2024:DHC:2801

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

% **Reserved on : 10th January, 2024**
Pronounced on: 8th April, 2024

\+ O.M.P. (COMM) 340/2021 & I.A. 14705/2021

NATIONAL HIGHWAY AUTHORITY OF INDIA ..... Petitioner

Through: Mr. Ankur Mittal and Mr. Raushal Kumar, Advocates.

versus

M S SSANGYONG ENGINEERING AND CONSTRUCTION CO. LIMITED ..... Respondent

Through: Mr.Navin Kumar, Ms.Rashmeet Kaur, Ms.Aarti Mahto and Ms.Bhagya Ajith, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

FACTUAL HISTORY

1. The petitioner namely National Highway Authority of India ('NHAI' hereinafter) is an undertaking of the Government of India entrusted for construction of National Highways throughout the country. As a set practice, the petitioner invites bids for construction of various portions of the said Highways by the private contractors.

2. In the year 2005, the petitioner invited bids for construction of Sagar By-Pass between 211 kms to 255 kms of National Highway-26 in

the State of Madhya Pradesh for a total contract value of Rs.1,88,45,07,303/-.

3. The respondent, *namely*, Ssangyong Engineering & Construction Co. Ltd. ('respondent Company' hereinafter), a company registered under the laws of Republic of Korea having its head office at Seoul, Korea and operational office at Gurugram, Haryana, submitted its bid for the said contract and was awarded the same *vide* letter dated 30th December, 2005.

4. Pursuant to completion of the tender process, various contracts were entered into between the parties. Since the impugned award has been passed in the contract package ADC-II/(C-6) dated 12th April, 2006 ('the Contract' hereinafter), the same is relevant for adjudication of the present petition, whereby, various terms and conditions were agreed upon by the parties with respect to the said contract package.

5. In order to supervise the contract performance, an Independent Engineer firm was appointed by the parties. As per the agreement, the said Engineer, a third party working independently was empowered to give decisions, opinions or consent, express his satisfaction or approval, or take action which may affect the rights and obligations of the employer or the contractor in terms of the Contract.

6. As per Clause 67 of the COPA, the parties had agreed to refer to resolve the disputes pertaining to decisions, opinions, determination, certification etc. through arbitration.

7. After completion of the work by the respondent Company, a Defect Liability Certificate dated 4th April, 2014 was issued by the Engineer recommending payment of Rs.10,73,36,988/- accrued against the

Statement of Completion submitted by the respondent Company on 28th May, 2013. Thereafter, on 16th June, 2014, the petitioner released 90% of the amount against the statement issued by the Engineer.

8. As per the agreement, the respondent company was required to submit a draft final statement showing value of all the work done in accordance with the Contract along with the amount which the company considers is due to them under the Contract within a period of 56 days. In furtherance of the said obligation, *vide* letter dated 24th June, 2014, the respondent company submitted the alleged final draft statement claiming the amount of Rs.160,71,89,930/- and USD $5,845,604.72.

9. Thereafter, numerous disputes arose between the parties regarding the completion of work and due payments, and the same were referred for arbitration. In the meanwhile, the Engineer issued a payment certificate dated 31st August, 2014 for a net value of Rs.14,24,50,311/-and USD $446,650.86.

10. Subsequent to issuance of the abovesaid certificate, the petitioner raised various grievances regarding completion of work *vide* letter dated 15th October, 2014 and sought reply from the respondent and the Engineer. In response to the questions raised by the petitioner, the respondent wrote several letters assuring compliance of the observations made by the petitioner.

11. It is stated that during the pendency of the said disputes/issues, in terms of Clause 67 of the COPA, the respondent Company invoked arbitration on 7th November, 2016 and accordingly, an Arbitral Tribunal was constituted for adjudication of the disputes wherein, the petitioner

preferred a counter claim regarding recovery of excess payments made to the respondent Company.

12. Pursuant to completion of the proceedings, the learned Tribunal passed an award dated 26th June, 2021 ('impugned award' hereinafter), thereby, holding that the Payment Certificate dated 31st August, 2014 shall be considered as Final Statement and therefore, directed the petitioner to make remaining payments to the respondent Company.

13. Aggrieved by the same, the petitioner has preferred the present petition.

PLEADINGS BEFORE THIS COURT

14. The petitioner has filed a synopsis briefly summarizing the grounds taken in its pleadings. The relevant extracts of the same reads as under:

> *"4.* ***GROUNDS OF CHALLENGE***
> ***A. DEFENCE OF NHAI/PETITIONER WAS COMPLETELY IGNORED AND NOT CONSIDERED***
> *i. Entire defence of NHAI was ignored and not looked into by AT, by wrongly recording that the payment certificate dated 31-08-2014 has not been challenged by either party. NHAI filed 19 volumes of documents and pleadings running to hundreds of pages explaining endless discrepancies in the certificate dated 31-08-2014, which were completely ignored by AT. – Impugn Award* ***Para 26(xxxiv) page 69***
> *ii. NHAI has taken a specific defence that the alleged payment certificate dated 31-08- 2014 had various discrepancies which are duly noted by AT in* ***para 21 page 41-44*** *but the AT has not dealt it with anywhere, no finding whatsoever has been rendered, effectively amounting to no adjudication at all.*
> *iii. Alleged payment certificate dt 31.08.2014 made by the engineer had calculations of various BOQ items/Variation Orders at* ***page 841-896****. The petitioner in its amended SOD*

*at **page 5791-5847** has pointed out various discrepancies in various items certified by Engineer*

*iv. The AT completed ignored that the NHAI has pointed out discrepancies in various quantities/variation items and further submitted that the claims filed by the respondent were theoretical in nature based on 'as built drawings' and not based on actual measurements at site. NHAI in support of the same, also filed **19 volumes of documents** on 09-06-2018 in support of its calculations, running into almost **4000 pages @ pg. 1497-5066 of Petition**, which has been given a complete goby by the AT.*

*v. In the impugned award, the AT ignored the detailed written submissions made by the NHAI on **page 9093-9140**, wherein, each item and discrepancy in the earlier certification was separately pointed out and revised calculation were also provided.*

Each discrepancy had a financial impact on the certificate. However, the AT still has not given any finding on the said calculations or detailed submissions made by NHAI. The AT has kept silent on the same and did not consider or dealt with the detailed submissions made in the pleadings and arguments.

vi. AT has virtually abandoned its fundamental duty to adjudicate and has wrongly recorded that there is no dispute in respect of amounts certified under the alleged payment certificate dated 31-08-2014, thus vitiating the entire award.

vii. The Broad nature of Discrepancies in the payment certificate are as under:

*a. Variation Orders – SOD- **para 30-31- @ 1238** - Written submissions at **pg [9078]***

*b. Foreign Indices – clause 70.3 COPA - Written submissions at **pg [9086]***

*c. Base Index for foreign component of work- Written submissions at **pg. 9089- 9091***

d.** Discrepancies in quantities and calculations- Written submissions at **pg. 9093-9140

viii. This Hon'ble Court in ***Campos Brothers Farms Vs. MatruBhumi Supply Chain Pvt. Limited and Ors. 261 (2019) DLT 201,*** *held that once it is found that the AT ignored the submission of a party in totality whatever be the merits of submission, the award cannot be enforced being in violation of the principles of natural justice. The said judgment was also noted with approval in para 83 & 88 of* ***Vijay Karia and others vsPrysmianCavieSistemi SRL and Others (2020) 11 SCC 1***

ix. Hon'ble Supreme Court in numerous judgments has held that award passed in an International Commercial Arbitration must not be contrary to public policy of India, i.e.,

a. Failure to decide a material issue which goes to the root of the matter or failure to decide a claim or counter claim in its entirety

- Vijay Karia and others vsPrysmianCavieSistemi SRL and Others (2020) 11 SCC 1 ***para 80-83, 88 Pg. 266-273***

- Renusagar Power Co. Ld. Vs General Electric Co. 1994 (1) SCC 644 – ***para 65, 66 pg. 152-153 and 85 pg. 160***

- Associate builder vs DDA (2015) 3 SCC 49- ***para 27 -28 pg. 95***

*- Gemini Bay Transcription Pvt v. Integrated Sales Service Ltd. [2021 SCC OnLine SC 572]-****Para 40-43 pg. 300-304***

- SsangYong Engineering and Construction vs NHAI (2019) 15 SCC 131- ***para 34 and 35 pg. 39-40***

b. Award being in contravention of fundamental policy of Indian law- para 34 of ***Ssangyong****, read with Para 30 of* ***Associate Builders Pg. 97***

c. Award being in violation of principles of natural justice. Section 18 and 34(2)(a)(ii) of the Act- para 34 of ***Ssangyong****, read with Para 30 of* ***Associate Builders Pg. 97***

d. Award is in conflict with justice or morality- most basic notions of morality or justice- para 35-36 of ***Ssangyong****and para 36 to 39 of* ***Associate Builders Pg. 99-101***

B. MEASURMENTS TO BE TAKEN AT SITE

i. The AT, despite holding that measurements are to be taken at ***SITE,*** *as recorded in measurement books, turned a blind eye to the case setup by the respondent that the so called payment certificate dated 31-08-2014 is prepared on the basis of as-built drawings, which in itself was sufficient to reject the entire claim of the respondent.-****para 26(i) to (xiii)- (page 55- 59) and 26 (xxxiii) at page 68***

ii. If measurements were to be based upon actual measurements at site from time to time, the statement dated 31-08-2014 which admittedly is based upon as-built drawings and not on actual measurements – is discrepant and cannot be accepted. AT ***contradicted*** *itself by giving finding in* ***para 26 (i)- (xiii) at page 55-59 and para 26 (xxxiii) pg 68****.*

iii. Specific case of NHAI during arguments was that measurements are to be taken at site, and on the basis of work executed from time to time. However, the same was ignored by the AT. The followings were submissions of the NHAI before AT which has been ignored.

