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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMM ARBITRATION PETITION (L) NO. 20173 OF 2026

Oil and Natural Gas Corporation Limited Deendayal Urja Bhawan, 5A-5B, Nelson Mandela Road, Vasant Kunj, Delhi-110070 … Petitioner

Vs.

Afcons Gunanusa Joint Venture Joint Venture of Afcons Infrastructure Limited, a company organised and existing under the laws of India and PT Gunanusa Utama Fabricators, a company organized and existing under the laws of Indonesia, the joint venture having its office at Afcons House, No. 16, Shah Industrial Estate Veera Desai Road, Andheri (W), Mumbai - 400053 Respondents

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Mr. Sharan Jagtiani, Senior Advocate with ms. Chitra Rentala, Mr. Atul Jain, Mr. Ritwik Kulkarni, Mr. Sohan Kinkhabwala, Mr. Alabh Lal, Mr. Abhimanyu Chaturvedi i/b Trilegal, for Petitioner.

Mr. Rajeev Sharma, Senior Counsel with Mr. Mayur Khandeparkar, Mr. Abhishek Birthray, MR. Kunal Kanungo, Ms. Shreya Sharwa, Mr. Tanmany Nandi, Mr. Kartikeya Tripathi, Ms. Rupa Shaw, for Respondent.

CORAM : AMIT BORKAR, J.

RESERVED ON : JULY 08, 2026.

PRONOUNCED ON : JULY 10, 2026

JUDGMENT:

1. By filing the present petition under Section 9 of the Arbitration and Conciliation Act, 1996, the petitioner, Oil and Natural Gas Corporation Limited (ONGC), has prayed for a direction against the respondent to renew and continue the Bank Guarantees furnished under the Contract till the petition filed under Section 34 challenging the arbitral award dated 10th March, 2026 is finally decided. By the said award, the Arbitral Tribunal rejected the petitioner's counterclaim for liquidated damages and also directed return of the Bank Guarantees. According to the petitioner, these Bank Guarantees are the only security available for protecting its claim. It is its case that, under the terms of the Contract, the Bank Guarantees are required to remain alive till the dispute regarding levy of liquidated damages is finally decided. On this basis, the present petition has been filed.

2. The facts giving rise to the present petition are as follows. On 16th September, 2008, Afcons Infrastructure Limited and PT Gunanusa Utama Fabricators entered into a Joint Venture Agreement and constituted the respondent for participating in the Project. Thereafter, on 29th May, 2008, the petitioner, ONGC, and Afcons executed the Contract for construction, installation and commissioning of the Project. Under the General Conditions of

Contract (GCC), the Completion Date was fixed as 30th April, 2011. The Contract provided that time was of the essence under Clause 6.3.1.2. It also gave ONGC a right to recover liquidated damages if there was delay in completion of the Project, in terms of Clause 6.3.2 of the GCC.

3. By its letter dated 29th April, 2011, ONGC informed Afcons that the Project had not been completed within the stipulated Completion Date. After that, by letters dated 3rd May, 2011, 16th May, 2011 and 30th May, 2011, Afcons requested ONGC to grant extension of time for completing the Project. Afcons also requested that no liquidated damages should be deducted and, on its own, offered to furnish Bank Guarantees as security instead of immediate recovery of liquidated damages. Thereafter, by letters dated 31st May, 2011, 21st June, 2011, 24th June, 2011 and 30th June, 2011, ONGC extended the Completion Date up to 31st December, 2011. At the same time, ONGC asked Afcons to furnish an unconditional and irrevocable Bank Guarantee covering the full amount of liquidated damages along with 10% interest. Afcons accepted this condition. While granting extension of time, ONGC clearly stated that it was not giving up its right to recover liquidated damages under Clause 6.3.2 of the GCC.

4. Thereafter, on 22nd July, 2011, the parties amended the Contract and inserted Clause 6.3.4 in the GCC. Under this clause, Afcons agreed to furnish unconditional and irrevocable Bank Guarantees securing 110% of ONGC's maximum claim towards liquidated damages. Clause 6.3.4 further provided that the Bank Guarantees would remain valid till the issue relating to ONGC's

entitlement to recover liquidated damages under the Contract was finally settled. Pursuant to this clause, Afcons furnished the required Bank Guarantees. Initially, they were valid up to 31st December, 2012. Thereafter, they were renewed from time to time and, at present, they are valid up to 15th July, 2026.

5. The Project was ultimately completed on 31st October, 2012 and 2nd January, 2013, after an effective delay of more than 220 days, which is approximately 30 weeks beyond the stipulated Completion Date. After completion of the Project, ONGC issued the Project Completion Certificate. Thereafter, by its letter dated 23rd April, 2013, Afcons denied that it was responsible for the delay in completion of the Project. ONGC disputed this stand by its letter dated 10th May, 2013. As both parties took different stands regarding responsibility for the delay and liability to pay liquidated damages, disputes arose between them. Subsequently, on 20th July, 2015, Afcons invoked the arbitration clause contained in Clause 1.3.2 of the GCC.

6. During the arbitral proceedings, Afcons filed an Interim Application under Section 17 of the Arbitration and Conciliation Act, 1996. By order dated 22nd April, 2022, the Arbitral Tribunal directed that the Bank Guarantees furnished in place of liquidated damages should be restricted to USD 29,909,433, INR 22,08,94,740 and EUR 4,551,725, which represented 110% of the maximum claim for liquidated damages, and further directed that such Bank Guarantees should remain alive till the final award was made. Thereafter, by the impugned award dated 10th March, 2026, the Arbitral Tribunal, amongst other things, dismissed

ONGC's counterclaims, including Counterclaim No. 8 claiming liquidated damages of USD 41,691,936.24, EUR 6,344,827.53 and INR 30,79,13,880/- together with interest. The Tribunal also directed ONGC to return the Bank Guarantees within ten days. Following the award, by letters dated 26th March, 2026 and 27th March, 2026, Afcons called upon ONGC to return the Bank Guarantees in accordance with the directions contained in the award. In reply, ONGC informed Afcons that it was taking steps to avail the statutory remedy available under law.

7. Thereafter, on 8th June, 2026, ONGC filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the impugned award, particularly the part by which its Counterclaim No. 8 for liquidated damages was rejected. According to ONGC, that part of the award is contrary to the fundamental policy of Indian law and is liable to be set aside. Along with the said petition, ONGC also filed an Interim Application seeking stay of the operation of the impugned award. Thereafter, on 13th June, 2026, ONGC filed the present petition under Section 9 seeking continuation of the Bank Guarantees. The present petition came up for hearing on 25th June, 2026, when this Court directed the respondent to file its reply on or before 5th July, 2026. Afcons accordingly filed its reply on 6th July, 2026. On 7th July, 2026, the petitioner filed its rejoinder dealing with the reply filed by Afcons. The matter is, therefore, before this Court for consideration.

8. Mr. Sharan Jagtiani, learned Senior Advocate appearing for the petitioner, submitted that ONGC has made out a strong prima

facie case for setting aside the impugned award. According to him, the Arbitral Tribunal has itself recorded that the delay in completion of the Project was solely because of Afcons. It has also held that Afcons was not entitled to an unconditional extension of time for completing the Project. The Tribunal has further held that ONGC was entitled to recover liquidated damages under Clause 6.3.2 of the General Conditions of Contract (GCC). He submitted that once these findings are recorded by the Tribunal itself, the dismissal of ONGC's counterclaim for liquidated damages is contrary to the findings contained in the award.

