adopted by the parties at the March and May 2008 hearings and the requests by both parties that we should do so, the Tribunal has considered the evidence and submissions FAO (OS) 371/2012 & 372/2012 Page 9 on the issue of the nine month EOT again."

After noticing all these, the single judge held as follows: 31. The position, therefore, that emerges is that the partial Award was, in fact, a final Award on two issues: (a) that the counter claims of NTPC were inadmissible and (b) SIEMENS's claims were not barred by limitation. Since the partial Award was not challenged under Section 34 of the Act in respect of the above two issues within the limitation period prescribed under Section 34 (3) of the Act, it cannot be permitted to be urged in the present petition by NTPC. O.M.P. No.230 of 2009 therefore cannot be entertained and is dismissed. It may also be mentioned that a third issue finally settled by the partial Award is that the Tribunal had jurisdiction to entertain the dispute (as held in para 4.16 and 4.22 of the partial Award). That has also not been challenged by NTPC.

32. Therefore, the scope of the present proceedings of the challenge by NTPC relates to two broad areas, namely, (i) the question whether there was indeed a nine-month extension given by the NTPC as evidenced by the letters dated 11th September 1998, 22nd January 1999, 19th March 1999 and 13th December 1999; and (ii) whether the Award in respect of the individual claims of NTPC as noticed hereinbefore is sustainable in law. 15. The next question considered in the impugned judgment was whether the EOT issue was decided contrary to the terms

of the contract. Here, the single judge considered Clause 22 of the agreement and the rival submissions. He took note of the terms of the agreement and the correspondence between parties and the NTPCs letter of 2nd July 1991 to SIEMENS; letter dated 7th April 1992 by NTPC to BHEL (to expedite the mobilization of the erection activities), the letter dated 22nd July 1992; letter dated 22nd June 1993 of NTPC to SIEMENS that it had yet to furnish details of the cost claim. These, the single judge felt, only showed that parties were still negotiating on the question of their respective obligations and who was to be blamed for delays in commissioning of the overall project. Next, the single judge examined the correspondence on the issue in 1997 and 1998, including a letter dated 8th December 1997 written by SIEMENS referring to meeting held with NTPC on 12th November 1997 on cost claim; to the letter dated 11th September 1998 by NTPC to SIEMENS referring to SIEMENS's letter dated 29th July 1998. In that letter SIEMENS had pointed out that the details demanded by NTPC on the claim for cost compensation was beyond the contract stipulations as per Clause 22.2 of FAO (OS) 371/2012 & 372/2012 Page 10 the GCC. It was pointed out that "NTPC is requesting for more and more details which are impossible to provide due to the reasons explained to you during our meeting held on 8th July 1998."

The further letter of 29-07-1998 by SIEMENS was also considered. Considering all these, it was held that NTPCs contention with respect to its non- acceptance of any EOT was without merit. It was held that the letter dated 1st December 1998 from NTPC to SIEMENS made no reference to letter dated 11th September 1998 but refers to a series of letters dated 30th September, 1st October, and 7th October 1998 as regards cost compensation. The stand of NTPC was that it was still willing to look into the claim and settle the same amicably in case it was agreeable on the number of titles of claims and furnish justification with documentary evidence. By letter dated 14th December 1998 written by NTPC wrote to SIEMENS stating that the full LD @ 5% of contract price would be levied in terms of the contract. In terms of Clause 21.3 GCC, SIEMENS was advised to indicate whether the recoveries were to be made from the first contract, second contract or the third contract. SIEMENS was again requested to furnish further documents/details to substantiate its claim for cost compensation. Later, on 22nd January 1999 NTPC insisted that it required detailed documents. This was seen

by the single judge as expressing NTPC's willingness to consider the implication of delay in opening of LC to the extent of nine months and accordingly shift the schedule for GTs as well as CCs for a period of nine months from their respective contractual dates. The minutes of meeting dated 6th/7th April 2000 was considered. The single judge therefore held that: 48. The collective reading of the above letters it reveals that the Tribunal has correctly concluded that there was indeed an EOT and there was acceptance by the NTPC that delays of about nine months could be reasonably attributed it on account of delayed opening of LCs. The submission that there was not even a single communication from SIEMENS from 1991 to 2000 wherein SIEMENS had even implied that NTPC had granted or agreed to grant an EOT is not correct. Before the Engineer, SIEMENS made a claim for compensation for 49. nine months' delay in terms of Clause 22.2 GCC. In terms of letter dated 16th August 2001 the Engineer gave a decision on Claim No.C-3 "increased cost for acceleration of Project Engineering Management and FAO (OS) 371/2012 & 372/2012 Page 11 Co-ordination" stating that "Siemens was not able to commission the GTs within extended period of nine months since schedule date and as such no acceleration in activities could be demonstrated.-. Hence not tenable."

50. What was distinctly different as regards the stage of the final Award, in comparison with the stage of the partial Award, was that witnesses of SIEMENS had been examined as had the witnesses of NTPC. For SIEMENS Mr. Scharmann appeared as witness of the company and Mr. L.C.H. Bunton appeared as an independent expert. For NTPC Mr. S. Datta and Mr. A.K. Sinha appeared as witness. NTPC did not produce an expert witness.

51. Mr. Scharmann was involved in the negotiations of the contract for Dadri Project from mid 1988. He was also involved in the execution of the contracts from their inception. On the other hand, NTPC's witness, Mr. Sinha admitted in his cross-examination that he had not been concerned with the project during construction and was not directly involved in it, having joined the project only in March 2007. Mr. Datta, the other witness of NTPC, was a junior member and was not a party to the correspondence between NTPC and SIEMENS relating to owner- caused delay of 9 months. The observation of the Tribunal in this regard in

Paras 108 and 109 reflected the correct picture and cannot be faulted. 16. The single judge accepted Siemens argument that Clauses 22.1 and 22.2 of the GCC specifically focused on the owner's delay and compensation that could be claimed by the contractor for such delay and that there was no reason why despite of an overall of delay of 55 months in the completion of project, the parties could not have agreed that for any part of the delay attributable to the owner, the contractor could claim compensation. It was held that 54. As observed earlier, the documents available to the Tribunal at the stage of partial Award, were also available to it for examination at the stage of the final Award. It took a consistent view. Its decision was neither contrary to the terms of reference or to the terms of the GCC or the applicable law. The Court, therefore, negatives the contention of NTPC that the impugned Award is liable to be set aside because the Tribunal failed to decide the dispute in accordance with terms of contract, thus violating Section 28 (3) of the Act. The submission that the Tribunal's final Award and partial Award are not in accordance with the agreement between the parties and liable to be set aside under Section 34 (2) (v) of the Act is also rejected. FAO (OS) 371/2012 & 372/2012 Page 12 55. The Court also finds no merit in the submission that the impugned Award of the Tribunal contained a decision that was beyond the scope of submission to arbitration under Section 34 (2) (iv). The submission that NTPC was prohibited from presenting its case under Section 34 (2) (iii) of the Act is without basis. NTPC appears to have had a full opportunity of presenting its defence in the arbitration proceedings throughout. 17. The single judge next went into NTPC's argument that the Tribunal decided the disputes, contrary to the substantive laws of India. The basis for this submission by NTPC was that time was the essence of the contract and this was a turnkey project. There were milestones for completion of various stages of the project. There were several stages by which these milestones had to be completed by SIEMENS and therefore, the question of NTPC alone being responsible for completing these milestones could not be examined in isolation. The submission is that all the various stages linked to form an integral part of the contract and unless and until SIEMENS had proved that it had completed its obligations well in time as contemplated by the contract, NTPC could not be saddled and made liable under the contract. Referring to various provisions of the contract, NTPC had urged that