NHAI submissions

a. Para v, at page 56 of award

b. Written submissions of NHAI – page 8955 – 8965

c. Importance of entries made in measurement books – page 8965 – 8970

d. Purpose of as-built drawings – page 8970

e. E.g. of entries in MBs – ***page 6162 @ 6164***

f.E.g. of sheets pasted in MBs based on ABD ***– page 1069***

g. SOD- page 1225 onwards para 12, 15, 24, 26, 27-28 – para 24 @ 1235

h. Amended SOD – @ 5760 @ 5791 - theoretical calculations by claimant

Claimant/Respondent submissions

a. SOC Para 24 page 588 @ 598 - As built drawings is the basis for calculating quantities

b. Rejoinder- para 24-page 1265

c. Supplementary rejoinder para 49 (i) page 5227– based on as-built drawings

d. Para 3.17 of written submissions of claimant – page 9195-9196

e. Certificate dated 31-08-2014- page ***823****–* ***our quantities are taken as per as built drawings***

iv. Despite noting that measurements were to be taken at site in accordance with Measurement Books and not as projected by the respondent i.e., As-Build Drawings. Therefore, the AT has modified the contractual terms which is not permissible and the same is contrary to public policy of India and can be set-aside while exercising jurisdiction under Section 34 of Arbitration Act.

C. NO FINDING ON NATURE OF CERTIFICATE DATED 31.08.2014 IN ACCORDANCE WITH TERMS OF CONTRACT

i. The core material issue which was to be adjudicated by the AT was the nature of payment certificate dated 31.08.2014 viz. Whether it is Interim Payment Certificate or Final Payment Certificate?

ii. Nobody pleaded or argued that the document dated 31-08-2014 is final statement or not. The claimant argued that it is a FINAL PAYMENT CERTIFICATE, while NHAI argued that it is an INTERIM PAYMENT CERTIFICATE and can be modified. The AT innovated, and deliberately maintained

silence on the nature of "certificate", despite coming to a conclusion that it is not a final payment certificate and held it to be "Final Statement". ***Para 26(xxxi) and Para 26(xxxii) page 67-68***

iii. The AT despite recording a finding that certificate dated 31.08.2014 is not a Final Payment Certificate, the AT deliberately did not hold that the certificate, therefore, is nothing but an Interim Payment Certificate instead formulated a new term i.e., 'Final Statement'

*iv. The AT ignored that there is no clause in entire contract which provides for payment of Final Statement, and as per terms of contract, payment can only be of IPC or FPC (**Clause 60.8**), not of any final statement.*

v. AT deliberately maintained silence if the certificate is not an FPC, then what is it? Any payment certificate has to be either FPC or IPC. There is no provision in the entire contract providing for payment of Final Statement.

vi. Specific case set up by NHAI was that the certificate is an IPC. No finding has been rendered on this material issue by AT, thereby denying adjudication of material issue.

vii. Since, no one argued or pleaded that 31-08-2014 is/is not a final statement, therefore, there was no occasion for parties to have made any submission on this count or for NHAI to respond to it. In addition, the other material issue as above was not even gone into by the AT, and payment has been directed without even looking into the provisions of the Contract Agreement.

viii. The AT's silence clearly appears to be deliberate, if the AT would have decided the nature of certificate, then it would have resulted into covering the limitation of counter claims filed by petitioner as well, under clause 60.9 COPA.

*ix. AT ignored the contractual provisions and language of clause 60.11 COPA "if engineer **disagrees** or **cannot verify any part** of the draft final statement", …… "it becomes evident that a **dispute exists**" ….., the Engineer shall issue to*

the Employer ***an interim payment certificate*** *for* ***those parts of the draft final statement which are not in dispute***

The Final statement shall be agreed upon settlement of Dispute

x. Express language of the contract has been given a complete goby the AT.

xi. As a matter of fact, clause 60.8 COPA categorically points towards payment obligation of NHAI, and it does not come into being merely there being a final statement in place.

The merits/ demerits of this material issue have not been gone into, and no opportunity was given to NHAI to present its case on this count, thus, violating Section 18, Section 34(2)(a)(iii) of the Arbitration Act.

xii. AT despite noting that Final Payment Certificate could not have issued by Engineer until the written discharge (not waived by NHAI) is taken in accordance with Cl. 60.12 of COPA. The AT deliberately did not decide the nature of certificate and termed it as Final Statement.

xiii. Since the alleged payment certificate was only an IPC and not final Statement, therefore under clause 60.9 of the contract agreement the engineer had the power to revise modify it and accordingly it was revised on 13.07.2017 & 31.12.2017. The said clause also does not place any restriction of time for modification or revision of the interim payment certificate.

*xiv. Certificate dated 31-08-2014 could have been termed as a final statement, as admittedly, there were number of disputes (****Para 13 page 19 of the award- disputes exist****) pending as on that date. (****Clause 60.11 COPA****)- para 26 (xxxiii) and (xxxiv) at page 68- 69.*

xv. AT ignored that that there were numerous disputes pending between parties, (Refer- ***Application – pg. 6086 – 6091 Table of disputes pending & WS- Pg 8970).*** *Even*

Respondent admitted that there were disputes pending ***(Refer- Pendency of various disputes – para 8, 22 SOC – page 591, 597, Payment statement @ pg. 715-716 notice of claims under clause 53.1. for INR 172,58,82,833/-, Rejoinder to amendment para 69-70 pg. 5420 & WS- Para e- 9188).***

D. WHETHER COUNTER CLAIMS OF PETITIONER WERE BARRED BY LIMITATION

*i. That the AT ignored that counter claims were on account of mistakes of engineer and claimant/respondent in calculations and could only have been filed, once the mistake was discovered and computation of accounts running into 8 years from 2006 to 2014 was done based on MBs, and RFIs, thus, the counter claim was not barred by limitation.-**Para 28 (iv) and (vi) page 81-82***

*ii. Despite holding that certificate dated 31-08-2014 is not an FPC in para **26(xxxii) at page 68**, the AT has referred to the said certificate as FPC to hold claim of NHAI as time barred.*

iii. The observation of the AT from page 83-86 are wrong and perverse that the NHAI discovered the mistake on 15.10.2014. It is submitted that on 15.10.2014, the NHAI issued observation and further sought comments of the claimant and engineer on the same. Therefore, NHAI would not have known as on 15.10.2014 that there were discrepancies in the alleged payment certificate dated 31.08.2014 as the NHAI as on that date did not know whether any recovery has to be made from the respondent. In fact, the respondent replied to the observations of NHAI only on 01-02-2015. Even if 3 years are counted from 01-02-2015, the counter claims are well within the period of limitation.

iv. Since the Claim was filed on 08-12-2017, and once the revised certificate was revised in 2017 and the arbitration was invoked only in 2016, therefore, the counter claims were well within the limitation period.

v. In various judgments, Hon'ble courts have held that period of limitation will not run until mistake has been discovered and that the period of limitation will run from the date of the knowledge of the mistakes which were only discovered on issuance of revised certificate in 2017. Therefore, the counter claims of the petitioner were within limitation.

a) Confer Da Confraria De sam Miguel E Santas Almas of church of VarcavsFilomenafernandes (2016) SCC OnLineBom 5399 - ***Para 5 pg. 355***

b) Food Corporation of India vs Municipal Committee (2018) SCC OnLine P&H 1161- ***Para 14, 15, 16 and 17 pg. 359-360***

c) Sri Balaji Agro Industries vs Managing Director (2017) SCC OnLineKar 4430 - ***Para 17 pg. 398, para 19- para 22 pg. 399-402 and para 24 pg. 403***

d) Ajmer Vidyut Nigam Ltd vsRahamatullah khan (2020) SCC OnLine SC 206 – ***Para 5 pg. 349, para 7 pg. 351 and para 9 pg. 352***

vi. AT failed to ignored that petitioner need not have to invoke arbitration clause to raise its counter claims. Once the claimant has already invoked arbitration clause, the petitioner can certainly raise its counter claims to avoid multiplicity of proceedings. Further Counter Claims can be raised in on-going arbitration ***(State of Goa Vs Praveen Enterprises, (2012) 12 SCC 581 para 25-33 & 41 and Chennai Water Desalination Ltd, Vs Chennai Metropolitan Water Supply & Sewage Board, Manu/TN/5922/2022 para 17-21)***

E. CONFLICTING FINDINGS IN OTHER ARBITRATION PRCOCEEDINGS

i. AT has given conflicting findings in two arbitrations which are on similar facts and circumstance. It is pertinent to note that two common arbitrators were same in both arbitration proceedings, wherein, by the majority award in another

arbitration award (C-5 package) it was held that payment certificate 14.08.2014 was not a Final Payment Certificate but an Interim Payment Certificate. - ***para 36(iv) pg. 124, 36 (xii) pg. 127, (xiii) pg. 127*** *of additional documents filed by petitioner on 11.11.2021.*

ii. The AT in another arbitration further held that counter claims of the petitioner were not time barred. ***(Para 32 pg. 118)***

iii. The Award passed in C-5 Package is also subject matter of challenge before this Hon'ble Court in OMP (Comm) No. 510/2020 & 515/2020.

iv. If there are two conflicting interpretations of clauses of the contract terms, then the same can interpreted in particular way to maintain uniformity and to avoid conflicting interpretations ***(Refer- NHAI Vs Progressive-MVR (JV), (2018) 14 SCC 688 & M/s GMR Pochanpalli Expressway Lrd. Vs NHAI, OMP (COMM) No. 433/2020 & 449/2020, para 4-6, 112-134 & 144)***

In view of the above submissions, the petition filed by the petitioner may be allowed."