9. Learned Senior Advocate further submitted that, despite recording the above findings, the Tribunal dismissed ONGC's counterclaim by relying upon the decision of the Supreme Court in *Kailash Nath Associates v. DDA (2015) 4 SCC 136*. According to the Tribunal, a claim for liquidated damages does not remove the requirement of proving actual loss and, therefore, ONGC could not recover liquidated damages without pleading and proving such loss. He submitted that the reliance placed on the said judgment is completely misplaced as it ignores the settled legal position applicable to the facts of the present case, particularly when the Contract relates to a public utility project.

(a) He submitted that in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.(2003) 5 SCC 705,* the Supreme Court held that where the terms of a contract clearly provide for payment of liquidated damages in case of breach, the party suffering the breach is not required to prove actual loss. In such a case, reasonable compensation can be awarded even

if actual loss is not specifically proved.

(b) He further submitted that in *Construction & Design Services v. DDA (2015) 14 SCC 263*, the Supreme Court, while following the decision in *Saw Pipes,* held that in public utility projects, loss to the affected party can be presumed even if there is no specific evidence of actual loss. If the amount fixed under the contract is a genuine pre-estimate of loss, proof of actual loss is not necessary. In such a situation, the burden shifts upon the party committing the breach to establish that no loss was likely to have been caused.

(c) He also relied upon the decision of the Delhi High Court in *GAIL (India) Ltd. v. Punj Lloyd Ltd. RFA (OS) (COMM) No. 6 of 2016*, wherein it was held that when parties have voluntarily agreed to a liquidated damages clause in a contract where timely completion is important, the agreed amount represents a genuine estimate of loss and becomes payable without proof of actual loss.

(d) Learned Senior Advocate also placed reliance upon the decision of the Supreme Court in *Saisudhir Energy Solutions Ltd. v. NTPC Ltd.2026 SCC OnLine SC 125*, wherein the Supreme Court reiterated that in projects involving public interest, the time schedule agreed between the parties assumes importance. Once the parties have agreed upon a liquidated damages clause which does not require proof of actual loss, the contractual terms bind both parties. A party committing the breach cannot avoid liability merely by

contending that the exact loss has not been proved. In such cases, the burden lies upon the defaulting party to establish that no loss was caused or that the stipulated amount is in the nature of a penalty.

(e) Reliance was also placed upon the decision of the Supreme Court in *BPL Ltd. v. Morgan Securities & Credits Pvt. Ltd. (2026) 3 SCC 1*, wherein it has been held that commercial contracts should be interpreted in a manner which gives effect to the intention of the parties. It was submitted that the terms voluntarily agreed upon by parties cannot be altered by judicial interpretation unless they are shown to be arbitrary, discriminatory, mala fide or affected by bias. It was further submitted that the Arbitral Tribunal is equally bound by the terms of the contract and cannot depart from them.

10. Learned Senior Advocate submitted that the impugned award wrongly distinguishes the decision in *Construction & Design Services* by observing that the presumed loss in that case was confined only to loss of interest on blocked capital. According to him, the Supreme Court had also recognised that delay in such public utility projects could result in environmental loss. He submitted that the Tribunal has not assigned any reason as to why similar losses, such as loss of interest on blocked capital, loss of earnings or environmental loss, could not be presumed in the present case also.

11. Learned Senior Advocate further submitted that ONGC is engaged in extraction of hydrocarbons, from which crude oil and natural gas are separated and thereafter supplied to refineries for further processing. For carrying out these activities, ONGC has established the IC Complex consisting of three units, namely, the Infill Complex Gas, the Infill Complex Production and the Infill Complex Water. According to him, the present Contract related to the design, engineering, testing, start-up and commissioning of the ICP-R process platform, which was an extension of the existing ICP platform.

12. It was submitted that the ICP-R process platform was necessary for increasing ONGC's production capacity and thereby enhancing extraction of crude oil and natural gas. According to him, the Contract was, therefore, directly connected with a project of public importance and also with the country's energy security. He submitted that delay in completion of such a project naturally resulted in different kinds of losses to ONGC, including loss of capital, loss of foreign exchange and loss of production. He further submitted that this was not a new case put forward for the first time in the present proceedings, as alleged by Afcons, but was consistently pleaded by ONGC before the Arbitral Tribunal and has also been noticed in the impugned award.

13. Learned Senior Advocate submitted that the impugned award also overlooks Clause 6.3.2 of the GCC. According to him, the clause specifically provides that the amount of liquidated damages represents a genuine pre-estimate of loss and is payable on demand without requiring proof of actual loss or damage. He

submitted that after holding Clause 6.3.2 to be valid and binding, the Tribunal could not have insisted upon proof of actual loss. By doing so, the Tribunal added a condition which the parties had consciously excluded from the Contract and thereby virtually re-wrote the contractual terms.

14. Learned Senior Advocate further submitted that Afcons has contended in its reply that Clause 6.3.2 of the GCC was applicable only till the final settlement of the arbitration. According to him, this contention is contrary to the express terms of the Contract and is also inconsistent with the principles laid down by the Supreme Court in *BPL Ltd. v. Morgan Securities & Credits Pvt. Ltd.*. He submitted that the Tribunal is bound to enforce the Contract as agreed between the parties and cannot alter or re-write its terms.

15. Learned Senior Advocate also submitted that the impugned award relies upon a statement made by the Minister of Petroleum and Natural Gas in the Lok Sabha to conclude that ONGC had suffered no loss. According to him, this approach is legally unsustainable. He submitted that the Contract itself records that ONGC entered into the Contract on its own behalf and that the Government of India had no rights, liabilities or obligations under it. He further submitted that the Minister was not a party to the arbitration proceedings, was not examined as a witness and was never subjected to cross-examination. Therefore, such a statement could not have been relied upon by the Tribunal while deciding the disputes.

16. Learned Senior Advocate further submitted that Afcons has contended in its reply that it had pleaded before the Tribunal that ONGC had suffered no loss and that ONGC did not deny the said contention. Though this submission is disputed, he submitted that the important aspect is that the Tribunal has never recorded any finding that ONGC had actually suffered no loss. According to him, instead of requiring Afcons to establish that no loss had occurred, as required by the law laid down in *Construction & Design Services*, the Tribunal wrongly shifted the burden upon ONGC to prove the loss. He submitted that, in the absence of any finding that Afcons had discharged its burden, it is incorrect to suggest that ONGC had accepted Afcons' case that no loss had been suffered.

17. Learned Senior Advocate then addressed the requirements for grant of post-award interim relief to a party which has partly failed before the Arbitral Tribunal. He submitted that, in the arbitration proceedings as a whole, ONGC cannot be treated as an unsuccessful party because the Tribunal rejected twelve out of the fifteen claims made by Afcons, involving claims of about USD 114.13 million and INR 101.18 crore, and only partly allowed three claims involving much smaller amounts. According to him, the only issue on which ONGC was unsuccessful was its Counterclaim No. 8 relating to liquidated damages. Therefore, for the limited purpose of the present petition, ONGC may be regarded as an unsuccessful party seeking protection of its liquidated damages claim by keeping the Bank Guarantees alive during the pendency of the petition under Section 34.

18. Learned Senior Advocate relied upon the decision of the Supreme Court in *Home Care Retail Marts Pvt. Ltd. v. Haresh N. Sanghavi 2026 SCC OnLine SC 670*. He submitted that the Supreme Court has held that even an unsuccessful party can maintain a petition under Section 9 after the award for preserving the subject matter of the dispute. According to him, apart from satisfying the ordinary requirements of a prima facie case, balance of convenience and irreparable injury, such a party is also required to establish rare and compelling circumstances justifying grant of interim protection. He submitted that the Supreme Court has further observed that removal of interim protection relating to a bank guarantee while the award is under challenge may result in irreversible prejudice to the unsuccessful party.