because of SIEMENS's failure to fulfill its obligations in agreed manner resulting in actual delay in shipment on account of delayed LCs, NTPC could not be held to have breached its obligation. A reference was made to Section 52 and Section 63 of the Contract Act to argue that by series of acts SIEMENS has dispensed with NTPCs performance of its obligations in respect of LCs and/or in any event extended time for such performance and that as the Tribunal had failed to address this submission, the Award contravened Section 28 (1) (b) of the Act. The Tribunal was faulted for shifting the burden of proof on to NTPC when in fact SIEMENS had failed to prove that it had fulfilled its obligations. Siemens argued that the contract did not spell out that it was contingent upon funding by KFW as condition precedent. Siemens letter dated 26th October 1989 SIEMENS accepted the Telex of Award upon the conditions set out therein including one condition that the Letter of Award (LOA) stating that it shall not be subject to approval of KFW was relied on. Discussing this and other contentions related to the subject, the single judge delineated the scope of the courts jurisdiction, i.e to consider if the award disclosed patent illegality which should be of such kind as to go to the root of FAO (OS) 371/2012 & 372/2012 Page 13 the matter. The single judge commented further that the public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. After discussing the principles applicable, the single judge dealt with various sub heads. For Claim No.2- Disruption and delay of project engineering, management and coordination, the findings of the tribunal and the rival contention of the parties, the single judge held: 75. The Tribunal noted that Mr. Scharmann was not cross-examined in relation to this claim apart from in relation to the overall delay period of 55 months. It held:

"there is no doubt that the cost of acceleration requested by NTPC was a direct consequence of the initial nine months of delay, thus satisfying an applicable criterion of clause 22.2. Secondly, the claim related to the open cycle stage and Mr. Scharmann's evidence was that the acceleration did serve to counteract the delay in the open cycle."

Further, it pointed out that NTPC failed to present evidence on quantum to counter Mr. Scharmann's evidence and the detailed submissions of Mr. Bunton on costs. This again being a matter of appreciation of evidence does not warrant interference by the Court. 18. On Claim No 4, i.e Additional Travel Cost for DM425955 the single judge held that the tribunal had analyzed the evidence on behalf of Siemens in some details; he therefore was of the opinion that being a purely factual finding, there was no need to interfere with the award. Likewise on Claim 5, the single judge held that the question involved pure appreciation of fact and that the tribunals findings were reasonable. On the claim for extension of Contract Performance guarantee (CPG) for which Siemens claimed DM305783/- the single judge held that since the Tribunal found that NTPC had agreed to a nine-month EOT, the CPGs necessarily were required to be kept alive for the extended period. Therefore the tribunal's conclusions were upheld. As to claim No.7, i.e. delayed payments incurring increased financing charges, the single judge again approved the award, which had noted that when payment obligations are not met on time, the contractor either has to finance expenditure from his own resources, or borrow, or both and that Siemens lost the use of money due under the contract, but paid late, due to the FAO (OS) 371/2012 & 372/2012 Page 14 late opening of letters of credit in the nine months delay in the initial stages. The calculation of what was lost by delayed payments is straightforward. The only questions are the applicable rate of interest and the applicable dates from which interest should be calculated. The Tribunal referred to the evidence of Mr. Scharmann and Mr. Bunton to conclude that 7.5% was a reasonable rate to be adopted for this claim. The single judge upheld the said finding as unexceptionable. The award on claim No.8 i.e Head Office overhead and profits was upheld. Arguments of parties 19. It is argued that the impugned judgment is erroneous as it declines to interfere with the findings of the Tribunal on the merits. Mr. Ashwini Kumar learned senior counsel argues that Section 34 did not preclude the appreciation of the merits of the award since that was not an aspect, which was ever gone into in the previous proceedings. Here, it was urged that the award suffered from patent illegality and was contrary to the public policy of India as it violated Section 28(3) of the Arbitration and Conciliation Act and was also violated Section 31(3). Learned counsel relied upon the decision of the Supreme Court in

ONGC v. Western GECO 2014(9) SCC2650 and McDermott International Inc.

20. Elaborating on the question of limitation, learned senior counsel urged that the Tribunal's findings with respect to limitation were in fact revisited in its final award of 06.01.2009. Those findings were impinged in proceedings under Section 34. As a result, the previous orders on the interlocutory determinations could not be considered as conclusive. Learned senior counsel points out that para 24 of the impugned judgment is contrary to law inasmuch as it proceeds on the assumption that limitation - which was the subject matter of the previous decision during the pendency of arbitration proceedings - was a closed chapter. Learned senior counsel relied upon Sections 16(5) and 16(6) of the Act and the decision of the Supreme Court in *M/s. Pandey & Co. Builders Private Limited v. State of Bihar and another*, AIR 2007 SC465 and *Jain Studios 2007 (145) DLT492*. It was emphasized that the jurisdictional question was all that was gone into in the previous proceedings stemming from exercise of Section 16. The decision on question FAO (OS) 371/2012 & 372/2012 Page 15 of such jurisdiction could never be held to be conclusive. It is only when after considering the merits of the matter that the Tribunal holds decisively whether on an issue such as limitation (after considering all evidence) that the subject matter is said to have been determined. Mr. Ashwini Kumar learned senior counsel laid great emphasis on the fact that in the previous proceedings, which led to the judgment of the Supreme Court, all that was decided was the question of jurisdiction under Section 16. He relied upon the judgment reported as *Pandurang Dhoni Chougulevs Maruti Hari Jadhav* AIR 1966 SC153 *K.K. Modi v. K.N. Modi* 1996 (2) SCC216 *Panchu Gopal Bose v. Board of Trustees* 1993(4) SCC338 and *Sher Singh v. Deputy Director* AIR 1978 SC341. It was stated that issues of jurisdiction should not be confused with the substantive issue of limitation, which goes into the claim and reaches the heart of the merits. Highlighting that limitation is not merely procedural but in reality shoots out a remedy even if one were to exist, learned senior counsel stated that the final finding of limitation was always subject to scrutiny under Section 34. It was argued that the single judge fell into serious error therefore, in holding that the partial award needed to be separately challenged; being a finding on a preliminary issue, concerning jurisdiction, the party aggrieved could always opt to challenge it in final the final award. Counsel highlighted the submission that till an issue of liability is

decided, there is no finality on an aspect regarding jurisdiction. Since the partial award merely dealt with jurisdiction, in the absence of the merits of the liability based on Siemens claims, the determination of the arbitrators on that aspect were not final; they could be challenged because they were subsumed in the final award. In refusing to go into that aspect, learned Single Judge fell into error.