15. In response to the above said, the respondent Company has also filed a brief summary of the arguments taken in its pleadings which reads as under:

*"**Case of the parties in arbitration and Findings by the Arbitral Tribunal***

11. The Respondent-SSY raised a preliminary objection that the said Counter-Claim as raised by the Petitioner-NHAI is barred by limitation. The Arbitral Tribunal holds that as per the agreed mechanism of dispute resolution contained in the Contract between the parties and in view of Clause 2.6 of GCC read with Clause 67 of COPA (Pages 274 & 335-339 of the paper-book), if the Petitioner-NHAI was aggrieved of

any certification of the Engineer and wanted to seek correction or revision as envisaged under Clause 2.6 of GCC, it ought to have invoked arbitration in terms of Clause 67 of COPA within the statutory period of 3 years from the date of the said certification i.e. 31.08.2014. Since, the Petitioner- NHAI failed to do so, the Counter-Claims filed on 08.12.2017 is barred by limitation.

12. In this regard the Arbitral Tribunal in Para 28 vi (Page 82 of the Paperbook) holds as under:

"Therefore, if the Respondent subsequently considers that the amounts have been wrongly agreed to between the Engineer and the Claimant, in the Final Statement or have been wrongly certified by the Engineer, it has the option to take action under Clause 2.6 of GCC. In any case, the Engineer has no authority under this Contract, to unilaterally revisit the Final Statement agreed to between the Engineer and the Claimant or the Final Certificate issued by the Engineer and revise either of them."

13. The Petitioner-NHAI in this regard contended that the certification dated 31.08.2014 was not final and was only interim in nature and thus, was open to correction and revision by the Engineer in terms of Clause 60.9 of COPA and therefore, the cause of action for seeking recoveries from the Respondent-SSY arose when the Engineer communicated the revised Final Bills on 13.07.2017 and 1.12.2017 which is a case covered by the provisions of Section 17 of the Limitation Act, 1963 being discovery of "mistake".

14. The Respondent argued before the Arbitral Tribunal that there is no term of the Contract which authorises NHAI or even the Engineer to revise or re-open a Certificate, on its own, after having certified amounts and making part payments upon the agreement Final Statement. Further, the Engineer has the right to make correction in an "Interim Payment Certificate" only by subsequent "Interim Payment Certificate" in terms of Sub-Clause 60.9 of COPA, there is

no authority to the Engineer to revise a Final Bill once issued upon agreement with the Engineer and the contractor- Respondent herein.

15. The Petitioner's contention that the "mistake" in the Final Payment Certificate was discovered only on 13.07.2017 or 31.12.2017, was never pleaded nor the same is factually correct. However, Respondent pointed out to the Arbitral Tribunal that even assuming the same to be correct for the sake of argument, the said alleged discovery of mistake was made bythe Petitioner or could have been made by the Petitioner:

i. on 31.08.2014, when the Respondent became aware of the contents of the said Certificate;

ii. thereafter, on 03.09.2014, when the Respondent released part payment towards Certificate dated 31.08.2014; and

iii. and finally, on 15.10.2014, when it recorded its reservations/observations in relation to the Certificate dated 31.08.2014, which were nothing but the Counter Claims preferred by the NHAI.

16.The above issue of limitation has been decided in favour of the Respondent by the Arbitral Tribunal in Paras 28 (x to xix) while holding that as per Petitioner's letter dated 15.10.2014, Petitioner-NHAI was in knowledge and had discovered the alleged discrepancies in the Certificate on 10.10.2014 or at least on 15.10.2014. Thus, the Arbitral Tribunal holds that even as per Section 17 of the Limitation Act, the Counter Claims could not have been filed by NHAI beyond 15.10.2017, which were filed for the first time on 08.12.2017 and amended on 13.07.2018 and 20.03.2019. The Arbitral Tribunal in Para 28 xix (Page 86 of the Paperbook) holds as under:

"xix. Therefore, even after considering the plea of the Respondent under Section 17(1)(c) of the Limitation Act 1963, that the period of limitation shall not begin till the Respondent discovered a mistake, it is held that the Counterclaim had to be filed on or before 15.10.2017. As such, the plea for its Counterclaims filed by it on 08.12.2017

is held to be filed after the prescribed period of limitation and is barred by Limitation."

17.The Arbitral Tribunal has allowed the claim for balance payment under Engineer's certification dated 13.08.2014 based on agreed Final Statement and the Counter-claim of the Petitioner-NHAI has been rejected as being time barred as discussed by the Arbitral Tribunal in Paras 26 and 28 of the Award (Page 55 to 88 of the Paper-book).

18. The Arbitral Tribunal in Para 26, xxxiii and xxxiv (Pages 68 to 69 of the Paper-book) concludes that:

(i) the certification issued by the Engineer on 31.08.2014, is a Final Statement agreed between the Contractor-Respondent herein and the Engineer under Sub-clause 60.11 of COPA and;

(ii) since the same has not been challenged by any party as per the agreed mechanism under clause 2.6 of the contract, the said certification dated 31.08.2014 has attained finality on 31.08.2014 and is to be implemented.

The relevant portion of the Award in this regard is reproduced hereunder for ready reference:

"xxxiii. ..... Actually, this document which is signed by both the Engineer and the Claimant was Part (a) of the Final Statement agreed between the Claimant and the Engineer, under Sub-Clause 60.11 of COPA and accordingly it attained finality on 31.08.2014.

xxxiv. Since this part of Final Statement has not been challenged by any Party under Clause 67 of COPA as per requirements laid down under Clause 2.6 of the Contract, it has become absolute and has to be implemented."

19. In Para 26(ii) (Page 55 of the Paper-book) the Tribunal finds that in order to examine the root cause of the dispute, the steps that were required to be taken by the parties for raising the bills and for releasing the payments in accordance with the Contract were relevant and discusses the same in Paras iii to xiv.

20. The Arbitral Tribunal further records that at no stage during the execution of the Contract, the Engineer has revised any previously certified IPC in terms of Sub-Clause

60.9 as alleged by the Petitioner-NHAI and thus, this could not have been done at the final stage.

21. Petitioner- NHAI had contended that the certification dated 31.08.2014 is subject to correction under Sub-clause 60.9 by the Engineer, however, the Tribunal in Para 26 xv (Page 60 of the Paper-book) rejects the same as under:

"the submission of the Respondent that under Sub-clause 60.9 of COPA, the Engineer could make corrections and modifications in Final Statement agreed to between the Engineer and the Claimant under Sub-clause 60.11 is not correct. Sub-clause 60.9 of COPA is limited to IPCs alone".

22. In Paras 26 xxii to xxiii of the Award, the Arbitral Tribunal rejects the contention of the Petitioner-NHAI that the certification dated 31.08.2014 is not final but interim in nature and interprets Sub-clause 60.11 of COPA. The Arbitral Tribunal also relies on the Petitioner's own pleadings before it wherein the certificate dated 31.08.2014 has been referred to as the "final bill" by the Petitioner as several places.

23. The Arbitral Tribunal holds that in terms of Clause 60.11 of COPA, it is the Engineer and the Contractor i.e. the Respondent-SSY herein, who have to agree on the Draft Final Statement submitted by the Contractor and a Final Statement is to be issued which represents the value of work done in accordance with the Contract. The Arbitral Tribunal also rejects that the contention of the Respondent that since disputes existed between the parties, Final Statement could not be issued. Accordingly, the Tribunal makes a factual finding in Para 26 xxiii as under:

"In the instant case, the Claimant has agreed to all changes suggested by the Engineer and so there is no dispute between the Engineer and the Claimant on the Draft Final Statement and so the Final Statement agreed between the Engineer and the Claimant becomes final."

24. In Para 26 xxi, the Arbitral Tribunal finds that the Final Bill was submitted by the Respondent on 24.06.2014 along with all supporting documents, on the basis of which, the Engineer issued its Certificate dated 31.08.2014 determining

the total amount due to the Claimant. The Arbitral Tribunal has held this Certificate to be a Final Statement and has directed the Petitioner-NHAI to pay balance amounts under the same to the Respondent after interpretation of the contract and appreciation of evidence on record. It is a settled law that such findings of the Arbitral Tribunal cannot be interfered with by the court under Section 34 of the Act.

25. The Arbitral Tribunal also notes that the Respondent has failed to point out any term of the Contract which empowers the Respondent to get the agreed Final Statement re-opened and finalised unilaterally by the Engineer, without the consent of the Claimant (Respondent herein). (Para 26 xxvii at Page 66 of the Paper-book).

26. The Arbitral Tribunal also notes that the Certification dated 31.08.2014 is a Certification under Clause 2.6 of GCC and could only be challenged in terms of Clause 67 of COPA, and in the absence of such challenge by any party to the Contract, the said certification became absolute and implementable.

27. Even on merits the Counter Claims of the Petitioner cannot be awarded as the same are untenable and unsubstantiated. The Counter-Claim of the Petitioner before the Arbitral Tribunal in respect of application of "linking factor" at the time of calculating Price Adjustment is completely frivolous. The same issue/dispute between the parties has already been decided in an arbitration proceeding arising out of this very contract and the said Award has become final and the awarded amount has been paid. Further, this issue has also been settled between the same parties in a similar contract wherein the Hon'ble Supreme Court in Ssangyong Engineering & Construction Co. Ltd. vs. National Highway Authority of India, 2019 (3) Arb. LR. 152 (SC) - (filed as CJ-16 before the Arbitral Tribunal) held the Indices used in Sub-Clause 70.3 cannot be unilaterally

modified and no linking factor can be applied. (See page 9147-Written Submission of the Respondent before the Arbitral Tribunal at Para 3.26)

Settled law:

28. The Arbitral Award contains factual findings as well as interpretation of the terms of the contract keeping in view of the conduct of the parties. Thus, such findings passed after appreciation of the evidence before the Arbitral Tribunal cannot be interfered with by this Hon'ble Court in the respectful submissions of the Respondent. The Petitioner is seeking re-appreciation of factual findings and is asking this Hon'ble Court to substitute the interpretation of the contract given before the Arbitral Tribunal with another view which is suitable to the petitioner. This Hon'ble Court cannot be called upon to sit in Appeal over an Arbitral Award.