19. Learned Senior Advocate further relied upon the decision of this Court in *ONGC v. Swiber Offshore Construction Pte. Ltd.Commercial Arbitration Petition (L) No. 17832 of 2026*. He submitted that this Court applied the principles laid down in *Home Care* and held that post-award interim protection can be granted only when exceptional circumstances exist which cannot be corrected at a later stage and where the applicant possesses a legally enforceable right to insist upon continuation of the bank guarantee. According to him, these are the principles which govern consideration of the present petition.

20. Learned Senior Advocate submitted that although this Court declined relief in *Swiber* on the facts of that case, the present case stands on a different footing and fully satisfies the principles laid down in *Home Care* as well as *Swiber*. According to him, the facts

of the present case are clearly distinguishable.

21. He submitted that, in *Swiber*, the parties had entered into Consent Terms under which the Bank Guarantee was to remain valid only for 120 days after the arbitral award. ONGC had thereafter sought continuation of the Bank Guarantee beyond the agreed period so as to use it as general security for its entire claim during the liquidation proceedings of Swiber. In the present case, however, there are no such Consent Terms. On the contrary, Clause 6.3.4 of the GCC, which was inserted at the request of Afcons, specifically requires the Bank Guarantees to continue as security for ONGC's claim for liquidated damages until the dispute is finally settled, which is now pending in the petition under Section 34.

22. Learned Senior Advocate further submitted that the petitioner has also established a strong prima facie case. He pointed out that, in *Swiber*, ONGC had failed before the Tribunal to establish that the delay in execution of the project was attributable to Swiber and, therefore, this Court found that the challenge to the arbitral award was not strong enough to ignore the findings recorded by the Tribunal. According to him, the position in the present case is entirely different because the impugned award itself records that the delay in completion of the Project was solely attributable to Afcons, that Afcons was not entitled to an unconditional extension of time and that ONGC was entitled to recover liquidated damages under Clause 6.3.2 of the GCC. He submitted that, despite recording these findings, the Tribunal ignored the binding law laid down by the Supreme Court in *Construction & Design Services*. According to him, the reasons

given by the Tribunal for distinguishing that judgment are brief and without proper reasoning. He submitted that the present Project is a public utility project of the very nature considered by the Supreme Court in *Construction & Design Services*, and the same principle has also been recognised in the decisions of the Supreme Court in *Saisudhir Energy Solutions Ltd.* and of the Delhi High Court in *GAIL (India) Ltd.*. Therefore, according to him, the Tribunal committed an error in disregarding the decision in *Construction & Design Services* and in applying the decision in *Kailash Nath Associates* to the facts of the present case.

23. Learned Senior Advocate submitted that the impugned award is liable to be set aside as it ignores the binding decisions of superior Courts. According to him, when an Arbitral Tribunal disregards the law laid down by the Supreme Court or a binding judgment of a High Court, it acts contrary to the fundamental policy of Indian law. He submitted that such an award cannot be sustained in law.

24. Learned Senior Advocate further submitted that, even assuming, without admitting, that the present case is governed by the principles laid down in *Kailash Nath Associates*, the said judgment itself recognises that where it is difficult or impossible to prove the exact loss, the amount of liquidated damages fixed under the contract, if it is a genuine pre-estimate of loss, can still be awarded. According to him, ONGC had specifically raised this contention before the Arbitral Tribunal. However, the Tribunal failed to examine whether, in the facts of the present case, the loss was difficult or impossible to quantify. He submitted that the

Tribunal itself has held Afcons responsible for the delay of more than 220 days in completing the Project. Since the Contract relates to a public utility project, the losses arising from such delay cannot be accurately measured in monetary terms. Therefore, according to him, the Tribunal ought to have considered this aspect but failed to do so.

25. Learned Senior Advocate further submitted that the impugned award is also liable to be set aside because the Tribunal relied upon a statement made by the Minister of Petroleum and Natural Gas in the Lok Sabha for holding that ONGC had suffered no loss. According to him, such reliance is legally impermissible because the Minister was neither examined as a witness nor subjected to cross-examination in the arbitral proceedings. He submitted that the Tribunal committed a serious error in relying upon such material while deciding the dispute. Therefore, according to him, ONGC has made out a strong prima facie case for setting aside the impugned award.

26. Learned Senior Advocate then submitted that the balance of convenience is also entirely in favour of ONGC. He pointed out that in *Swiber*, continuation of the Bank Guarantee would have extended the security beyond what the parties had expressly agreed under the Consent Terms. According to him, the facts of the present case are completely different. Here, the Bank Guarantees were furnished by Afcons itself in place of ONGC's contractual right under Clause 6.3.2 of the GCC to deduct liquidated damages from the running bills. He submitted that Afcons has continued to renew these Bank Guarantees for nearly fifteen years. Therefore,

directing continuation of the Bank Guarantees would only preserve the existing position which has remained throughout the arbitration proceedings. According to him, such continuation would not cause any prejudice to Afcons, whereas permitting the Bank Guarantees to expire would seriously prejudice ONGC. He further submitted that ONGC had refrained from deducting liquidated damages from Afcons' bills only because Afcons had furnished these Bank Guarantees. Had ONGC exercised its contractual right to deduct the amount at that stage, it would have continued to retain the amount of liquidated damages even today.

27. Learned Senior Advocate further submitted that Clause 6.3.4 of the GCC itself forms part of the contractual mechanism agreed between the parties. According to him, this clause specifically requires the Bank Guarantees to remain as security for ONGC's claim for liquidated damages until the dispute is finally settled. Since the dispute is presently pending in the petition filed under Section 34 of the Arbitration and Conciliation Act, the contractual obligation to continue the Bank Guarantees still survives. Therefore, according to him, the balance of convenience clearly favours ONGC.

28. Learned Senior Advocate next submitted that ONGC would also suffer irreparable injury if the Bank Guarantees are not continued. He relied upon the decision of the Supreme Court in *Home Care Retail Marts Pvt. Ltd.*, wherein it has been observed that post-award interim protection can be granted to an unsuccessful party where such protection does not affect the enforceability of the award. He also relied upon the decision of this

Court in *Swiber*, wherein it was recognised that continuation of a Bank Guarantee may, in an appropriate case, constitute a permissible post-award interim measure. According to him, these decisions recognise that interim protection can be granted even after an award if refusal of such protection would result in irreparable prejudice.

29. Learned Senior Advocate submitted that while applying the above principles in *Swiber*, this Court held that the Bank Guarantee in that case had been furnished only as security for liquidated damages and could not be converted into a general security for all claims of ONGC. This Court also held that the fact that Swiber was undergoing liquidation was, by itself, not a rare or compelling circumstance for grant of post-award protection. According to him, the present case stands on an entirely different footing because the Bank Guarantees constitute the only security available for ONGC's claim for liquidated damages and are due to expire on 15th July, 2026. He submitted that if the Bank Guarantees are permitted to lapse, the very subject matter of the present dispute would be lost forever. Even if ONGC ultimately succeeds in its petition under Section 34, such success would become meaningless because there would be no security left to satisfy its claim. According to him, ONGC would be left without any effective remedy.

30. Learned Senior Advocate further submitted that one of the constituents of the respondent Joint Venture is a foreign company situated in Indonesia. According to him, after completion of the Project, the purpose for which the Joint Venture was constituted

has already been achieved. Therefore, if the Bank Guarantees are allowed to expire, ONGC may face serious difficulty in securing and enforcing its claim for liquidated damages against the foreign entity. He submitted that this itself shows that ONGC would suffer irreparable prejudice if the Bank Guarantees are not continued.