21. Learned counsel also relied on the decision in decisions in *State of Orissa v DamodarDass* 1996 (2) SCC216 *Steel Authority of India v J.C. Budhiraja* 1998 (8) SCC122 *S. Rajan v State of Kerala* AIR 1992 SC1918 and Section 9 of the Limitation Act. It was argued that once it was proved by NTPC that the cause of action accrued and the right to sue arose in 1991, limitation ran concurrently. The mere exchange of correspondence without a concrete agreement could not have resulted in the conclusion that there was extension of time. It was emphasized that since in India, it is recognized that immediately upon difference between the parties, cause of action to sue arises, there could have been no postponement or suspension of the time once it commenced. The learned senior counsel also relied on Section 9 of the Limitation Act, in support of his submission.

22. Proceeding to deal with the factual aspect of issue concerning limitation, learned senior counsel urged that the impugned judgment is in obvious error as so far as it relies upon the alleged agreement of 11.09.1998, i.e. NTPC's letter to SAG, stating that delay in arranging the import license or LC (could affect the project by nine months), to decide the issue of limitation against the appellant. Learned senior counsel argued that for the purpose of deciding an issue with respect to limitation, the law is settled: time begins to run or commences when the right to sue or arbitrate arises in favor of the claimant. Learned senior counsel relies upon paras 3.3 to 3.6, 4.33 to 4.35 and 4.45 of the partial award. Learned counsel relied upon the fact that SAG invoked the arbitral mechanism under Section 26 between the parties as far back as on 30.04.1992 for amicable settlement of disputes. Their claims were rejected by NTPC. SAG's letter dated 12.01.1999 was relied upon by NTPC to say that according to its understanding, the claims, made earlier were rejected. Further, reliance is placed on SAG's letter dated 29.11.1990 that the cause of action arose on 29.01.1990 or latest on

30.01.1991. It was submitted that consequently, the single judge gravely erred in law in not upholding the contention that regardless of the materials, once the period of limitation expired sometime in 1993 or 1994, there was no question of SAG claiming any amounts. That the arbitral tribunal awarded various amounts on the claims was in flagrant violation of Section 43 of the Arbitration Act, read with Section 3 of the Limitation Act. Once the limitation period began and was not shown to have been extended within the time, the law in India did not admit the possibility of such time barred claim being resurrected through subsequent negotiations or alleged agreements. The award was therefore, fundamentally opposed to substantive law and patently erroneous.

23. The NTPC's senior counsel next argued that negotiations towards a possible settlement and its existence for a long time did not extend nor bar the urging of the aspect relating to limitation. The matter of fundamental policy of India and integral to the legal FAO (OS) 371/2012 & 372/2012 Page 17 question is an applicable principle that time has to be computed from the date when the right to sue first arose. Learned senior counsel also relies upon Article 15 of the Limitation Act to say that in the circumstances, the right to sue having occurred long back, the question of SAG's claim being within the time could not have arisen. Mr. Kumar, learned senior counsel argued that the learned Single Judge went wrong in refusing to consider and independently evaluate the Tribunal's findings on the merits, including the reasonableness of the SAG's claims and the amounts.

24. It was submitted that the findings of the arbitral tribunal with respect to appreciation of documents such as conditions in the contracts was contrary to law. The interpretation of Clauses 22 and 32 of the contract were perverse and erroneous and therefore, violated Section 28 (3) of the Arbitration Act. It was submitted that interpretation of the contract is also an issue of law, which the courts are bound to consider in the proceedings under Section 34.

25. NTPCs counsel highlighted that the learned Single Judge merely endorsed the reasoning of the Tribunal. It is submitted that a bare reading of the award would show facially that it is an unreasoned award contrary to evidence, provisions of Act and wholly arbitrary. It is submitted that so far as the amounts awarded towards

disruption and delay (C-2/C-5) are concerned, the award does not fulfill the test of being a reasoned one as no intelligible basis for the amounts awarded are discernable. Learned counsel relied upon the portions of the award in this case directing payment of DM331416 and 192198. He also relied upon claim no.5 and said that there was an element of overlapping. It was stated that the question of idling cost and enforced storage were indistinguishable and the reliance placed upon cross-examination to find it in favor of SAG was not good enough. It was submitted that SAG's failure to obtain certificates proves that in fact the goods were reached and available for storage. Likewise, it is submitted by Sh. Ashwini Kumar, learned senior counsel that the award, as far as it pertained to travel expenditure etc. was untenable if not entirely exaggerated and contrary to law. The single judge, it was emphasized, was under an obligation to appreciate the evidence in the light of the contract between the parties and the reasoning of the tribunal; in refusing to do so, and FAO (OS) 371/2012 & 372/2012 Page 18 superficially reproducing portions of the findings in the award with a view to upholding them, the single judge erred in law.

26. Mr. Parag Tripathi, learned senior counsel for Siemens, contended that the issue of limitation of Siemens claims urged at the stage of the partial award could not be agitated by NTPC. Referring to the issues framed for decision in the partial award were directly related to the question of facts concerning limitation counsel invited attention of the court to the arbitral proceedings hearings at New Delhi on 3, 4 and 5 May 2002 to decide these two objections. Pursuant to the liberty granted by the Tribunal, the parties filed their respective pre-hearing and post-hearing written submissions. Hearings were held; the partial award thereafter ruled that Siemens claims were within time. This was sought to be impeached under Section 37; the court ruled that such a remedy was not maintainable. The further appeal to the Supreme Court resulted in a decisively ruling that the only remedy for NTPC to question the partial award was a proceeding under Section 34. Reliance was placed on National Thermal Power Corpn. Ltd. v. Siemens Atkiengesellschaft, (2007) 4 SCC451. The Supreme Court by this decision held that against the Partial Award, NTPC's remedy was under Section 34 of the Act and not under Section 37 of the Act. Particular emphasis was placed on the following findings: 18. The expression 'jurisdiction' is a word of many hues. Its colour is to be

discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. 19...Same is the position when an Arbitral Tribunal finds that a claim was dead and was not available to be made at the relevant time or that the claim was not maintainable for other valid reasons or that the claim was barred by limitation. They are all adjudications by the Tribunal on the merits of the claim and in such a case the aggrieved party can have recourse only to Section 34 of the Act and will have to succeed on establishing any of the grounds available under that provision 27. Once Supreme Court held that NTPCs remedy against the Partial Award was to file an application for setting aside the Partial Award under Section 34 of the Act, necessarily it had to comply with the time period provided under Section 34 (3) of the Act FAO (OS) 371/2012 & 372/2012 Page 19 to challenge the award. NTPCs reluctance in doing so meant that the partial award on that aspect attained finality. Therefore, dismissal of OMP2302009 was justified. It was argued that filing of a belated petition under Section 34 denuded the court jurisdiction to examine the issue of limitation or maintainability. Reliance was placed on State of Himachal Pradesh v. Himachal Techno Engineers, (2010) 12 SCC210 to argue that having regard to the proviso to Section 34(3) of the Arbitration Act, the provisions of Section 5 of the Limitation Act, would be inapplicable in regard to petitions under Section 34 of the Act. While Section 5 of the Limitation Act does not place any outer limit in regard to the period of delay that could be condoned, the proviso to sub-section (3) of Section 34 of the Act places a limit on the period of condonable delay by using the words may entertain the application within a further period of thirty days, but not thereafter. It was urged that several issues were finally decided by the partial award, such as (a) NTPCs counter claims were not maintainable; (b) It decided that the claims of SAG were not barred by limitation. This finding was accepted by NTPC to be a final determination. Counsel for NTPC conceded that the decision on the question of limitation could not be questioned; and that (c) settlement of the claims for costs could not be finalised till the end of the project and that NTPC could not blow hot and cold (Paragraphs 4.16 and 4.22 of the Partial Award). This finding too was accepted by NTPC as final.

28. It was argued that a decision on the question of limitation depended very much on the acceptance by NTPC that there were owner-caused delays and that there was an extension of nine months. If the finding on limitation cannot be challenged, it follows directly that the agreement regarding nine months extension cannot also be challenged. Here it was emphasized that the partial Award cannot be prima facie or tentative with regard to the finding on extension of time and be final with regard to the other issues namely: the rejection of counter-claims; decision that the delays can be assessed only at the end of the project; decision that SAGs claims are not time barred etc. In this regard even during the proceedings related to the Final Award it was accepted by NTPC that it could not go behind the findings in the Partial Award with regard to rejection of NTPCs counter-claims and the claims of SAG not being barred by limitation. This is recorded in paragraph 7 of the Final Award. It was submitted that a partial award is final to the extent FAO (OS) 371/2012 & 372/2012 Page 20 that it finally decides the issues arising in the arbitration. In this connection Siemens relies upon *McDermott International Inc and State of Arunachal Pradesh v. Damani Construction Co.*, (2007) 10 SCC742 This finding on limitation was accepted by NTPC to be a final determination. No argument on limitation was advanced by NTPC before the Tribunal at the Final Award stage and before the Single Judge. As a matter of fact the counsel for NTPC conceded that he could not question the decision on the issue of limitation. Counsel stated that it is settled law that pleas not raised before the arbitral tribunal [or given up]. cannot be considered by a court in a petition filed under Section 34 of the Act and applying this analogy under Section 37 of the Act. In this regard *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, (2011) 10 SCC573 is also relied upon.

29. Siemens further contests NTPCs reliance on the correspondence exchanged between 1991 and 1993 to contend that the cause of action accrued during this period is misplaced. A reading of the letters exchanged would show that its claims had not crystallized at that point in time. It was submitted that the letter of Siemens, of 30 April 1992 merely reserved its "rights for further proceedings under clause 26.2 and 27 of GCC for settlement of disputes and arbitration"(paragraph 14 of the said letter). A reservation of right is not tantamount to invocation of arbitration or even an intention to invoke arbitration. In this regard the Tribunal at

paragraph 4.4 of its Final Partial Award has also found that SAG reserved its rights for further proceedings under Article 26.2 and 27 of GCC. This aspect was expressly considered in paragraph 4.4 of the tribunals Final Partial Award: Thus, by letter dated 30 April 1992, the Claimant raised the issue of alleged delays by the Respondent ..and asked for a substantial interim payment. The Single Judge also similarly held that Siemens had sought interim payment. In this regard the Single Judge at paragraph 37 of the judgment whilst referring to NTPCs letter dated 22 July 1992 (which is in response to SAGs letter of 30 April 1992) stated that In a letter dated 22nd July 1992 NTPC informed SAG with reference to interim claim of DM350 million. Counsel submitted that according to the tribunal, NTPC itself did not consider the letter of 22nd July, 1992 as the end of the matter and rather relied on the on the letter dated 22nd June, 1993 (of NTPC). Therefore, the single judges opinion that the parties were still negotiating the issue, was justified. FAO (OS) 371/2012 & 372/2012 Page 21 30. Mr. Tripathi pointed out that after the judgment of the Supreme Court, the Tribunal held proceedings for hearing opening submissions and cross-examination of witnesses on 13, 14 and 15 March 2008. Siemens produced witness statements from (1) Mr. Heinz Jrgen Scharmann as a witness of fact and (2) Mr. L G H Bunton FRICS FCI Arb as an independent expert witness. NTPC produced witness statements from Mr. S Datta and Mr. A K Sinha as witnesses of fact. NTPC did not produce an expert witness despite a specific direction of the Tribunal that the parties can lead expert evidence. Subsequently the parties filed pre-hearing written submissions and on 12, 13 and 14 May 2008, the Tribunal heard closing oral submissions. The parties also filed post-hearing closing submissions. During the proceedings both parties were given a full opportunity to present their case by the Tribunal and were treated equally. Therefore, the NTPCs complaint of insufficient opportunity is baseless. It was submitted that the issue whether the partial final award could be revisited in the light of any new evidence was gone into during the hearing. Reliance was placed on the final award, to the following extract: 48 Mr. Dave produced no additional documentary evidence or even suggested that it existed, when asking the Tribunal at the March and May 2008 hearing to rule finally that there had been no agreement on the question of a nine month extension of time under Clause 22.1 of the GCC. He relied on exactly the same documents as had been placed before the