29. The Petitioner has failed to make out a case under the limited scope of Section 34 of the Arbitration and Conciliation Act. In view of the law settled by the Hon'ble Supreme Court in the case of Ssangyong Engineering & Construction Co. Ltd. v. NHAI; 2019 (3) Arb. LR 152 SC and various other subsequent Judgments of the Apex Court as well as Hon'ble High Courts, it is respectfully submitted this Court cannot interfere with the findings of the Arbitral Tribunal which are based on appreciation of facts and evidence before it and makes a plausible interpretation of the Contract between the parties.

30. While the Award is not opposed to the Public Policy of India, even otherwise, under the ground of 'public policy', this Court cannot re-open or review the merits of the case in hand. In Para 23 of the Ssangyong (supra), the Hon'ble Supreme Court holds that the ground of 'fundamental policy of India' would be relegated to the understanding of this expression contained in the case of Renusagar Power Co. ltd vs. General Electric co. 1994(1) SCC 644 and thus, a narrow approach would have to be adopted in such cases.

31. Further, the present Award is in terms of the contract between the parties and the interpretation given by the Arbitral Tribunal is fair and reasonable, even otherwise, after the amendment of Section 28 of the Arbitration and Conciliation Act, 1996 in 2015, the setting aside of the

award merely on the ground that the same contrary to the contract is no longer available under the limited scope of Section 34 of the Act.

32. It is wrong to even suggest that the Arbitral Tribunal has violated the principles of natural justice or to contend that Arbitral Tribunal has given a go-by to the defence set up by the Petitioner in the facts of this case. A reading of the Award would show that all contentions of the Petitioner. NHAI have been specifically dealt with by the Tribunal in Paras 26 to 28 of the Award in question and as has been detailed herein above. It is further submitted that once the Arbitral Tribunal holds that Counter claims before it are barred in time, the Arbitral Tribunal is not permitted to decide the said claims on merits. Thus, this ground of challenge raised by the Petitioner is highly misconceived and thus, not tenable.

33. The discussion of the Arbitral Tribunal in relation to the issue of limitation is also comprehensive and has been made after appreciating the facts and evidence placed on record, which cannot be interfered with by this Hon'ble Court under Section 34 of the Act, 1996. Also, the Arbitral Tribunal has decided the contention of the Petitioner regarding Section 17 of the Limitation Act and has righty rejected the counter claims. The Petitioner has not been able to point out any ground for assailing such a finding.

Thus, the Award dated 26.06.2021 cannot be set aside and the present Petition isliable to be dismissed with costs."

SUBMISSIONS

On behalf of the petitioner

16. Learned counsel appearing on behalf of the petitioner NHAI submitted that the findings arrived at by the learned Tribunal are contradictory, vague, devoid of any logic and violative of the fundamental policy of the Indian law and therefore, liable to be set aside.

17. It is submitted that the learned Tribunal erred in envisaging the Payment Certificate dated 31st August, 2014 as the final statement as the Contract does not provide for any such term and the same is limited to either Final Payment Certificate or Interim Payment Certificate.

18. It is submitted that Clause 60.11 of the Contract categorically provides for final statement only after settlement of the disputes, however, despite pendency of several disputes between the parties, the learned Tribunal erroneously construed the above said Payment Certificate as final.

19. It is submitted that Clause 60.12 of the COPA provides for issuance of the discharge certificate in case a final statement is agreed between the parties and issuance of the Final Payment Certificate can only happen subsequently, therefore, terming the Payment Certificate as Final Certificate has led to miscarriage of justice, and the same is not permitted under the law.

20. It is submitted that despite holding that the written discharge was not submitted to the Engineer, the learned Tribunal awarded the claim in favor of the respondent Company, thereby, leading to erroneous interpretation of the terms of the Contract.

21. It is submitted that the learned Tribunal failed to appreciate Clauses 60.11 to 60.13 of the Contract which deal with the procedure regarding preparation of final statement and subsequent issuance of Final Payment Certificate, and where disputes between the parties is pending, the Engineer is empowered to issue only an Interim Payment Certificate.

22. It is submitted that the learned Tribunal failed to appreciate that the factum of pendency of numerous disputes between the parties was

admitted by the claimant/respondent Company itself in its statement of claim, therefore, the Certificate dated 31st August, 2014 could not be termed as a Final Payment Certificate.

23. It is submitted that during the course of proceedings before the learned Tribunal, the petitioner had apprised the members about the other disputes pending between the parties, however, the learned Tribunal still chose to ignore the same and erroneously adjudicated the issues in favour of the respondent Company.

24. It is submitted that the learned Tribunal erred in not appreciating that Clause 60.8 of the Contract provides for payment of dues by the NHAI only after issuance of a Final Statement and upon submission of written discharge to the Engineer, therefore, non-compliance of the same would automatically preclude any liability on the petitioner.

25. It is also submitted that the learned Tribunal failed to appreciate that the written discharge is aimed at bringing the entire Contract to the closure, and non-compliance of the same makes it evident that the said Contract was not completed, therefore, issuance of the Final Payment Certificate could not have been done by the Engineer as the same is against the terms of the Contract.

26. It is further submitted that in another contract package C-5, between the same parties, the learned Tribunal came to a categorical finding that the Draft Final Statement could not be termed as the Final Statement if dispute exists between the parties. Therefore, the Tribunal taking contradictory views in two different awards on the basis of same contract makes it evident that the impugned award warrants interference of this Court. Reliance has been placed upon the judgment laid down by

the Hon'ble Supreme Court in the case of ***National Highway Authority of India v. Progressive-MVR (jv)***[1] whereby, it was held that the contradictory opinions create a situation of anomaly and therefore, the same needs to be avoided.

27. It is submitted that the learned Tribunal arbitrarily held that the above said Certificate of Payment was not challenged by the petitioner, however, the material on record depicts the contrary, where the petitioner had filed numerous documents to show that the said Certificate is baseless and *de hors* the true facts.

28. The learned counsel also submitted that the learned Tribunal erred in appreciating that the above said Final Statement was revised by the Engineer by issuing subsequent certificates dated 13th July, 2017 and 31st July, 2017, therefore, the issue of limitation in filing counter claim does not arise, as the limitation period would be counted from the issuance of subsequent certificates and therefore, holding the question of limitation against the petitioner is bad in law.

29. In view of the foregoing submissions, the learned counsel for the petitioner submitted that the present petition be allowed and prayed that the impugned award be set aside by this Court.

(on behalf of the respondent)

30. *Per Contra*, the learned counsel appearing on behalf of the respondent Company vehemently opposed the present petition submitting to the effect that the learned Tribunal rightly appreciated the evidence on

[1]**(2018) 14 SCC 688.**

record and, therefore, decided the dispute in favor of the respondent Company.

31. It is submitted that pursuant to issuance of the Taking Over Certificate dated 6th April, 2013 as well as completion of the defect liability period on 4th April, 2014, the Engineer deemed it appropriate to issue the Final payment Certificate dated 31st August, 2014 and therefore, the same is in accordance with the terms of the Contract.

32. It is submitted that the petitioner NHAI released the payments regarding the work only after getting satisfied with the work done by the respondent Company and therefore, is barred from claiming any dispute at a later stage.

33. It is submitted that the learned Tribunal rightly held the Certificate dated 31st August, 2014, to be the Final Statement agreed between the parties as the said Certificate was not challenged by any of the parties and therefore, it attained finality.

34. It is submitted that Clause 60.11 of the Contract specifies that it is the Engineer and the Contractor, i.e., the respondent Company who need to agree to the Payment Certificate and since there was no dispute on the payment amount between Engineer and the Contractor, the said certificate attains finality.

35. It is also submitted that the petitioner failed to point out any terms in the Contract which empowers them to reopen the agreed Final Statement, therefore, the contention regarding reopening of the agreed Final Statement was rightly rejected by the learned Tribunal, deeming the above stated Certificate to be final.

36. It is further submitted that the learned Tribunal rightly held that any challenge to the aforementioned Certificate could have been made only as per the Contract, where the parties aggrieved by the said Certificate have to invoke arbitration. Therefore, failure of the petitioner to challenge the said Certificate amounts to acceptance of the amount due towards the respondent Company.

37. The learned counsel for the respondent Company submitted that Section 34 of the Act provides for limited interference to an arbitral award as the findings arrived at by an Arbitral Tribunal are based on appreciation of facts and evidence before it and on the plausible interpretation of the agreement executed between the parties. Reliance has been placed upon the judgment of the Hon'ble Supreme Court in the case of ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI***[2]**.**

38. It is therefore submitted that this Court cannot act as a Court of appeal as it is precluded from re-opening or reviewing the merits of the case in hand and therefore, a narrow approach should be adopted in such cases.

39. In light of the foregoing submissions, the learned counsel appearing for the respondent Company submitted that the present petition being devoid of any merits is liable to be dismissed.

SCHEME OF THE ACT

40. Arbitration in India has existed from antiquity where traces of the same can also be found in regulations drafted during the colonial times.[3] The first consolidated act was the Indian Arbitration Act, 1899 where the

[2] **2019 (3) Arb. LR 152 SC**
[3] Bengal Regulations of 1772.

arbitral award could have been set aside for various reasons. Subsequently, the Code of Civil Procedure, 1908 provided for arbitration[4]. In the said Code, the relevant provisions empowered the Courts to remand back the dispute to the Arbitral Tribunal for fresh adjudication.