31. Learned Senior Advocate also submitted that ONGC has acted with due diligence and without any delay. He pointed out that in *Swiber*, although ONGC was aware from the beginning about the date of expiry of the Bank Guarantee, it approached the Court only shortly before its expiry. According to him, the facts of the present case are different. As the Bank Guarantees were due to expire on 15th July, 2026, ONGC filed the petition under Section 34 along with the Interim Application seeking stay on 8th June, 2026 and thereafter filed the present petition on 13th June, 2026. He submitted that the present petition was immediately moved before this Court and the proceedings have thereafter been prosecuted with promptness. Therefore, there is no delay or lack of diligence on the part of ONGC.

32. Learned Senior Advocate further submitted that the present case discloses exceptional and rare circumstances warranting grant of interim protection. He pointed out that although this Court in *Swiber* held that no exceptional circumstances were established in that case, the facts of the present case are materially different. According to him, the impugned award itself records that the delay of more than 220 days in completion of the Project was solely attributable to Afcons, that Afcons was not entitled to an unconditional extension of time, and that ONGC was entitled to

recover liquidated damages under Clause 6.3.2 of the GCC.

33. Learned Senior Advocate submitted that despite recording these findings, the Tribunal rejected ONGC's claim for liquidated damages by relying upon the decision in *Kailash Nath Associates* while ignoring the binding principles laid down by the Supreme Court in *Construction & Design Services*. According to him, the reasons given by the Tribunal for doing so are brief and unsupported by proper reasoning. He submitted that since the Contract relates to a public utility project and the Tribunal has already found a delay of more than 220 days attributable to Afcons, ONGC's claim for liquidated damages of about INR 323 crores deserves to remain secured by continuation of the Bank Guarantees till the dispute is finally decided.

34. Learned Senior Advocate further submitted that under the Joint Venture Agreement, the liabilities of Afcons Infrastructure Limited and PT Gunanusa Utama Fabricators are joint as well as several. According to him, ONGC is, therefore, entitled to proceed independently against PT Gunanusa Utama Fabricators for recovery of its claim. He submitted that if the Bank Guarantees are allowed to lapse, ONGC will face serious prejudice in enforcing its claim for liquidated damages against the foreign constituent of the Joint Venture.

35. Learned Senior Advocate also submitted that, according to the records available on the website of this Court, Afcons has itself filed proceedings challenging the impugned award. However, according to him, this fact has not been disclosed by Afcons in its

reply to the present petition. He submitted that, irrespective of such non-disclosure, the fact that both parties have challenged different parts of the impugned award clearly shows that the disputes between them are still pending adjudication. Therefore, according to him, Clause 6.3.4 of the GCC continues to operate and requires the Bank Guarantees to remain valid until the disputes are finally settled.

36. Learned Senior Advocate then dealt with the contentions raised by Afcons in its reply. He submitted that Afcons has claimed that it is a financially sound company having an annual turnover of more than INR 13,000 crores and has relied upon its consolidated financial statements in support of this contention.

37. According to the learned Senior Advocate, reliance upon the consolidated financial statements is misplaced because the liability in the present proceedings is that of Afcons Infrastructure Limited as a constituent of the respondent Joint Venture. The financial position of its subsidiaries and associate companies is not relevant for deciding the present dispute.

38. Learned Senior Advocate further submitted that Afcons has not placed on record its latest audited financial statements for the financial year 2025-26. According to him, those financial statements show a significant deterioration in the financial position of Afcons Infrastructure Limited. He submitted that the profit before tax has substantially reduced, the cash flow from operating activities has considerably declined, the debt-equity ratio has increased and the net profit margin has also reduced.

According to him, these financial indicators demonstrate a weakening financial position.

39. Learned Senior Advocate submitted that these financial figures clearly indicate deterioration in the financial condition of Afcons Infrastructure Limited and also show lack of sufficient liquidity to satisfy ONGC's claim for liquidated damages of about INR 323 crores. He further submitted that although Afcons has contended that continuation of the Bank Guarantees would cause financial hardship and irretrievable loss, no material has been produced to substantiate such contention. According to him, Afcons has relied upon a letter issued by the State Bank of India stating that Bank Guarantees may require a one hundred per cent cash margin. However, no material has been placed to show that the Bank Guarantees issued by Punjab National Bank in the present case are subject to any such requirement.

40. Learned Senior Advocate further submitted that even if it is assumed that Afcons has deposited one hundred per cent cash margin with Punjab National Bank by way of fixed deposits, Afcons would continue to earn interest on such deposits. According to him, continuation of the arrangement which has remained in existence for nearly fifteen years cannot cause any substantial financial prejudice to Afcons, particularly when compared with the serious prejudice likely to be caused to ONGC if the Bank Guarantees are permitted to lapse.

41. In conclusion, learned Senior Advocate submitted that the present case discloses rare and exceptional circumstances justifying

grant of interim protection. He, therefore, prayed that this Court should restrain return of the Bank Guarantees and direct their extension and continuation until the petition under Section 34 is finally decided. In the alternative, he prayed that Afcons be directed to furnish fresh Bank Guarantees of equivalent value in terms of the prayers made in the petition.

42. Mr. Rajeev Sharma, learned Senior Advocate appearing for the respondent, submitted that the petitioner had neither pleaded nor proved before the Arbitral Tribunal that it had suffered any loss because of the delay in completion of the Project. According to him, there was also no pleading or evidence to show that such loss was impossible or difficult to prove. He submitted that, in the absence of such pleadings and evidence, the petitioner could not invoke the liquidated damages clause contained in the Contract.

43. Learned Senior Advocate invited my attention to the judgment of the Supreme Court in *Fateh Chand v. Balkishan Dass AIR 1963 SC 1405*. He submitted that the Supreme Court has held that Section 74 of the Indian Contract Act, 1872 entitles the aggrieved party to receive reasonable compensation for breach of contract irrespective of whether actual loss or damage is proved. However, according to him, the said provision only dispenses with strict proof of actual loss. It does not permit grant of compensation where no legal injury has in fact been caused because of the breach. He submitted that compensation for breach of contract can be awarded only for such loss or damage as naturally arises in the ordinary course of events or which the parties knew, at the time of entering into the contract, was likely to result from such breach.

44. Learned Senior Advocate also relied upon the judgment of the Supreme Court in *Kailash Nath Associates* . He submitted that the Supreme Court has held that since Section 74 provides for reasonable compensation for loss or damage caused by breach of contract, the existence of such loss or damage is an essential requirement for invoking the provision. He further submitted that the Supreme Court has explained that the words "whether or not actual damage or loss is proved" mean that proof of actual loss is dispensed with only where it is impossible or difficult to establish such loss. According to him, only in such cases can the amount of liquidated damages specified in the contract, if it represents a genuine pre-estimate of loss, be awarded.

45. Learned Senior Advocate submitted that the Arbitral Tribunal has considered both the judgments in *Fateh Chand* and *Kailash Nath Associates* and, after appreciating the material placed before it, has recorded a finding that the petitioner failed to plead as well as prove any loss. He submitted that, in fact, the respondent had never pleaded that the petitioner had suffered no loss. He also relied upon the judgment of this Court in *ONGC v. Swiber Offshore Construction Pte. Ltd.* and submitted that this Court has extensively considered the principles governing exercise of powers under Section 9 after passing of an arbitral award at the instance of an unsuccessful party. According to him, since the present petition also seeks post-award relief, those principles are directly applicable. He further submitted that the scope of interference under Section 34 is limited and, therefore, the petitioner cannot seek wider relief by filing the present petition.