Tribunal at the hearing in 2002. As to witness, the cross-examination of Mr. Scharmann and Mr. Datta on the issue of the nine month extension were by reference to the correspondence before the Tribunal in 2002 and 2008. 31. It was in the light of the above materials and submissions that the tribunal reiterated its findings on the question of limitation. Then, the tribunal considered claims of Siemen as to whether the delay covered by the 9 month extension of time caused or gave rise to the claims and secondly whether the amounts claimed are demonstrable and reasonable compensation as provided in Article 22.2 of the GCC. It was stressed that the said clause has several limbs: (i) an act or omission on the part of the Owner, (ii) Contractors performance is delayed due to this act or omission, (iii) the Owner shall give due extension (iv) to the extent the Owners delay has caused delay in the Contractors performance (which may not be for the whole delay). This means in turn, that (a) There has to be an act or omission on the part of the Owner for which Contractor's performance FAO (OS) 371/2012 & 372/2012 Page 22 is delayed; (b) The Contractor shall be given due extension of time for the completion of the works to the extent such omission on the part of the Owner has caused delay in the Contractor's performance of his work; (c) In addition the Contractor is entitled to reasonable compensation only if the delays have resulted in any increase in the costs. (It may or may not have). (d) The Owner can examine the justification for such a request for claim. The justification for such a request for claim by the Owner can only arise if the condition of clause 22.1 is satisfied that there has been an act or omission on the part of the Owner causing delay. Otherwise the question of examination of claim does not arise. It was stated that Clause 22 shows that extension of time is only a corollary to owner caused delays. It is not an independent subject. The real issue is whether there is owner caused delays because if there is, extension of time automatically and necessarily follows. The crucial question under Clause 22.1 is whether there has been owner-caused delays. It was argued that Acceptance of nine months delay having occurred at the very inception of the project and therefore extension of time by nine months was therefore not disputed and in any event clearly established. The finding of 9 month extension of time is a finding of fact based on documentary and oral evidence on record. This issue of 9 month extension has been examined on several occasions. Counsel also submitted that no issue of

concurrent delays (contended by NTPC) arose and relied on Para 83 of the final award and the corresponding decision of the single judge.

32. It was submitted that Siemens produced voluminous documentary evidence for each head of claim supported by oral evidence of Mr. Scharmann and expert evidence of Mr. Bunton. No expert evidence of any kind was led by NTPC. Nor did NTPC lead any independent evidence to contradict the computation of claims by Siemens. This formed the basis of the tribunals analysis and award on claims C-2 to C-8. The Single Judge went into each claim and upheld the conclusion of the Arbitral Tribunal in respect of Claims C2to C8. The Single Judge, therefore, examined the computation of Siemens claims, at two stages i.e. in the Final Award. The conclusions are based on appreciation of documentary and oral evidence on record produced by SAG; and NTPC cannot seek re- examination of the evidence in an application under Section 34 of the Act and even less so in an appeal under Section 37 of the Act. Lastly it was stressed that the scope of a FAO (OS) 371/2012 & 372/2012 Page 23 challenge under Section 37 of the Act is more limited than under Section 34. Here, Food Corporation of India vs. Shanti Cereals Pvt. Ltd. 2010(3) Arb. L.R. 296 and Morepen Laboratories Ltd. vPhafag AG &Ors2013(2)ARBLR503(Delhi)that appellate intervention is warranted only if the single judge's determination about the Award's exceeding jurisdiction, or being manifestly contrary to Indian law or substantive provisions, is erroneous. Short of such threshold, this Court, as an appellate court would not substitute its opinion to another plausible one, adopted by the court of first instance. Analysis and Findings i) Was the issue of limitation precluded because of the findings and observations in the partial award.

33. NTPC argues that the issue of limitation is one, which goes into the root of the matter; if there is an erroneous finding, it can be impeached notwithstanding that in an earlier stage, an arbitral tribunal might have ruled upon it. In this regard, NTPC's counsel emphasized that the a decision on the question of limitation is not final, at the interim award stage; that notwithstanding nomenclature, the partial final award in this case was essentially in the nature of a interim order or decision which did not have the characteristics of an award. Such a result arises only when the question of liability of one or other party is decided. He had urged, further, in

support of this plea that tribunal was not seized of all materials necessary to make a final determination on the issue of jurisdiction. Therefore, the final award and the impugned judgment of the single judge, according to him is plainly erroneous.

34. At the outset, it is worthwhile noticing that the Supreme Court's judgment (concerning maintainability of appeal against the interim award, which rejected the plea of limitation) at the outset noticed the facts involved, i.e the NTPC's objections, which were the subject matter of the partial final award:

"Number of issues were framed and the Tribunal after considering the submissions of the parties, gave a partial award on 31-7-2002 and held that the claim of the respondent-SAG was maintainable and was not barred by limitation while the counter claims of the appellant-NTPC was FAO (OS) 371/2012 & 372/2012 Page 24 not admissible because the same were caught by the agreement contained in the minutes of meeting (MoM) dated 6th/7th April, 2000."

35. The Supreme Court also noticed the view of this court expressed, while rejected the appeal under Section 37 at that stage, against the interim partial award. In fact the Supreme Court extracted the view of this court, in the following terms:

"the tenor of the reasoning and finding recorded by the Arbitral Tribunal in its dispensation titled as "Partial Final Award" and on a true construction and scope of the provisions of Section 16 and Section 37 of the Act, is clearly of the view that the impugned dispensation dated 31-7- 2002 rendered by the Arbitral Tribunal cannot by any stretch be said to be an order passed by the Tribunal either under the provisions of Section 16 (2) or Section 16 (3) of the Act and in any case deciding the question of jurisdiction in the negative which will fall within the ambit of appellable orders within the meaning of Section 37 (2) (a) of the Act. In the opinion of this Court, the impugned partial Award is nothing but an Award of interim Award deciding the counter claims of the NTPC finally on merits. This Court, therefore, must hold that the present appeal filed by the NTPC against such a Partial Award under the provisions of Section 37 (2) (a) of the Act is misconceived and is not maintainable."

36. The Supreme Court itself was of opinion that this court's view was correct; it concluded in its judgment that:

"10. Learned counsel for the appellant tried to refer to some of the decisions of this Court but we do not think those decisions need to be noted in the present case as the whole question turned on the facts involved in the present case and we are satisfied that the partial award can be given and against this partial award the appellant has remedy under Section 34 of the Act and thereafter they could file appeal under Section 37 of the Act. But no direct appeal would lie before the High Court because no jurisdictional issue was involved. The counter-claim was disposed of on the basic fact that the counter-claims had been settled by the MoM dated 6th/7th April, 2000. In this view of the matter, we need not refer to the decisions cited by learned counsel and other written submissions made by the appellant. We are satisfied that the view taken by the High Court is correct, appeal was not maintainable under Section 37(2) of the Act before the High Court and there is no ground to interfere with the order passed by the High Court. Accordingly, the appeal is dismissed with no order as to costs."

FAO (OS) 371/2012 & 372/2012 Page 25 37. In view of the inter parties determination- that firstly the partial award was an interim award (as far as the issue of limitation with regard to maintainability of the counter claim) which could not be appealed against and secondly (perhaps more importantly) that the remedy against such decision in the partial award was recourse to Section 34, during the earlier stage of the proceeding, NTPC's argument that it nevertheless had the option of choosing to await the outcome in the final award and not apply under Section 34, needs close examination. What was clearly spelt out by the court was that in respect of a matter, which decided an issue finally (i.e. the maintainability of the counter claim) there was an award and the appeal under Section 37 was not maintainable.