41. The object of the Act has been discussed by the Hon'ble Supreme Court as well as various High Courts in a catena of judgments. In ***BCCI v. Kochi Cricket (P) Ltd.***[5] the Hon'ble Supreme Court analyzed the objectives of the Act and made the following observations:

> *"76. The learned counsel for the appellants have painted a lurid picture of anomalies that would arise in case the Amendment Act were generally to be made retrospective in application. Since we have already held that the Amendment Act is only prospective in application, no such anomalies can possibly arise. It may also be noted that the choosing of Section 21 as being the date on which the Amendment Act would apply to arbitral proceedings that have been commenced could equally be stated to give rise to various anomalies. One such anomaly could be that the arbitration agreement itself may have been entered into years earlier, and disputes between the parties could have arisen many years after the said arbitration agreement. The argument on behalf of the appellants is that parties are entitled to proceed on the basis of the law as it exists on the date on which they entered into an agreement to refer disputes to arbitration. If this were to be the case, the starting point of the application of the Amendment Act being only when a notice to arbitrate has been received by the respondent, which as has been stated above, could be many years after the arbitration agreement has been entered into,*

[4] Schedule II
[5] **(2018) 6 SCC 287**

would itself give rise to the anomaly that the amended law would apply even to arbitration proceedings years afterwards as and when a dispute arises and a notice to arbitrate has been issued under Section 21. In such a case, the parties, having entered into an arbitration agreement years earlier, could well turn around and say that they never bargained for the change in law that has taken place many years after, and which change will apply to them, since the notice, referred to in Section 21, has been issued after the Amendment Act has come into force. Cut-off dates, by their very nature, are bound to lead to certain anomalies, but that does not mean that the process of interpretation must be so twisted as to negate both the plain language as well as the object of the amending statute. On this ground also, we do not see how an emotive argument can be converted into a legal one, so as to interpret Section 26 in a manner that would be contrary to both its plain language and object

77. *However, it is important to remember that the Amendment Act was enacted for the following reasons, as the Statement of Objects and Reasons for the Amendment Act states:*

> *"**2.** The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said Report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the RajyaSabha on 22-12-2003. The said Bill was referred to the Department-related*

Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and report. The said Committee, submitted its Report to Parliament on 4-8-2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the RajyaSabha.

3. *On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost-effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.*

4. *As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.*

5. *As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, the President was*

pleased to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015.

6. *It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely—*

(i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the Arbitral Tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(vi) to provide for a model fee schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of Arbitral Tribunal, where a High Court appoints arbitrator in terms of Section 11 of the Act;

(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be

resolved through fast-track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. *The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost-effective and lead to expeditious disposal of cases."*

78. *The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's Press Release dated 7-3-2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons,*

"... have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act", and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act. [

These amendments have the effect, as stated in HRD Corpn. v. GAIL (India) Ltd., (2018) 12 SCC 471 of limiting the grounds of challenge to awards as follows: (SCC p. 493, para 18)"18. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705 has been expressly done away with. So has the judgment in ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in Renusagar Power Plant Co. Ltd. v. General Electric Company, 1994 Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein viz. "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in Renusagar, 1994 Supp (1) SCC 644. "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204. Section 28(3) has also been amended to bring it in line with the judgment of this Court in Associate Builders, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one."] It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to

be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated."

42. Upon perusal of the aforesaid judgment, it is evident that the primary objective of the Act is to effectively and expeditiously dispose of the disputes between the parties. In order to adhere to the legislative intent, it has been deemed necessary by the mandate of the Act and the Hon'ble Supreme Court to limit interference in the process of arbitration, irrespective of the stage of the arbitration proceedings.

43. In the instant case, the petitioner has invoked Section 34 of the Act to challenge the impugned Award. Therefore, it becomes imperative to discuss the nature and scope of the aforesaid provision. The relevant portion of the said provision is reproduced hereunder:

*"**34. Application for setting aside arbitral award.—** (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
(2) An arbitral award may be set aside by the Court only if—
(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—
(i) a party was under some incapacity; or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters

submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
(b) the Court finds that—
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
(ii) the arbitral award is in conflict with the public policy of India.
Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—
(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
(ii) it is in contravention with the fundamental policy of Indian law; or
(iii) it is in conflict with the most basic notions of morality or justice.
Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.…"

44. Upon perusal of the aforesaid provision, it is clear that the intent of the legislature while enacting the Act, as well as while carrying out the amendments to the same, was that there should be limited intervention of the Courts in arbitral proceedings, especially after the conclusion of the proceedings. It is well settled that any claim brought before a Court of

law under Section 34 of the Act shall be in accordance with the principle of the provisions laid down under the Act as well as interpreted by the Hon'ble Supreme Court.

45. From the foregoing discussions, it is settled that Section 34 of the Act has a limited scope and the Courts can only intervene if the conditions mentioned in the said provision are fully met.

46. At this stage, this Court deems it apposite to discuss the role of an Arbitral Tribunal. An Arbitral Tribunal is constituted with the consent of both the parties when the arbitration clause is invoked by either of the parties to an agreement.

47. Upon constitution, the Tribunal conducts the inquiry and proceedings with the participation of the parties to the dispute. It is considered that while adjudicating a case, the Tribunal delves into the Statement of Claim, Statement of Defense presented by and on behalf of the parties and passes an award after due deliberations on issues in question. Therefore, as per the settled principle, an unfettered intervention in the Tribunal's functioning would defeat the spirit and purpose of the Act.

48. The question of powers conferred to the Courts while examining the challenge made to an Arbitral Award is answered by the Hon'ble Supreme Court in several cases and it is well settled that the Court need not examine the validity of findings or the reasoning behind the findings given by the Arbitrator. Therefore, the only question before the Courts while adjudicating an Arbitral Challenge is whether the conclusion drawn in the impugned Award is supported by the findings of the Arbitrator.

49. The said principle was reiterated by the Hon'ble Supreme Court in ***Anand Brothers (P) Ltd. vs. Union of India &Ors.***[6] and it was held as under:

> *"7. Before we examine whether the expression "finding" appearing in Clause 70 would include reasons in support of the conclusion drawn by the arbitrator, we consider it appropriate to refer to the Constitution Bench decision of this Court in Raipur Development Authority v. Chokhamal Contractors wherein this Court was examining whether an award without giving reasons can be remitted or set aside by the Court in the absence of any stipulation in the arbitral agreement obliging the arbitrator to record his reasons. Answering the question in the negative, this Court held that a nonspeaking award cannot be set aside except in cases where the parties stipulate that the arbitrator shall furnish reasons for his award. This Court held: (SCC pp. 750-51, para 33) —33 . ... When the parties to the dispute insist upon reasons being given, the arbitrator is, as already observed earlier, under an obligation to give reasons. But there may be many arbitrations in which parties to the dispute may not relish the disclosure of the reasons for the awards. In the circumstances and particularly having regard to the various reasons given by the Indian Law Commission for not recommending to the Government to introduce an amendment in the Act requiring the arbitrators to give reasons for their awards we feel that it may not be appropriate to take the view that all awards which do not contain reasons should either be remitted or set aside.‖ Having said that, this Court declared that the Government and their instrumentalities should-as a matter of policy and public interest-if not as a compulsion of law, ensure that whenever they enter into an agreement for resolution of disputes by way of private arbitrations, the requirement of speaking awards is*

[6]**(2014) 9 SCC 212**

expressly stipulated and ensured. Any laxity in that behalf might lend itself to and, perhaps justify the legitimate criticism, that the Government failed to provide against possible prejudice to public interest.

8. The following passage is in this regard apposite: (Raipur Development Authority case, SCC pp. 752-53, para 37) —

> *37. There is, however, one aspect of non-speaking awards in non-statutory arbitrations to which Government and governmental authorities are parties that compel attention. The trappings of a body which discharges judicial functions and is required to act in accordance with law with their concomitant obligations for reasoned decisions, are not attracted to a private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to exert the State's sovereign judicial power. But arbitral awards in disputes to which the State and its instrumentalities are parties affect public interest and the matter of the manner in which Government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of policy and public interest. Government and its instrumentalities cannot simply allow large financial interests of the State to be prejudicially affected by non-reviewable---except in the limited way allowed by the statute-non-speaking arbitral awards. Indeed, this branch of the system of dispute resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of Government have come to suffer by awards which have raised eyebrows by doubts as to their rectitude and propriety. It will not be justifiable for Governments or their instrumentalities to enter into arbitration agreements which do not expressly stipulate the*

rendering of reasoned and speaking awards. Governments and their instrumentalities should, as a matter of policy and public interest-if not as a compulsion of law-ensure that wherever they enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated and ensured. It is for Governments and their instrumentalities to ensure in future this requirement as a matter of policy in the larger public interest. Any lapse in that behalf might lend itself to and perhaps justify, the legitimate criticism that Government failed to provide against possible prejudice to public interest.

9. Reference may also be made to the Arbitration and Conciliation Act, 1996 which has repealed the Arbitration Act, 1940 and which seeks to achieve the twin objectives of obliging the Arbitral Tribunal to give reasons for its arbitral award and reducing the supervisory role of courts in arbitration proceedings. Section 31(3) of the said Act obliges the Arbitral Tribunal to state the reasons upon which it is based unless the parties have agreed that no reasons be given or the arbitral award is based on consent of the parties. There is, therefore, a paradigm shift in the legal position under the new Act which prescribes a uniform requirement for the arbitrators to give reasons except in the two situations mentioned above. The change in the legal approach towards arbitration as an alternative dispute resolution mechanism is perceptible both in regard to the requirement of giving reasons and the scope of interference by the court with arbitral awards. While in regard to requirement of giving reasons the law has brought in dimensions not found under the old Act, the scope of interference appears to be shrinking in its amplitude, no matter judicial pronouncements at time appear to be heading towards a more expansive approach that may appear to some to be opening up

areas for judicial review on newer grounds falling under the caption 'public policy' appearing in Section 34 of the Act. We are referring to these developments for it is one of the well-known canons of interpretation of statutes that when an earlier enactment is truly ambiguous in that it is equally open to diverse meanings, the later enactment may in certain circumstances serve as the parliamentary exposition of the former.

xxx xxx xxx

14. It is trite that a finding can be both: a finding of fact or a finding of law. It may even be a finding on a mixed question of law and fact. In the case of a finding on a legal issue the arbitrator may on facts that are proved or admitted explore his options and lay bare the process by which he arrives at any such finding. It is only when the conclusion is supported by reasons on which it is based that one can logically describe the process as tantamount to recording a finding. It is immaterial whether the reasons given in support of the conclusion are sound or erroneous. That is because a conclusion supported by reasons would constitute a "finding" no matter the conclusion or the reasons in support of the same may themselves be erroneous on facts or in law. It may then be an erroneous finding but it would nonetheless be a finding. What is important is that a finding presupposes application of mind. Application of mind is best demonstrated by disclosure of the mind; mind in turn is best disclosed by recording reasons. That is the soul of every adjudicatory process which affects the rights of the parties…."