46. In reply to the contention of the petitioner that the respondent has also filed a petition under Section 34 challenging the arbitral award, learned Senior Advocate submitted that such challenge has no bearing on the present proceedings. According to him, the grounds raised by the respondent in its petition under Section 34 relate to different issues and are independent of the controversy involved in the present petition. He further submitted that the Supreme Court in *Home Care Retail Marts (P) Ltd.* has held that an unsuccessful party in arbitration can seek relief under Section 9 only if the relief claimed is of a non-prejudicial nature.

47. Learned Senior Advocate submitted that if the respondent is required to continue the Bank Guarantees, it would have to provide security of nearly INR 400 crores even though it has succeeded before the Arbitral Tribunal. According to him, such a direction would seriously prejudice the respondent and, therefore, the relief sought by the petitioner cannot be treated as a non-prejudicial interim measure. He submitted that the respondent has already placed material in its affidavit to show that its financial position is sound and that its assets are sufficient to satisfy the petitioner's claim in the event the petitioner ultimately succeeds in the proceedings under Section 34. He also invited my attention to Clause 8 of the Bank Guarantee and submitted that the petitioner is entitled to make a demand under the Bank Guarantee within twelve months after expiry of its validity, provided the cause of action has arisen during the period when the Bank Guarantee remained valid. According to him, this clause itself sufficiently protects the petitioner's interest.

48. Learned Senior Advocate further submitted that, without prejudice to its rights, the respondent is willing to furnish a corporate guarantee in favour of the petitioner if the petitioner ultimately succeeds in the proceedings under Section 34. According to him, in view of this offer and having regard to the principles laid down by the Supreme Court in *Home Care Retail Marts*, the petitioner has failed to satisfy the conditions required for grant of post-award interim protection. He therefore submitted that the present petition deserves to be dismissed.

49. In rejoinder, Mr. Jagtiani, learned Senior Advocate appearing for the petitioner, submitted that the judgment of the Supreme Court in *Construction & Design Services* lays down that it is not necessary in every case for the claimant to plead and prove actual loss. According to him, the Supreme Court has held that where the contract provides only the maximum limit of liquidated damages and not a fixed amount, the Court may treat an appropriate part of such amount as reasonable compensation even in the absence of specific evidence of actual loss, while treating the remaining amount as penalty, if necessary. He further submitted that the Supreme Court has also held that the burden of proving that no loss was likely to have been suffered rests upon the party which committed the breach and not upon the party claiming liquidated damages.

50. Learned Senior Advocate also referred to Clause 8 of the Bank Guarantee and submitted that the expression "cause of action" used therein cannot be understood in the same manner as the cause of action required for filing a civil suit. According to him,

Clause 8 merely permits invocation of the Bank Guarantee where the claim arises during the period for which the Bank Guarantee remains valid. He submitted that the petitioner is, therefore, entitled to continuation of the Bank Guarantees and to the reliefs prayed for in the present petition.

Reasons and Analysis

51. I have carefully considered the pleadings, the documents placed on record, the arbitral award, the submissions made by the learned Senior Counsel appearing for both sides and the judgments relied upon by them. Both parties have made many submissions on different issues. Still, the issue before this Court is of limited nature. This Court is exercising powers under Section 9 of the Arbitration and Conciliation Act, 1996 after the arbitral award has been passed and during pendency of the petition filed under Section 34 challenging that award. Therefore, at this stage, this Court is not required to finally decide whether the arbitral award is right or wrong. At the same time, this Court also cannot ignore the challenge made to the award because the petitioner is seeking continuation of the Bank Guarantees though the Tribunal has directed that they should be returned. Therefore, the only question for consideration is whether, in the facts of the present case, the petitioner has made out a case for grant of post-award interim protection.

52. Before considering the rival submissions, it is necessary to see the legal position relating to a petition under Section 9 after an arbitral award is passed. Earlier, different Courts had taken

different views whether a party who failed before the Arbitral Tribunal could still file a petition under Section 9 after the award. That issue now stands settled by the judgment of the Supreme Court in *Home Care Retail Marts Pvt. Ltd.*. The Supreme Court has held that the words "a party" used in Section 9 cannot be given different meaning depending on whether such party has succeeded or failed before the Tribunal. The Act does not make any such distinction. Therefore, every party to the arbitration agreement can invoke Section 9 till the arbitral award is enforced under Section 36. However, the judgment in *Home Care Retail Marts* does not mean that unsuccessful party will get interim protection as a matter of right. The Supreme Court has also made it clear that the normal principles for grant of interim relief will continue to apply. The applicant has to show a prima facie case, balance of convenience and likelihood of irreparable injury. The Supreme Court has further observed that where the applicant has lost before the Tribunal, the requirement becomes much stricter. Such party has to show rare and compelling circumstances. This higher standard is prescribed because the Tribunal has considered the evidence and passed the award. Therefore, while considering a request for post-award interim protection, the Court cannot ignore the findings recorded in the arbitral award.

53. This Court had occasion to consider these principles in *ONGC v. Swiber Offshore Construction Pte. Ltd.* While applying the law laid down by the Supreme Court in *Home Care Retail Marts*, this Court observed that though an unsuccessful party can maintain a petition under Section 9, continuation of a Bank

Guarantee after rejection of its claim can be granted where the challenge to the award is exceptionally strong and the surrounding facts also show compelling circumstances. The arbitral award cannot be ignored while exercising powers under Section 9. The findings recorded by the Tribunal continue to operate unless the award is set aside.

54. Keeping these principles in mind, it is necessary to consider the rival submissions. The petitioner has argued that the impugned award suffers from serious error because the Tribunal has ignored binding judgments of the Supreme Court while rejecting its counterclaim for liquidated damages. According to the petitioner, the Tribunal has recorded that the delay of more than 220 days in completing the Project was because of the respondent. The Tribunal has also held that the respondent was not entitled to unconditional extension of time and that ONGC was entitled to recover liquidated damages under Clause 6.3.2 of the General Conditions of Contract. According to the petitioner, after recording these findings, the Tribunal could not have rejected the counterclaim because loss was not pleaded and proved. It is submitted that this approach is contrary to the settled law governing public utility contracts.

55. On the other hand, the respondent submitted that the award cannot be read by taking some findings. According to the respondent, the Tribunal has considered the entire evidence, examined the pleadings of parties and reached a conclusion that the petitioner had neither pleaded nor proved any loss. It is submitted that the Tribunal has applied the principles laid down by

the Supreme Court in *Fateh Chand* and *Kailash Nath Associates* and recorded its findings. According to the respondent, whether those findings are right or wrong is a matter which will be examined in the proceedings under Section 34. At this stage, the award is valid and binding and cannot be ignored because another possible view may be available.

56. In my view, the petitioner is right in saying that while considering whether a prima facie case exists, the Court cannot ignore the grounds on which the arbitral award is challenged. At the same time, the respondent is right in submitting that this Court cannot make a detailed examination of the award while exercising jurisdiction under Section 9. This Court is not deciding the petition under Section 34. Therefore, it is not expected to decide whether the award deserves to be set aside. The only exercise before this Court is to see whether the challenge raised by the petitioner is exceptionally strong so that interim protection deserves to continue till the petition under Section 34 is finally decided.

57. The petitioner has placed emphasis on the findings recorded by the Tribunal that the delay was attributable to the respondent. Those findings cannot be ignored because they form the foundation of the petitioner's claim for liquidated damages. If the Tribunal had held that the petitioner was responsible for the delay, the matter would have stood on a different footing. However, in the present case, the Tribunal appears to have accepted that the delay was because of the respondent and that Clause 6.3.2 of the Contract was applicable. Even then, the Tribunal rejected the counterclaim on the ground that actual loss was neither pleaded

nor proved. Whether this approach is correct is one of the important issues which will have to be considered in the proceedings under Section 34. Therefore, at this stage, it cannot be said that the petitioner has raised only a imaginary challenge.