38. It is necessary to keep in the background of the ensuing discussion the previous discussion and the litigation history of this case. NTPC's attempt was to say that a determination of limitation by an arbitrator was not an interim award. That it had chosen to approach the court earlier under Section 37, in no manner

precluded it now from saying that in reality, the determination was by no means final and that it is upon the issuance of the final award that the question of limitation has to be considered. The subsidiary argument was that for a decision on limitation, all essential facts had not been brought on record; being a mixed question of fact and law, the tribunal in a real sense could be said to have decided the issue of limitation in the final award. The ruling in Jain Studio and Pandey & Sons were relied on. The latter decision is of the Supreme Court; it was rendered in the context of an order of an arbitrator who held that he lost his mandate since he had rendered his award. The arbitrator accepted the contention and said he had no jurisdiction: that order was appealed against. The appeal to the Patna High court was dismissed on the ground that such court was not one, which possessed primary civil jurisdiction. In those facts, the Supreme Court held that:

"After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the Arbitrator has an obligation to raise the said question before the Arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. Such a question was required to be raised during arbitration proceedings or soon after initiation thereof as a preliminary issue. FAO (OS) 371/2012 & 372/2012 Page 26 Unlike the 1940 Act, the Arbitrator is entitled to determine his own jurisdiction. In the event, the Arbitrator opines that he has jurisdiction in the matter, he may proceed therewith, which order can be challenged along with the award in terms of Section 34 of the 1996 Act."

39. In Jain Studio, this Court held as follows:

"13. The position would be however different where the arbitral tribunal finds that it is competent to proceed with the arbitration. No appeal has been provided in such a case. The consequences of such a decision are provided in Section 16 (5) of the said Act is that the arbitral proceedings would continue resulting in an arbitral award. The remedy is provided in Section 16 (6) of the said Act, which is to challenge the ultimate award under Section 34 of the said Act. There is no segregated challenge permissible only on the question of the competency of the arbitral tribunal.

14. In this behalf, reference may be made to the judgment of the Apex Court in Pandey and Co. Builders Pvt. Ltd v State of Bihar wherein the Court observed that in the event the Arbitrator opines that he has jurisdiction in the matter, he may proceed therewith which Order can be challenged along with the Award in terms of Section 34 of the said Act.

15. In Ketu Construction (I) Ltd v Gas Authority of India Ltd &Ors 2005 (1) Arbitration L.R. 230 (Delhi) (DB), a Division Bench of this Court found from the facts of the case that the appellant had been questioning the jurisdiction of the arbitrator at all stages and in spite of the protests regarding jurisdiction, the arbitrator had proceeded with the matter and had given a 'no claim' award. It was observed that the only remedy left with the appellant was to wait till the award was given as per Sub-section 6 of Section 16 of the said Act and thereafter challenge the award pursuant to Sub-section 6 of Section 16."

40. Chapter I of the Arbitration Act, which begins with the interpretation clause, provides for the general provisions. Section 2 (c) defines "arbitration award" to include an interim award. Section 5 provides for a non-obstante clause in the matters governed by Part I stating that no judicial authority shall intervene except where so provided for therein. Section 16 enables arbitral tribunals to rule on their jurisdiction. Chapter VII provides for recourses available against the arbitral awards. Section 34 of the Act provides that the Court may be approached against an arbitral award by way of an application for setting it aside in terms of sub-sections (2) or (3). At first glimpse NTPC's argument that the determination in the partial final award is nothing but an order and the FAO (OS) 371/2012 & 372/2012 Page 27 courts quite correctly ruled previously that an appeal was not available, is powerful. However, what is important to notice is that the partial final award is not an "interim award" in the sense that the determinations are of a kind that could be subsumed by a larger determination in the final award proceedings. There is no doubt that the matter decided by the partial award (which is the interim award) finally was that no counter claim by NTPC was maintainable. If NTPC had a grievance on that score, it was open to seek recourse to Section 34, which it never did.

41. Though the partial award is not an "interim award" it pronounced on matters of importance. These were, firstly, that the objections as to Siemens' claims being time barred were ill founded and that NTPC's counter claims in turn, were time barred. On the first aspect there was no finality; though there was finality as to maintainability of NTPC's counter claim. So far as the former, i.e whether Siemens' claims were time barred is concerned, all materials, which existed at the time of determination in the partial award were considered by the tribunal. These materials were examined threadbare and NTPC's arguments were sought to be regurgitated at the final award stage. This is evident from the final award itself.

42. It would be useful to notice the proceedings before the arbitral tribunal, which maintained an oral transcript of the submissions made. The following extracts of the proceedings are instructive on this aspect:

"7. The second issue disposed of by the Partial Award, was that of the Respondent's counterclaims as referred to in the Partial Award at paragraph 4, paragraphs 4.1 to 4.67:

"The first counter claim is not admissible both in its original form and as amended. The second, third, fourth, fifth, sixth, eighth and ninth counterclaims which have been the subject of a prior binding settlement are not admissible. And the seventh counterclaim is not admissible, there being no dispute."

It was expressly accepted by Mr. Dave that it was not open to the Respondent to seek to go behind this finding in the Partial Award. Accordingly, it was common ground that the finding of the Tribunal barring the Respondent's counterclaims was final. No issue arises on this finding."

FAO (OS) 371/2012 & 372/2012 Page 28 43. In para 19, the Tribunal recorded what the position of NTPC was in regard to the partial Award in the impugned final award:

"19. As the Transcript record (Day 1, pages 16-17), Mr. Dave said that his position with respect to the Partial Award was:

"Dushyant Dave: So far as the question of time bar is concerned, it has been held against us. But undoubtedly it is our stand that we have never agreed, we have only agreed to consider if it is possible and we are going to take a stand that by virtue of acquiescence they would not, be entitled to raise these claims now. So, it is our stand that we have never agreed to give it. Dushyant Dave: We have ... there are two things, Sir, here. One is, it is for them to show that there was an agreement on our part that 9 months extension is granted. I think none of the documentary evidence adduced by them establish that. But, be that as it may, we have specifically averred in our reply to the statement of claim that we have never agreed. That's our stand. And the witness only fortifies that in his evidence. Chairman: I understand that ... but the question I think or the point that I think Mr. Gupta will or is raising, is that it is not open to you to take these points at this stage of the proceedings, having regard to the terms of the Final Partial Award. If that's right, it will be helpful to know why you say... or given that, that is an argument, you are plainly going to have to meet. It would be helpful to know why you say that this is open to you?. Dushyant Dave: Because the findings in Partial Award were in respect of two specific issues. And in my respectful submission, those issues, decision on those issues, certainly would disentitle me from now arguing on limitation. But it certainly does entitle me to show that there was no agreement and therefore the Claimant has to prove that it is entitled to damages on account of any delay. That there was a delay and that therefore it is entitled to ... that will have to be established because those are part of the other issues which now are before the Hon'ble Tribunal for decision. A number of issues were framed and only two issues came to be decided in the Partial Award."