50. Upon perusal of the aforementioned paragraphs, it is observed that the amendment made to the Act also aims to achieve the twin objectives, i.e., obliging the Tribunal to provide reasons for its award and reducing the supervisory role of the Courts in the proceedings. Therefore, it is well

established that the Courts can only examine the Award and should not conduct an inquiry into the facts and evidence of the matter.

51. The aforementioned statutory provision and established judicial dictum establishes the criteria upon which an Arbitral Award may be set aside by the Courts. These criteria encompass three essential facets: *firstly*, when the award contravenes the public policy; *secondly*, when the award exhibits patent illegality; and *lastly*, when the Arbitrator fails to adhere to the fundamental principle of natural justice.

52. Therefore, the role of the Courts in a petition filed under Section 34 of the Act is limited to determination of whether the impugned award can be set aside on the basis of any of the three conditions as mentioned in the preceding paragraph.

53. In the instant case, the arbitration arises out of an international agreement between the parties where the respondent Company is a foreign entity, therefore, leading to invocation of an international commercial arbitration.

54. The scope of interference in an international commercial arbitration has been dealt with by the Hon'ble Supreme Court in numerous judgments, wherein, the Hon'ble Court has clarified that the grounds to challenge an arbitral award would be even more restricted and an award arising out of an international commercial arbitration can only be interfered with if it is in contravention to the public policy of the country.

55. The consideration of mandatory national laws is important to ensure that an award is not opposed to the public policy of the country and therefore can be made enforceable. The mandatory national laws include the basic notion of morality and justice, therefore, the Courts

need to determine whether an award is adherent to the said principles as included within the public policy.

56. The term public policy was entered into the Arbitration *fora* even before the enactment of the Act of 1996 where the foreign awards were not enforced if the same would amount to contravention of the public policy of India. Pursuant to enactment of the Arbitration Act, 1940, the Courts narrowly construed the grounds for challenge of the award and steadfastly refused to assume the appellate jurisdiction over the legality of an arbitral award.

57. The Act, 1996 was enacted immediately after the policy of globalization was introduced in India. The said Act proved to be an overarching statute governing both Indian and foreign arbitrations. As per the objectives of the Act, the purpose for its enactment was to make the arbitration laws more responsive to the contemporary requirements where fair and quick mechanisms can be adopted to minimize the supervisory role of the Courts in the country.

58. The term public policy does not find any mention in the provisions of the Act, however, the same has been interpreted and clarified by the Courts of this Country. The latin maxim underlying the said term is *ex dolo malo non oritur action*, which means that no Court of law would lend its aid to a person who finds its cause of action upon an immoral and illegal act.

59. The doctrine of public policy *per se* has been subject to various interpretations by the Constitutional Courts of the country. Over a period of time, the Courts in the country adopted a broader view with respect to the interpretation of the said term thereby shifting the trends.

60. In various cases, the Hon'ble Supreme Court adopted broader view regarding the issue of what would constitute public policy and also justified the unpredictable nature of the said term which may shift from time to time.

61. In ***Associate Builders v. DDA,***[7] the Hon'ble Supreme Court dealt with the issue of interpretation of the term public policy in relation to enforcement of the awards arising out of international arbitration and held as under:

> *"**17.** It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.*
>
> ***18.** In Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:*
>
> > *"**7. Conditions for enforcement of foreign awards**.— (1) A foreign award may not be enforced under this Act—*
> >
> > ***
> >
> > *(b) if the Court dealing with the case is satisfied that—*
> >
> > ***
> >
> > *(ii) the enforcement of the award will be contrary to the public policy."*

[7]**(2015) 3 SCC 49**

> *In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to*
>
> *(i) The fundamental policy of Indian law,*
>
> *(ii) The interest of India,*
>
> *(iii) Justice or morality,*

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).

19. *When it came to construing the expression "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)*

> *"31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public*

interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

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

***

74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator

or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken

care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

20. *The judgment in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] has been consistently followed till date.*

21. *In Hindustan Zinc Ltd. v. Friends Coal Carbonisation [(2006) 4 SCC 445] , this Court held: (SCC p. 451, para 14)*

"14. The High Court did not have the benefit of the principles laid down in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] , and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

22. *In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held: (SCC pp. 209-10, paras 58-60)*

"58. In Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression 'public policy' was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5

SCC 705 : AIR 2003 SC 2629] (for short 'ONGC'). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. v. BrojoNathGanguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression 'public policy' on the touchstone of Section 23 of the Contract Act, 1872 and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Contract Act, 1872. In ONGC [(2003) 5 SCC 705 : AIR 2003 SC 2629] this Court, apart from the three grounds stated in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. 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. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependent upon the nature of transaction and

nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See State of Rajasthan v. BasantNahata [(2005) 12 SCC 77] .)"

23. *In Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd. [(2006) 11 SCC 245] , Sinha, J., held: (SCC p. 284, paras 103-04)*

"103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so 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.

104. What would be a public policy would be a matter which would again depend upon the nature of transaction and the nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept of what was a public good or public interest or what would otherwise be injurious to the public good at the relevant point as contradistinguished by the policy of a particular Government. (See State of Rajasthan v. BasantNahata [(2005) 12 SCC 77] .)"

24. *In DDA v. R.S. Sharma and Co. [(2008) 13 SCC 80] , the Court summarised the law thus: (SCC pp. 91-92, para 21)*

"21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

25.*J.G. Engineers (P) Ltd. v. Union of India [(2011) 5 SCC 758 : (2011) 3 SCC (Civ) 128] held: (SCC p. 775, para 27)*

"27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."

26. *Union of India v. Col. L.S.N. Murthy [(2012) 1 SCC 718 : (2012) 1 SCC (Civ) 368] held: (SCC p. 724, para 22)*

> *"22. In ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] this Court after examining the grounds on which an award of the arbitrator can be set aside under Section 34 of the Act has said: (SCC p. 727, para 31)*
>
> *'31. ... However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal'."*

Fundamental Policy of Indian Law

27. *Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]*

judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

28. *In a recent judgment, ONGC Ltd. v. Western Geco International Ltd. [(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)*

> *"35. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in ONGC [(2003) 5 SCC 705 : AIR 2003 SC 2629] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or*

obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audialterampartem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury [Associated Provincial Picture Houses Ltd. v. WednesburyCorpn., (1948) 1 KB 223 : (1947) 2

All ER 680 (CA)] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

(emphasis in original)

29. *It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.*

30. *The audialterampartem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:*

*"**18.Equal treatment of parties**.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.*

***

34.Application for setting aside arbitral award**.—(1)*

> *(2) An arbitral award may be set aside by the court only if—*
>
> *(a) the party making the application furnishes proof that—*
>
> ***
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"*

62. In ***SsangyongEngg. & Construction Co. Ltd. v. NHAI,***[8] the Hon'ble Supreme Court held that the term public policy of India would mean the fundamental policy of Indian law. The relevant paragraph reads as under:

> ***"34.*** *What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post*

[8]**(2019) 15 SCC 131**

amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

63. In a recent decision delivered by the Hon'ble Supreme Court in the case of ***Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum***[9] the Hon'ble Court further summarized the principles laid down by the Court in earlier judgments and held as under:

> *"**42.** In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , this Court held that an award could be said to be against the public policy of India in, inter alia, the following circumstances:*
> ***42.1.** When an award is, on its face, in patent violation of a statutory provision.*
> ***42.2.** When the arbitrator/Arbitral Tribunal has failed to adopt a judicial approach in deciding the dispute*
> ***42.3.** When an award is in violation of the principles of natural justice.*
> ***42.4.** When an award is unreasonable or perverse.*
> ***42.5.** When an award is patently illegal, which would include an award in patent contravention of any substantive law of India or in patent breach of the 1996 Act.*
> ***42.6.** When an award is contrary to the interest of India, or against justice or morality, in the sense that it shocks the conscience of the Court."*

64. A perusal of the aforesaid paragraph makes it clear that in order to determine upon a challenge to an arbitral award arising out of

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[9] **(2022) 4 SCC 463**

international commercial arbitration, the term public policy would be restricted to the Indian laws and not the international ones. In ***Associate Builders (Supra),*** the Hon'ble Supreme Court clarifies the meaning of the term public policy, whereby, it was held that the award can be set aside if it is in contravention to the fundamental policy of India.

65. The perusal of the above cited paragraphs also makes it clear that the expression 'fundamental to the policy of Indian law' is a principle which states that a Court and also a quasi-judicial authority must apply its mind to the peculiar facts and circumstances while arriving at a conclusion and adhere to the principles of natural justice.

66. In light of the foregoing discussions, it is clear that insofar an international commercial arbitration is concerned, the term public policy would not mean a mere violation, rather there is a threshold which mandates the interference in such awards where only in cases of unfairness and unreasonableness which goes to the root of the matter that can be termed a violation of the basic principles adopted by the country by way of various laws.

67. Therefore, in an international commercial arbitration, the Courts only have a limited supervisory role under the Act where intervention should be at minimal level and limited to the circumstances deemed to be unfair and unreasonable which shocks the conscience of the Court.