58. At the same time, the submission of the respondent that the award has to be read as a whole deserves consideration. The Tribunal has not rejected the counterclaim without assigning reasons. It has discussed the legal principles flowing from *Fateh Chand* and *Kailash Nath Associates*. It has considered the pleadings and evidence placed before it before recording its conclusion that loss was not pleaded or proved. Therefore, this is not a case where the Tribunal ignored the issue or passed an order without discussion. Whether the reasons given by the Tribunal are sustainable is another matter. But, at present, it cannot be said that the award is without reasons or passed without application of mind.

59. The dispute between the parties is regarding the interpretation of Section 74 of the Indian Contract Act and the effect of the judgments in *Saw Pipes Ltd.*, *Construction & Design Services* and *Kailash Nath Associates*. According to the petitioner, the decision in *Construction & Design Services* applies because the present Contract relates to a public utility project and, therefore, proof of actual loss is not necessary. On the other hand, the respondent has submitted that *Kailash Nath Associates* lays down that existence of loss is an essential requirement for applying Section 74 and unless the petitioner has pleaded and proved actual loss, or at least shown that such loss was impossible or difficult to

prove, compensation cannot be granted. This issue goes to the root of the challenge made by the petitioner and therefore requires careful examination.

60. Both parties have relied upon several judgments in support of their submissions. The petitioner has relied upon *Saw Pipes*, *Construction & Design Services*, *Saisudhir Energy Solutions*, *GAIL (India) Ltd.* and *BPL Ltd.* The respondent, on the other hand, has relied upon *Fateh Chand*, *Kailash Nath Associates* and the judgment of the this Court in *Punj Lloyd Ltd.* Therefore, the issue is not simply to accept one judgment and reject the other. The duty of the Court is to see whether all these judgments can be read together and whether the Tribunal has correctly understood and applied the legal principles coming from them. Only after such examination can it be considered whether the petitioner has shown the exceptionally strong prima facie case.

61. The main submission of the petitioner is that the Arbitral Tribunal has committed a legal error while applying the law relating to liquidated damages. According to the petitioner, after recording that the delay of more than 220 days in completion of the Project was because of the respondent and that ONGC was otherwise entitled to invoke Clause 6.3.2 of the General Conditions of Contract, the Tribunal could not have rejected the counterclaim on the ground that actual loss was not pleaded or proved. It is submitted that while doing so, the Tribunal ignored the law laid down by the Supreme Court from time to time in matters relating to public utility contracts.

62. Before considering this submission, it is necessary to see the scheme of the Contract. Clause 6.3.2 provides for recovery of liquidated damages in case of delay. Later, at the request of the respondent, Clause 6.3.4 came to be added in the Contract. Under this clause, instead of ONGC deducting the liquidated damages from the running bills, the respondent agreed to furnish unconditional and irrevocable Bank Guarantees for 110% of the maximum claim towards liquidated damages. The clause further provides that these Bank Guarantees shall remain alive till the issue relating to ONGC's right to recover liquidated damages is settled. Prima facie, this arrangement appears to show that both parties agreed to keep the dispute open and secure the claim through Bank Guarantees, so that the Project could continue without affecting the financial flow.

63. The petitioner has placed reliance upon the judgment of the Supreme Court in *Saw Pipes*. According to the petitioner, the Supreme Court has held that where the parties themselves have agreed upon a genuine pre-estimate of damages, the Court can grant reasonable compensation even without proof of actual loss, provided the requirements of Section 74 of the Contract Act are satisfied. The judgment also says that in commercial contracts the parties are in a better position to estimate the likely result of breach. Therefore, according to the petitioner, once Clause 6.3.2 is accepted to be valid, insisting on strict proof of actual loss would defeat the purpose for which such clause was included.

64. The petitioner has also relied upon the later judgment in *Construction & Design Services*. According to the petitioner, that

judgment is important because it relates to a public utility project. The Supreme Court observed that delay in such projects causes loss to the public authority, though the exact amount of such loss may not always be possible to calculate. The Supreme Court also noticed that delay may result in blockage of capital, delayed use of public infrastructure and other consequences which may not be capable of exact proof. Therefore, where the amount mentioned in the Contract is a genuine pre-estimate of the likely loss, reasonable compensation can be granted without insisting on proof of the monetary loss. According to the petitioner, the present Project relating to increase in production of crude oil and natural gas is of similar nature and therefore the same principle should apply.

65. The respondent, however, has disputed this interpretation. Learned Senior Counsel submitted that *Construction & Design Services* does not say that proof of loss is unnecessary in every matter. According to him, the judgment says that where loss is obvious but the exact amount is difficult or impossible to calculate, proof of the loss may not be necessary. Even then, the party claiming liquidated damages must at least plead that loss has occurred and also explain why such loss cannot be proved. According to the respondent neither of these basic requirements was satisfied. In support of this submission, the respondent has relied upon the judgments in *Fateh Chand* and *Kailash Nath Associates*. In *Fateh Chand*, the Supreme Court observed that Section 74 removes the requirement of proving actual damage in proper cases, but it does not permit grant of compensation where no legal injury is caused. This principle was explained in *Kailash*

Nath Associates, where the Supreme Court summarised the law under Section 74. The Court held that damage or loss caused because of breach is a necessary requirement for applying Section 74. It also explained that the words "whether or not actual damage or loss is proved" mean that where actual loss can be proved, such proof should be given. It is only where the loss is difficult or impossible to prove that the amount fixed in the Contract, if found to be a genuine pre-estimate, may be awarded as compensation.

66. At the first reading, the judgments relied upon by both parties appear to support different views. However, on closer consideration, such difference may not exist. This Court in *Punj Lloyd Ltd.* has read these judgments together. The Court held that Section 74 cannot be read separately from Section 73. Even where the Contract contains a liquidated damages clause, the party alleging breach must plead and show that some loss has occurred. Where actual loss can be proved, such proof should be produced. If, because of the nature of the transaction, proof of loss is impossible or difficult, then those circumstances must be pleaded and shown. Only after that can the Court exercise its discretion to award the liquidated amount as compensation, if it is satisfied that such amount is a genuine pre-estimate of the loss.

67. Prima facie, this view appears to bring *Kailash Nath Associates* and *Construction & Design Services* on the same line. *Construction & Design Services* does not lay down that proof of loss is unnecessary in every public utility project. Similarly, *Kailash Nath Associates* does not require proof of the loss in every case. The principle in judgments appears to be that legal injury must

exist. The difference is about the manner in which such loss has to be established. Where the nature of the Project makes exact calculation of loss difficult or impossible, the Court may, depending upon the surrounding facts and the terms of the Contract, presume that some loss has occurred.

68. Whether the petitioner has satisfied these requirements is the dispute between the parties. According to the petitioner, the Project was not an ordinary contract but was connected with the country's hydrocarbon infrastructure. It is submitted that delay in commissioning such Project resulted in blockage of capital, postponement of production, loss of foreign exchange and other consequences affecting public interest. It is further submitted that these aspects were pleaded before the Tribunal and have also found place in the arbitral award. Therefore, according to the petitioner, this is the kind of matter where the principle laid down in *Construction & Design Services* ought to have been applied.