44. Mc Dermott (supra) dealt with the issue of impeaching a partial award (again in the course of ICC arbitration) was in issue; the Supreme Court ruled as follows: The 1996 Act does not use the expression "partial award". It uses interim award or final award. An award has been defined under Section 2 (c) to include an interim award. Sub-section (6) of Section 31 contemplates an interim award. An interim award in terms of the said provision is not one FAO (OS) 371/2012 & 372/2012 Page 29 in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage. The learned arbitrator evolved the aforementioned procedure so as to enable the parties to

address themselves as regard certain disputes at the first instance. As would appear from the partial award of the learned arbitrator, he deferred some claims. He further expressed his hope and trust that in relation to some claims, the parties would arrive at some sort of settlement having regard to the fact that ONGC directly or indirectly was involved therein. While in relation to some of the claims, a finality was attached to the award, certain claims were deferred so as to enable the learned arbitrator to advert thereto at a later stage. If the partial award answers the definition of the award, as envisaged under Section 2 (c) of the 1996 Act, for all intent and purport, it would be a final award. In fact, the validity of the said award had also been questioned by BSCL by filing an objection in relation thereto. We cannot also lose sight of the fact that BSCL did not raise any objection before the arbitrator in relation to the jurisdiction of the Arbitrator. A ground to that effect has also not been taken in its application under Section 34 of the Act. We, however, even otherwise do not agree with the contention of Mr. Mitra that a partial award is akin to a preliminary decree. On the other hand, we are of the opinion that it is final in all respects with regard to disputes referred to the arbitrator which are subject matter of such award. We may add that some arbitrators instead and in place of using the expression "interim award" use the expression "partial award". By reason thereof the nature and character of an award is not changed. As, for example, we may notice that in arbitral proceedings conducted under the Rules of Arbitration of the International Chamber of Commerce, the expression "partial award" is generally used by the arbitrators in place of interim award. In any view of the matter, BSCL is not in any way prejudiced. We may state that both the partial award and the final award are subject matter of challenge under Section 34 of the Act. 45. The single judge decision in Jain Studios was rendered after Mc Dermott, yet, there is no reference or consideration of that binding authority; two, it distinguishes Noida Toll Bridge Co. Ltd v Mitsui Marubeni Corporation 124 (2005) DLT337 another decision of a single judge, who held that a decision as to maintainability on grounds including limitation- once gone into, cannot be re-opened. However, the text of Section 16 is quite clear; as to matters that can and are decided finally and are stand alone in one sense, there is finality. There clearly was finality to the issue of counter claims being FAO (OS) 371/2012 & 372/2012 Page 30 time barred. However, since all

evidence had not been considered, the issue of Siemens claims being time barred was undoubtedly a finding: it could not be called final to be impeached independently under Section 34. It is this kind of finding that Parliament had in mind when it enacted Section 16 (5). The clear observations of this court and the Supreme Court that its remedy was not in an appeal (we are satisfied that the partial award can be given and against this partial award the appellant has remedy under Section 34 of the Act and thereafter they could file appeal under Section 37 of the Act) is decisive; it precludes challenge on the issue of limitation of NTPCs counter-claims on the ground that it was time barred. The observations are binding inter parties, the arbitral tribunal and this court. Consequently, the issue could not have been urged once over. Those findings were not in the context of the ruling that Siemens claims were within limitation; as they could be challenged in after the final award. The single judge, to this extent, was not correct in law. The upshot of the discussion is that NTPC could maintain a challenge on the question of limitation of Siemens claims: but in the final award, which it did by filing OMP2292009. Its dismissal, can be however premised not only on the observations of the single judge about finality to this issue in the partial award, but also on the merits of the issue of limitation in the final award, as we shall presently notice. As far as OMP2302009 is concerned, the court is of opinion that it was correctly dismissed. The partial award was final with respect to NTPCs counter claims as it had been so held in the earlier round right up to the Supreme Court; the partial award had also ruled that the counter claims (of NTPC) were not maintainable, because it ceased to have any cause of action as it the matter had been settled. Additionally, even the partial award could if at all (despite the findings of the Supreme Court) have been challenged provided a Petition were filed within the time, under Section 34. NTPC interestingly, in its appeal, states that its challenge is confined to dismissal of its counter claim: however, as it did not challenge it within time and further because the findings of the Supreme Court are decisive that its claim is not warranted because the matter was settled, the challenge to rejection of its counter claim had to fail. Therefore, dismissal of OMP2302009 was justified. Consequently, FAO (OS) 371/2012 has to fail. FAO (OS) 371/2012 & 372/2012 Page 31 46. The above observations are not dispositive of the matter, because the single judge did not base his conclusions on

the limitation issue being precluded because of the partial award; he took note of the fact that the final award itself reiterated the findings of the partial award and also furnished other independent reasons for holding that Siemens claims were within time. This aspect would be discussed in the next section, i.e the merits of the final awards findings with respect to the question of limitation of Siemens claim. On merits, was the decision that Siemens claims within time- as well as on the ii) extension of time (EOT)- sound and justified (OMP2292009 and FAO3722012) 47. The question here is whether the arbitral tribunals findings in the final award as to Siemens claims being within time and not time barred, justified in the circumstances of the case: as well as on the related question of whether there was a valid and binding EOT. This court had noted that the partial final award devotes a considerable part of its discussion to the question of limitation. The contractual conditions, the correspondence between parties, for the period 1990-1998 was analyzed. The merits challenge has to be concerned not as much as to the factual analysis conducted by the tribunal as to the approach adopted by it, to see if there is patent illegality or public policy infraction of a kind that vitiates the award. It is a well-worn and platitudinous proposition that review by courts is quintessentially not an appellate review; it is not even a supervisory review of the kind known in Indian civil law, but one that uses a narrow lens that lets pass mere errors as opposed to fundamental or egregious errors which shock the conscience of the court, impelling intervention. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, [(2012) 5 SCC306] the Supreme Court, following its approach of least intervention, ruled that if two interpretations of a contract are possible, an arbitrator can choose any interpretation that is possible if not a plausible one. *Associated Builders v. Delhi Development Association* [(2015) 3 SCC49] further underscored upon the narrow jurisdiction under section 34: An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do. (emphasis supplied) 48. NTPC relied on *PanchuGopal Bose and Damodar Das* to