68. Having discussed the scheme of the Act and the provision relevant for adjudication of the instant dispute, this Court shall now move to the adjudication of the instant petition.

ANALYSIS AND FINDINGS

69. Keeping in mind the settled position of law, the limited question for adjudication before this Court is whether the impugned award suffers from illegality and therefore can be termed against the public policy of the country or not.

70. In order to answer the said issue, this Court deems it imperative to examine the impugned award and determine whether various clauses of the agreement were rightly interpreted or not.

71. The relevant extract of the impugned award reads as under:

> *"26.0 Discussions and Findings of the Arbitral Tribunal, on the Claims raised by the Claimant:*
>
> *i. The dispute primarily relates to the sanctity of the Final Statement agreed between the Engineer and the Claimant, under Sub-Clause 60.11 of COPA and the Final Payment certificate issued by the Engineer under Sub-Clause 60.13 of COPA.*
>
> *ii. Therefore, in order to examine the root causes of the dispute, the Arbitral Tribunal decided to determine the steps that were required to be taken by the Claimant, Engineer and the Respondent for raising the Bills and for releasing the payments, in accordance with the various provisions of the*
>
> *Contract and to examine the actions taken by the Claimant, Respondent and the Engineer.*
>
> *iii. Sub-Clause 60.1 of COPA (Page 230 of Contract), required the Contractor to submit a statement to the Engineer by the 7th day of each month for the work executed up to the end of the previous month in a tabulated form approved by the Engineer, showing therein the amounts that the Contractor considered himself to be entitled to. The statement was to inter-alia include the estimated value of Temporary and Permanent Works up to the end of the month*

in question, determined in accordance with Sub-Clause 56.1 at base unit rates and prices and in local currency and the actual value certified for payment for the Temporary and Permanent Works executed up to the end of previous month, at base unit rates and prices and in local currency.

iv. Sub-Clause 56.1 (Page 201 of Contract), referred to in Sub-Clause 60.1, mandates that the Engineer shall ascertain and determine by measurement the value of the Works in accordance with the Contract. The Engineer shall, when he requires any part of the Work to be measured, give reasonable notice to the Contractor's authorized agent to assist the Engineer in making such measurements and supply all particulars required by the Engineer. For the purposes of measuring such Permanent Works as are to be measured by records and drawings, the Engineer shall prepare records and drawings as the work proceeds and the Contractor, as and when called upon to do so in writing, shall within 14 days, attend to examine and agree such records and drawings with the Engineer and shall sign the same when agreed. In case the Contractor is unable to agree to such records or drawings, or does not sign them, they would nevertheless be taken to be correct.

v. Although the Respondent in its SOD has contended that the Contract did not provide for certification of quantum of work in stages and payments were released on Interim Estimate Basis, yet during the oral arguments it referred to Clause 57.1 of COPA (Para J of RD-9), to state that the measurements are to be taken as per specifications and drawings of the works and are to be recorded in measurement book of NHAI from time to time. Importantly,

i. All measurements must be taken at site; and

ii. Must be countersigned-by-the representative of contractor; and
iii. The monthly interim payment application of the Contractor as per sub-clause 60.1 should be strictly in accordance with these measurements.

Sub-clause 57.1 also mandated that the 'Engineer/ Engineer's Representative shall be responsible for ensuring that all measurements are taken as per specifications and drawings for the works and are recorded in the measurement book of NHAI'.

vi. Therefore, although the Respondent has contradicted its own stand taken in its SOD (RD-9 Para O and P), it concedes that the work is to be measured as the work proceeds, has to be recorded in the measurement book of NHAJ at site along with the progress of work and the monthly statements are to be raised based upon the work actually done up-to the previous month and thereafter be certified by the Engineer which becomes the basis for monthly payments.

vii. It therefore, becomes undisputed that as per Sub-Clause 60.1 of COPA, the Claimant was required to submit to the Engineer, a statement showing the amounts that it considered to be due to it, for the works executed by it up to the end of previous month. These amounts as per Sub-Clauses 56.1 of GCC and 57.1 of COPA were to be based on measurements taken at site under the supervision of the Engineer and agreed to by the representative of the Claimant. Thus, the Claimant was required to show in the said statement, inter-alia, the estimated value of all works executed during the month in question, determined in accordance with sub-clauses 56.1 of GCC and 57.1 of COPA, ie., on the basis of measurements of the work done at site, and the actual value of all work certified by the Engineer up the end of the previous month.

viii. It also becomes undisputed that the valuation of the works carried out at site is determined by actual measurements and on the basis of records of working drawings. Thus, the value of work determined and certified by the Engineer through IPCs is based on actual executed quantities and the payments are not released on the basis of estimated quantities included in the BOQ forming part of the

Contract, as has been contended by the Respondent in its Statement of Defence.

ix. Further, Sub-Clause 60-2 of COPA (Page 231 of Contract), inter-alia mandates the Engineer to broadly determine within 5 days of the receipt of the monthly statement from the Contractor referred to in Sub-Clause 60.1, the amount due to the Contractor and accordingly recommend to the Employer for release to the Contractor up to a maximum of 75% of net payment against monthly statement, pending Certificate of IPC by the Engineer. It further mandates the Engineer to approve or amend the said statement in such a way that in his opinion it reflects the amount due to the Contractor in accordance with the Contract, after deduction, other than the amount pursuant to Clause 47, of any such sums which may have become due and payable by the Contractor to the Employer, and within 21 days of the receipt of the monthly statement referred to in Sub-Clause 60.1, determine the amount due to the Contractor and deliver to the Employer and the Contractor an Interim Payment Certificate, certifying the amounts due to the Contractor after adjusting the payment already released to the Contractor against the said statement.

X. Thus, the Certification done by the Engineer in its monthly IPCs for all the items of Work executed by the Claimant, is in accordance with the drawings approved by the Engineer and is quantified on the basis of actual measurements of the various components of Works carried out at site. Therefore, it represents a mile-stone based certification and so the -quantification done is firm on the date of issue of the IPC. Therefore, the averment of the Respondent that the Engineer was issuing Interim Payment Certificates on tentative basis based on quantities in the BOQ (RD-2, Para16) and that the Certification in the IPCs was done after simply deducting the amounts withheld under the Contract and there is no certification relating to work executed (RD-2, Para 17), has no basis and needs to be rejected.

xi. The averment of the Respondent that Contract did not provide for certification of quantum of work in stages and that payments were released on Interim Estimate Basis and the Interim Payment Certificates by their name mean that they are interim and not final (RD-2, Para 12), is also incorrect. Since the various items of the work have to be executed over a period of time and cannot be completed over a single billing cycle, their valuation and stage payment has to be finalized as the work proceeds and the payment is released accordingly, which then becomes 'interim payment for those items of work. The Respondent has not brought to the notice of the Arbitral Tribunal, any Clause of the Contract that would support the contention of the Respondent that the payments were to be released on Interim Estimate Basis. On the contrary, Sub- Clauses 56.1 of GCC and 57.1 of COPA specifically state that the value of the works shall be ascertained and determined by measurement.

xii. Even, the averment of the Respondent that the Engineer was issuing IPCS just after deducting the withheld amounts under the Contract and was not certifying all the works executed up to the date while issuing various Interim Payment Certificates is incorrect. As has been discussed, herein above, under Sub-Clause 56.1 of GCC and Sub-Clause 57.1 of COPA, the Engineer was required to certify payments after carrying out the valuation of the Works done on the basis of measurements at site, with or without the assistance of the Claimant.

xiii. From above, it can be concluded that from the monthly certification done by the Engineer in its monthly IPCs, the quantities of all the items of Works executed by the Claimant and their valuation, as the work proceeded was available both with the Engineer and the Respondent and the Respondent continued to release the money based on these certifications. Therefore, in case the Respondent wanted to carry out verification of quantities independently, it could have done so with the assistance of the Engineer or even with the assistance of the Claimant or both, at the stages

when various IPCs were issued by the Engineer or even thereafter till they reached a finality through the acceptance of Final Statement, by both the Engineer and the Claimant.

xiv. Sub-Clause 60.9 of COPA (Page 230 of Contract) authorizes the Engineer to make by any interim Payment Certificate, any correction or modification in any previous Interim Payment Certificate issued by him, and he, also has the authority to omit or reduce the value of such work in any Interim Payment Certificate, if any work is not being carried out to his satisfaction.

XV. Therefore, the Respondent is correct in its submission that as per Sub- Clause 60.9 of COPA, the Engineer is empowered to make any correction or modification in any Interim Payment Certificate, which has been issued by him. Therefore, although, IPCs were to be issued by the Engineer after carrying out due diligence and on the basis of measurements at site, yet in order to take care of any errors or omissions that may have crept in while issuing any one or more IPCs, Sub-Clause 60.9 of COPA gives an opportunity to the Engineer or to the Claimant and the Respondent through the Engineer to set right the errors that may have inadvertently crept in. It also provides an opportunity to the Engineer to omit or reduce the value of any work in any IPC which is not found to be carried out by the Engineer to his satisfaction. The Claimant has in Para 28 of its SOC stated that 'It is pertinent to note at this stage that the Engineer at no point of time during the execution of the Contract revised, corrected or modified any of the IPCs which were previously certified by the Engineer and paid by the Respondent. This averment of the Claimant has neither been contested by the Respondent in its SOD, nor has the Respondent brought any material on record to disprove it. Therefore, it can be held that the Engineer did not carry out any corrections or modifications in any of the IPCs during the 'course of the execution of the Contract. The submission of the Respondent that under Sub-Clause 60.9 of COPA, the Engineer could also make corrections or modifications in the Final

Statement agreed to between the Engineer and the Claimant under Sub-Clause 60.11 is not correct. Sub-Clause 60.9 of COPA is limited to IPCs alone.

xvi. Sub-Clause 48.1 regarding Taking Over Certificate (Page 195 of Contract) states:

> *"When the whole of the Works have been substantially completed and have satisfactorily passed any Tests on Completion prescribed by the Contract, the Contractor may give a notice to that effect to the Engineer, with a copy to the Employer, accompanied by a written undertaking to finish with due expedition any outstanding work during the Defects Liability Period. Such notice and undertaking shall be deemed to be a request by the Contractor to the Engineer to issue a Taking Over Certificate in respect of the Works. The Engineer shall, within 21 days of the date of delivery of such notice, either issue to the Contractor, with a copy to the Employer, a Taking-Over Certificate, stating the date on which, in his opinion, the Works were substantially completed in accordance with the Contract, or give instructions in writing to the Contractor specifying all the work which, in the Engineer's opinion, is required to be done by the Contractor before the issue of such Certificate. The Engineer shall also notify the Contractor of any defects in the Works affecting substantial completion that may appear after such instructions and before completion of -Over Certificate within 21 days of completion, to the satisfaction of the Engineer, of the Works so specified and remedying any defects so notified."*

xvii. Sub-Clause 60.10 regarding Statement at Completion (Page 235 of Contract) states:

> *"Not later than 84 days after the issue of the Taking over Certificate in respect of the whole of the Works, the Contractor shall submit to the Engineer six (6)*

copies of a Statement at Completion with supporting documents showing in detail, in the form approved by the Engineer,

(a) the final value of all work done in accordance with the Contract up to the date stated in such Taking Over Certificate.