69. The respondent has disputed this. According to the respondent, these losses were never pleaded or proved before the Tribunal. General statements regarding public interest cannot take the place of pleadings relating to loss. It is submitted that the petitioner neither established the nature of the alleged loss nor explained why such loss was incapable of proof. Therefore, according to the respondent, the Tribunal rightly applied the judgment in *Kailash Nath Associates* and held that the requirements of Section 74 were not satisfied.

70. The petitioner has criticised the Tribunal for relying upon a statement made by the Minister of Petroleum and Natural Gas in Parliament while considering whether ONGC had suffered any loss. According to the petitioner, such statement could not have been treated as evidence because the Minister was never examined before the Tribunal and the statement was never tested by cross-examination. It is also submitted that under the Contract, ONGC had entered into the agreement on its own behalf and not on behalf of the Union of India. Therefore, according to the petitioner, the Tribunal committed a serious legal error by relying upon such statement while deciding the issue relating to loss.

71. Prima facie, this submission also requires consideration in the proceedings under Section 34. Whether the Tribunal was justified in relying upon such material, and to what extent such reliance is permissible, cannot be decided in the present proceedings. However, since the petitioner has challenged that part of the reasoning and the respondent has defended it, the issue cannot be said to be without substance.

72. The petitioner has argued that after holding Clause 6.3.2 to be binding, the Tribunal has rewritten the Contract by introducing a condition requiring proof of loss, though the parties had agreed otherwise. The respondent has disputed this submission by contending that every liquidated damages clause remains subject to Section 74 of the Contract Act and no contractual clause can override the statutory requirement that compensation must remain reasonable and connected with the loss caused because of the breach. This submission deserves consideration because it concerns

the relation between the freedom of parties to enter into a contract and the limitations contained in Sections 73 and 74 of the Contract Act.

73. After considering the rival submissions, I am, prima facie, of the opinion that the petitioner has raised substantial questions relating to interpretation of Section 74, the scope of the judgments in *Kailash Nath Associates* and *Construction & Design Services*, and the effect of the contractual clauses relating to liquidated damages. Therefore, at this stage, the challenge raised by the petitioner cannot be said to be without merit. These issues will have to be finally decided in the proceedings under Section 34. What still remains to be considered is whether, despite this position, the petitioner has shown such exceptional circumstances which would justify continuation of the Bank Guarantees.

74. The respondent has placed reliance upon the observations made by this Court in *Swiber Offshore Construction Pte. Ltd.* In that case, this Court observed that merely because a challenge is arguable, interim protection cannot follow and the arbitral award cannot be ignored while deciding a petition under Section 9. There cannot be any disagreement with this principle. At the same time, every judgment has to be understood in the facts of that particular case. In *Swiber*, the Tribunal had held that ONGC failed to establish that the delay affecting the critical path of the Project was attributable to the contractor. Therefore, the challenge in that case required reconsideration of factual findings relating to delay. Apart from this, there were also Consent Terms under which the parties had agreed that the Bank Guarantee would continue for a limited

period after the award. It was in those facts that this Court held that ONGC had not shown the exceptional circumstances contemplated by the Supreme Court in *Home Care Retail Marts*. Prima facie, the facts of the present case are different. Here, the Tribunal has accepted that the delay was attributable to the respondent. It has held that the clause relating to liquidated damages was otherwise applicable. Therefore, the dispute is not about the factual finding regarding delay but about the legal effect which the Tribunal has given to those findings. Whether the Tribunal has correctly applied the law laid down in *Construction & Design Services*, *Kailash Nath Associates* and the other judgments is a legal issue. Without expressing any opinion on that question, it cannot be said that the challenge raised by the petitioner is without merit. Therefore, though the principles stated in *Swiber* continue to apply, their application will depend upon the facts of the case.

75. After considering the rival submissions, it becomes necessary to see whether the petitioner has fulfilled the requirements for grant of post-award interim protection. As already noticed, the Supreme Court in *Home Care Retail Marts Pvt. Ltd.* has held that because a party has failed before the Arbitral Tribunal, it does not lose its right to invoke Section 9. At the same time, the Supreme Court has also made it clear that such relief cannot be granted in an ordinary way. The standard is much higher. Therefore, this Court has to see whether the petitioner has shown a prima facie case and whether the facts of the present case show exceptional circumstances which would justify continuation of the Bank

Guarantees.

76. In the facts of the present case, certain circumstances, prima facie, appear to support the petitioner's case for the purpose of Section 9. Firstly, the Arbitral Tribunal has recorded that the delay of more than 220 days in completion of the Project was because of the respondent. Secondly, the Tribunal has found that the respondent was not entitled to an unconditional extension of time for completing the Project. Thirdly, the Tribunal has further accepted that ONGC was otherwise entitled to invoke Clause 6.3.2 of the General Conditions of Contract relating to liquidated damages. These findings cannot be ignored while considering whether the petitioner has made out a prima facie case for grant of interim protection.

77. The next question is regarding the balance of convenience. According to the petitioner, the Bank Guarantees were given because the respondent requested for such arrangement. Instead of deducting liquidated damages from the running bills, ONGC agreed to accept Bank Guarantees so that the Project could continue smoothly. It is also not disputed that these Bank Guarantees have remained alive for almost fifteen years, including during the arbitral proceedings. Therefore continuation of the arrangement keeps the same position which has continued for a long time. The respondent has submitted that continuation of the Bank Guarantees after the arbitral award would require it to keep security of nearly INR 400 crores alive though it has succeeded before the Tribunal. According to the respondent, such continuation causes prejudice because a successful party is entitled

to enjoy the benefit of the award. It is further submitted that material has been produced to show that the financial position of the respondent is sound and that it would be able to satisfy any liability if the petitioner succeeds.

78. It is true that a successful party becomes entitled to enjoy the benefit arising from the decision in its favour. The same principle applies to an arbitral award. However the petitioner is not asking for enforcement of its claim or immediate invocation of the Bank Guarantees. The petitioner is asking for continuation of the existing security till the proceedings under Section 34 are decided. Therefore, whether such continuation would really cause prejudice to the respondent has to be considered in the light of the arrangement voluntarily entered into between the parties. In this background, Clause 6.3.4 becomes important. Prima facie, this clause appears to have been inserted at the request of the respondent. The object was to replace deduction of liquidated damages by furnishing Bank Guarantees. The clause provides that the Bank Guarantees shall continue till settlement of the dispute relating to liquidated damages. It is true that the words "final settlement" may require interpretation in the proceedings under Section 34. However, at this stage, the language of the clause support the submission of the petitioner that the parties intended the Bank Guarantees to continue till the dispute reaches finality.

79. The respondent has relied upon Clause 8 of the Bank Guarantee and submitted that after expiry of the validity period, an additional claim period is available and therefore the petitioner's rights remain protected. The petitioner has disputed

this interpretation and submitted that the claim period cannot extend the life of the Bank Guarantee and would apply only where a cause of action arises while the Bank Guarantee is alive. This issue involves interpretation of the terms of the Bank Guarantee and cannot be finally decided in the present proceedings. Prima facie, however, the existence of the claim period may not answer the grievance of the petitioner that once the Bank Guarantee expires, the security may no longer remain available.

80. The question of irreparable injury also requires consideration. According to the petitioner, the Bank Guarantees are the only security available for its claim of liquidated damages. If they are allowed to lapse and the petitioner succeeds in the proceedings under Section 34, the challenge may become meaningless because the security would no longer exist. The petitioner has pointed out that one of the constituents of the respondent Joint Venture is a foreign company situated in Indonesia. According to the petitioner, after completion of the Project, the purpose of the Joint Venture stands achieved. Therefore, recovery against the foreign entity may become difficult.