urge that a cause of action for suing occurs when the dispute first arises. As authorities enunciating principles which courts are bound to follow, these judgments are instructive; that much is beyond debate. The question here, is when did the cause of action really arise and if it did, was the dispute of the kind where Siemens could have laid a claim at that stage. Before a further discussion, it would be necessary to extract the following passage from Damodar Das: In *PanchuGopal Bose v Board of Trustees for Port of Calcutta*, [1993]. 4 SCC338 this Court had held that the provisions of the Limitation Act would apply to arbitrations and notwithstanding any terms in the contract _to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party, in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question is when the cause of arbitration arises in the- absence of issuance of a notice ..or omission to issue notice for long time after the contract was executed?. Arbitration implies to charter out timeous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aids promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. It was further held that where the arbitration agreement does not really exist or ceased to exist or where the dispute applies outside the scope of arbitration agreement allowing the claim, after considerable lapse of time, would be a harassment to the opposite party. It was accordingly held in that case that since the petitioner slept over his rights for more than 10 years, by his conduct he allowed the arbitration to be barred by limitation and the Court would be justified in relieving the party from arbitration agreement under Sections 5 and 12 (2) (b) of the Act. It is seen that the first contract was of year 1967-68 and was executed in 1967 itself. The amount was stated to have been received in September 1967 itself. The notice admittedly was issued on September 15, 1980 which is hopelessly barred by limitation. Any other construction would feed impetus to choose the covenant at convenience or in concert. With regard to other two claims, it is slated by the learned counsel for the FAO (OS) 371/2012 & 372/2012

Page 33 respondent that the appellant had extended the time for execution of work till 1979 but admittedly in respect of the claim arising out of Civil Appeal Nos. 2544 and 2987 of 1982, he admittedly completed the execution of work on December 30, 1977. In the third case, he abandoned the work. However, in view of the dispute that the respondent had the benefit of extension of the execution of the work, it cannot be laid that there would be no dispute as to whether the claims are barred by limitation. Under those circumstances, it would be difficult to decide whether the two claims are barred by limitation. That would be a matter for decision by arbitrator. The singular reference and emphasis by NTPC is to a letter by Siemens of 30th April, 1992 and its reply dated 22 July 1992, to urge about the earliest point in time when the cause of action first arose. The partial final award discussed this very aspect and rejected NTPCs contention: It is clear that the Respondent did not consider that this letter [i.e. letter dated 22 July 1992 of NTPC]. was the end of the matter. The parties continued to correspond and to meet to clarify issues. Subsequent correspondence is characterized by requests by the Respondent for further information to enable proper consideration of the Claimants clause 22 claim (for example, the respondents letter to the Claimant dated 22 June 1993.) The impugned judgment, in the course of consideration of the 9 month EOT referred to the correspondence exchanged between the parties especially the letters dated 22 July 1992 of NTPC and 22 June 1993 of SAG and held in paragraph 38, of the impugned judgment that The above correspondence shows that the parties were still negotiating on the question of their respective obligations and as to who could be blamed for delays in commissioning the overall project. It also appears that they were willing to wait for the commissioning of the combined cycle modules before taking a final view.

49. Furthermore, this court notices that the partial final award contains an elaborate factual analysis as well as discussion of Indian law on the subject of limitation (Paras 4.2 to 4.55). These reveal that the entire correspondence between 2nd July, 1991 and 11th September 1998 was considered. The tribunal also applied Indian law, particularly Article FAO (OS) 371/2012 & 372/2012 Page 34 113 of the Limitation Act. It rejected NTPCs contention that Siemens claims were time barred. There were three broad threads of reasoning: first that the claims were not demonstrably crystallized earlier, given the correspondence of the

parties and that their rejection, by the Engineer in charge (of the Owner, i.e. NTPC) constituted the starting point for deciding when the cause of action arose, rather than when the claims were first voiced. The second was the tribunal's reliance on Article 32 of the contract, which talked of project completion- and its consideration in the context of a series of letters exchanged by the parties, whereby NTPC represented unambiguously that Siemens claims would be considered at the end of the project. These were reiterated in the final award; what is more, the final award also took note of all correspondence and the further correspondence as well as minutes of meeting, leading right up to the Engineer's decision of 16th August, 2001. In the light of this entire discussion, the tribunal in Para 57-58 and 84-86 of the final award concluded that Siemens claims were not time barred; it also ruled that there was a valid and binding extension of time (EOT). The final award not only took note of Damodar Das and the other decisions cited in these proceedings, but importantly was mindful of the Supreme Court inter parties binding ruling in this case (Para 53 of the final award). The final award expressly states that it is to be read with and is a continuation of the partial award. Therefore the reasoning in the partial award is expressly part of the final award. There is, in this court's opinion, no infirmity with the reasoning that till the completion of contract, claims could not be crystallized as that is based on an interpretation of the contract, which is both reasonable and within the exclusive domain of the tribunal; also, the issue of EOT likewise, was a fact based finding. Having regard to the overview of circumstances, this court holds that the tribunal diligently considered all the facts and applied the law correctly in deciding the issue of limitation and EOT. Therefore, the single judge's view that there was no patent error of law in this regard is correct and does not call for interference. iii) Review on the merits of the findings 50. At the stage of review of the findings, this court has to be careful that the appellate review is not of the award, but of the single judge's impugned judgment. In other words, FAO (OS) 371/2012 & 372/2012 Page 35 the once removed (not second guessing) jurisdiction available through the narrow lens of Section 34 has been undertaken. Therefore, the scope of this appellate review is extremely slender. Of course, in the primary jurisdiction, if the single judge egregiously overlooks a patent error, that can be corrected in this appeal. However, when all the relevant facts and the applicable law has been

seen and the conclusions reflect a view that is plausible not necessarily the only one, in law, the court would not be acted correctly if it were to substitute that view.

51. If the above approach were to be adopted, it is apparent in this case that while undertaking the review permissible under Section 34, the single judge went into each head of claim. It was not a case put forward by NTPC that the damages and compensation or the heads under which they were awarded were contrary to substantive law- say Section 73 of the Contract Act, or the findings so shocking as to be characterized as one which no reasonable individual could countenance, if placed under similar circumstances. Being findings of fact having regard to the nature and degree of proof adduced before the tribunal, the court would not be justified in minutely examining them. The following note of caution sounded by the Supreme Court in *Associated Builders* (supra) is instructive: 22. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the Arbitrator for having applied a formula of 20 months instead of 25 months. Though this would inure in favour of the appellant, it is clear that the appellant did not file any cross objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with claims 12 and 13. The formula then applied by the Division Bench was that it would itself do "rough and ready justice". We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the Arbitrator's view and does what it considers to be "justice". With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost FAO (OS) 371/2012 & 372/2012 Page 36 sight of the fact that it is not a first appellate court and cannot interfere with errors of fact. 52. Therefore, we find no infirmity with the approach of the tribunal much less, in the impugned judgment, in so far as the findings and conclusions with respect to the merits of the various heads of claim awarded.

53. In view of the foregoing findings, the present appeals are meritless. They are consequently dismissed with costs throughout. Accordingly, the bank guarantees which were kept alive due to interim orders of the Court shall stand discharged.
DECEMBER23 2016 S. RAVINDRA BHAT (JUDGE) DEEPA SHARMA (JUDGE)
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