81. The respondent has disputed this apprehension. According to it, the financial position of Afcons Infrastructure Limited is strong and its assets are adequate to satisfy any liability which may arise. The respondent has expressed readiness to furnish a corporate guarante. These submissions deserve consideration. At the same time, it cannot be ignored that a corporate guarantee and an unconditional Bank Guarantee issued by a nationalised bank are

not the same. Both stand on different footing and give different degree of security. Therefore, merely because the respondent is willing to furnish a corporate guarantee, it may not become substitute for the security agreed between the parties. The petitioner has also questioned the financial material relied upon by the respondent. According to the petitioner, the respondent relied upon consolidated financial statements, whereas the latest financial statements of Afcons Infrastructure Limited indicate reduction in profitability, decline in operating cash flow, increase in debt-equity ratio and fall in the profit margin. The respondent has disputed the importance of these figures. At this stage, it would not be proper to record any final finding regarding the financial condition of the respondent. However, these submissions do indicate that the apprehension expressed by the petitioner cannot be treated as without basis.

82. One more circumstance also deserves notice. Both parties have challenged parts of the arbitral award. According to the respondent, its challenge relates to different issues and does not affect the present proceedings. Though this submission may be correct, the fact remains that neither party has accepted the award in full. Both have approached this Court under Section 34. Therefore, the disputes between them have not attained finality. This circumstance alone may not justify continuation of the Bank Guarantees, but it forms one part of the overall background while considering the nature of interim protection sought.

83. On the facts placed in the present case, the following circumstances, when considered cumulatively, may constitute the

exceptional and compelling circumstances contemplated by the Supreme Court in *Home Care Retail Marts Pvt. Ltd.* for continuation of the Bank Guarantees after the arbitral award:

(i) The Arbitral Tribunal has recorded a finding that the delay of more than 220 days in completion of the Project was attributable to the respondent;

(ii) The Tribunal has held that the respondent was not entitled to an unconditional extension of time for completion of the Project;

(iii) The Tribunal has also accepted that Clause 6.3.2 of the General Conditions of Contract governing liquidated damages was otherwise applicable;

(iv) Despite the above findings, the Tribunal rejected the counterclaim on the legal ground that loss was neither pleaded nor proved. Therefore, the challenge under Section 34 substantially raises a legal issue rather than requiring reappreciation of disputed facts;

(v) The petitioner has raised substantial questions regarding the interpretation of Section 74 of the Indian Contract Act and the interplay between the judgments in *Saw Pipes Ltd.*, *Construction & Design Services, Kailash Nath Associates*, *Saisudhir Energy Solutions Ltd.*, *Punj Lloyd Ltd.* and other authorities;

(vi) The challenge under Section 34 is not merely arguable. It raises an important question whether the

Tribunal misinterpreted precedents governing public utility contracts;

(vii) The Contract relates to a public utility project concerning crude oil and natural gas production, involving issues of national energy infrastructure where monetary loss may not be capable of exact proof;

(viii) The petitioner has maintained that losses such as blockage of capital, delayed production, foreign exchange implications and consequential public losses arise from delay in such projects, and these aspects were part of the arbitral record;

(ix) The petitioner has challenged the Tribunal's reliance upon the statement made by the Minister of Petroleum and Natural Gas, contending that such material was not evidence before the Tribunal and was never tested by cross-examination;

(x) Clause 6.3.4 of the Contract was introduced at the request of the respondent after delay had occurred;

(xi) Instead of exercising its right to deduct liquidated damages from the running bills, ONGC agreed to accept Bank Guarantees to enable the Project to continue smoothly;

(xii) The Bank Guarantees therefore formed security consciously substituted for deduction of liquidated

damages;

(xiii) Clause 6.3.4 provides that the Bank Guarantees shall continue till final settlement of the dispute relating to liquidated damages, giving the petitioner basis to seek continuation of the security;

(xiv) The Bank Guarantees have remained alive for nearly fifteen years, throughout the arbitral proceedings. Continuation would preserve the existing position and not create new security;

(xv) The petitioner does not seek encashment of the Bank Guarantees or satisfaction of its claim. It seeks preservation of the existing security pending adjudication under Section 34;

(xvi) The Bank Guarantees constitute the only security available for securing the petitioner's liquidated damages claim;

(xvii) If the Bank Guarantees are permitted to expire and the petitioner succeeds under Section 34, restoration of the same security may become impossible, thereby rendering the relief ineffective;

(xviii) One constituent of the respondent Joint Venture is a foreign company incorporated in Indonesia. After completion of the Project, the Joint Venture has served its purpose, making future enforcement of the petitioner's claim against the foreign constituent may

be more difficult;

(xix) The corporate guarantee offered by the respondent is not commercially equivalent to an unconditional Bank Guarantee issued under the Contract;

(xx) The petitioner approached the Court promptly before expiry of the Bank Guarantees by filing the Section 34 petition, the stay application and the present Section 9 petition without delay, showing due diligence'

(xxi) Both parties have challenged parts of the arbitral award under Section 34. Therefore, the award has not attained finality and the disputes remain subjudice;

(xxii) Continuation of the Bank Guarantees does not enlarge the petitioner's contractual rights. It preserves the security agreed between the parties until the pending proceedings are decided;

(xxiii) Refusal of interim protection is likely to result in irreversible prejudice because once the Bank Guarantees lapse, the security may disappear even if the petitioner succeeds in setting aside the award.

84. Considering all these circumstances together, the present case may be regarded as falling within the category of "rare and compelling circumstances" contemplated in *Home Care Retail Marts Pvt. Ltd.*, justifying continuation of the Bank Guarantees

pending disposal of the proceedings under Section 34.

85. After considering the rival submissions, the terms of the Contract, the arbitral award and the judgments relied upon by both sides, I am, prima facie, of the view that the present matter satisfies the higher standard laid down by the Supreme Court for grant of post-award interim protection. The present view is reached because, when all the circumstances appearing from the record are considered together, they show an exceptional situation where refusal of interim protection may defeat the purpose of the pending challenge. The Supreme Court in *Home Care Retail Marts* has observed that post-award interim protection should be granted only in rare and compelling cases. Prima facie, in my opinion, the present matter appears to satisfy that requirement.

86. In view of the foregoing discussion, and upon overall assessment of the material record, the following order is passed:

(a) The Arbitration Petition is allowed;

(b) Pending hearing and final disposal of the petition filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the arbitral award dated 10th March, 2026, the respondent shall renew, extend and keep alive all the Bank Guarantees furnished under Clause 6.3.4 of the General Conditions of Contract, on the same terms and conditions and for the same amounts, from time to time;

(c) The respondent shall take all necessary steps for renewal and extension of the Bank Guarantees at least

fifteen days before their expiry and shall furnish copies of the renewed Bank Guarantees to the petitioner immediately upon renewal;

(d) Till the petition under Section 34 is decided, the respondent shall not take any steps for cancellation, discharge, or release of the Bank Guarantees;

(e) The petitioner shall not invoke the Bank Guarantees solely on the basis of this order. The rights and obligations of the parties in relation to invocation of the Bank Guarantees shall remain subject to the terms of the Contract, the Bank Guarantees and further orders, if any, passed by the competent Court;

(f) It is clarified that all observations made in this order are prima facie in nature and are confined only to adjudication of the present petition under Section 9 of the Arbitration and Conciliation Act, 1996. The Court hearing the petition under Section 34 shall decide the same independently and uninfluenced by any observations contained in this order;

(g) All rights and contentions of both parties in the proceedings under Section 34 and all other connected proceedings are kept open;

(h) There shall be no order as to costs.

(i) Pending Interim Applications, if any, stand disposed of.

(AMIT BORKAR, J.)