(b) any further sums which the Contractor considers to be due; and

(c) an estimate of amounts, which the Contractor considers, will become due to him under the Contract.

xviii. Estimated amounts shall be shown separately in such Statement at Completion. The Engineer shall certify payment in accordance with Sub-Clause. It is noted that on Substantial Completion of the Work, on 06.04.2013 and with effect from 12.03.2013, the Engineer issued a Taking Over Certificate (TOC) in accordance with Clause 48.1 of GCC (Page 195 of the Contract). Thereafter, as per requirements of Sub-Clause 60.10 of COPA (Page 235 of Contract), the Claimant on 28.05.2013, submitted to the Engineer with a copy to the Respondent, a Statement at Completion with all the supporting documents (CD-2, Annex. C-5). On the basis of this Statement at Completion, the Engineer determined the value of the Work done and certified the amount payable till the date of TOC, through an IPC (IPC-73), vide his letter dated 10.06.2014 (CD-2, Annex. C-99) and 90% of the amount so determined by the Engineer was released by the Respondent (CD-2, Annex. C-99 to C-103).

xix. Sub-Clause 62.1 regarding Defects Liability Certificate (Page 206 of Contract) states:

"The Contract shall not be considered as completed until a Defects Liability Certificate shall have been signed by the Engineer and delivered to the Employer, with a copy to, the Contractor, stating the date. on which the Contractor shall have completed his obligations to execute and complete the Works and

remedy any defects therein to the Engineer's satisfaction. The Defects Liability Certificate shall be given by the Engineer within 28 days after the expiration of the Defects Liability Period, or, if different defects liability periods shall become applicable to different Sections or parts of the Permanent Works, the expiration of the latest such period, or as soon thereafter as any works instructed, pursuant to Clauses 49 and 50, have been completed to the satisfaction of the Engineer. Provided that the issue of the Defects Liability Certificate shall not be a condition precedent to payment to the Contractor of the second portion of the Retention Money in accordance with the conditions set out in Sub-Clause 60.3."

XX. Sub-Clause 60.11 regarding Final Statement (Page 235 of Contract) states:

"Not later than 56 days after the issue of Defects Liability Certificate pursuant to Sub-Clause 62.1, the Contractor shall submit to the Engineer six (6) copies of a draft final statement for consideration with supporting documents showing in detail, in form approved by the Engineer,

(a) the value of all work done in accordance with the Contract; and

(b) any further sums which the Contractor considers to be due to him under the Contract.

if the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed (for the purposes of these Conditions referred to as the "Final Statement").

If following discussions between the Engineer and the Contractor and any changes to the draft final statement which may be agreed between them, it becomes evident that a dispute exists, the Engineer shall issue to the Employer an Interim Payment Certificate for those parts of the draft final statement which are not in dispute. The dispute shall then be settled in accordance with Clause 67. The Final Statement shall be agreed upon settlement of the dispute."

xxi. It is noted that upon expiry of Defect Liability Period (DLP) on 12.03.2014, the Engineer vide his letter dated 04.04.2014, issued a Defects Liability Certificate (DLC) in terms of Clause 62.1 of GCC (Page 206 of Contract). acknowledging that the Claimant had completed its obligations to execute and complete the Works and remedy any defects therein to the Engineer's satisfaction. Thereafter, as per requirements of Sub-Clause 60.11 of COPA (Page 235 of Contract), the Claimant on 24.06.2014, submitted to the Engineer with a copy to the Respondent, 6 sets of Draft Final Statement with all the supporting documents (CD-3, Annex. C-104). On the basis of this Draft Final Statement, the Engineer issued a Final Payment Certificate vide his letter dated 31.08.2014 (CD-4, Annex. C-211) stating that the Engineer had after allowing for all previous payments, determined the total amount due to the Claimant.

xxii. Referring to Sub-Clause 60.11 of COPA, the Respondent in its written submissions of oral arguments (RD-9 Pages 53-59) in its Paras III. i.g). III. i.i) and III. i.q) has respectively averred that 'if any part of the Draft Final Statement is not agreed upon, which includes both Clause 60.11 (a) or (b), only an Interim Payment Certificate can be issued', 'In the instant case, admittedly as on the date of Draft Final Statement, including on the date of the so-called Final Statement leading to issuance of so-called Final Payment Certificate dated 31 August 2014, admittedly a number of disputes were pending between the parties' and

'What clause 60.11 of COPA contemplates is the existence of dispute and not who has the authority to adjudicate the same. So long as the dispute exists, Final Payment Certificate under sub-clause 60.13 cannot be issued. On the contrary, the argument made by Claimant's counsel is an admission of the fact that the dispute exists'.

xxiii. It is noted that that the draft final statement referred to in Sub-Clause 60.11 of COPA consists of two independent and distinct parts, viz.

(a) the value of all work done in accordance with the Contract; and

(b) any further sums which the Contractor considers to be due to him under the Contract.

The first part constitutes the value of all work done in accordance with the Contract. If, the Engineer disagrees with or cannot verify any portion of this part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in this part of the draft, as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed. If following discussions between the Engineer and the Contractor and any changes to the draft final statement which may be agreed between them, it becomes evident that a dispute to the first part still exists, the Engineer shall issue to the Employer an Interim Payment Certificate for those parts of the draft final statement which are not in dispute. The disputed portion of this part of the Statement shall then be settled in accordance with Clause 67 of COPA The second part constitutes all further sums which the Claimant considers to be due to him under the Contract. The Second part therefore, comprises of all the sums which the Claimant considers to be due to it whereas the Engineer does not agree to that contention. Therefore, this has to be resolved through the mechanism laid down in the Contract I.e. Clause 67 of COPA. Therefore, for the Second part of the draft

Final Statement, the Engineer and the Claimant have to simply agree to the aggregate sum of money involved in disputes which are awaiting resolution under the Dispute Resolution Mechanism under Sub-Clause 67 of COPA. In the instant case the Claimant has agreed to all the changes suggested by the Engineer and so there is no dispute between the Engineer and the Claimant on the Draft Final Statement, and so the Final Statement agreed to between the Engineer and the Claimant becomes final.

xxiv. Sub-Clause 60.12 regarding Discharge (Page 235 of Contract) states: "Upon submission of the Final Statement, the Contractor shall give to the Employer, with a copy to the Engineer, a written discharge confirming that the total of the Final Statement represents full and final settlement of all monies due to the Contractor arising out of or in respect of the Contract. Provided that such discharge shall become effective only after payment due under the Final Certificate issued pursuant to Sub-Clause 60.13 has been made and the Performance Security referred to in Sub-Clause 10.1 has been returned to the Contractor."

xxv. Sub-Clause 60.13 regarding Final Payment Certificate (Page 236 of Contract) states:

> *"Within 28 days after receipt of the Final Statement and the written discharge, the Engineer shall issue to the Employer (with a copy to the Contractor) a Final Payment Certificate stating:*
>
> *(a) The amount which, in the opinion of the Engineer, is finally due under the Contract and,*
>
> *(b) After giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled under the Contract, other than Clause 47, the balance, if any, due from the Employer to the Contract or from the Contractor to the Employer as the case may be."*

xxvi. The Respondent in Para 70 of its amended SOD (taken on record through application dated 20.03.2019), has stated that in view of pendency of disputes between the Parties, no Final Payment Certificate under Sub- Clause 60.13 could be issued. The Engineer could have only issued an interim payment certificate in respect of those parts of a final statement which are not in dispute. Only after settlement of disputes in accordance with clause 67, the Final Payment Certificate could have been issued. This is further fortified from a reading of clause 60.13, which categorically states that the Final Payment Certificate shall only be issued on receipt of final statement and the written discharge. The Contractor has admittedly not given written discharge-till date, and no written discharge was available with the Engineer or submitted to the Engineer by the Claimant as on August 31, 2014. Therefore, the payment certificate dated August 31, 2014 should only be treated as an interim payment certificate, and not final payment certificate.

xxvii. At the same time, the Respondent vide Para 41 of its amended SOD (RD- 2) has stated that the Engineer after verification from IPCs, RFIs, MBS etc. corrected the final bill date 31.08.2014 and submitted revised final bill on 13.07.2017 and further revised Payment Certificate submitted on 31.12.2017. Yet again, in Para 60 of the same amended SOD, the Respondent has referred to the Final Payment Certificate dated 31.12.2017. However, the Respondent has not clarified how the Revised Final Payment Certificate issued by the Engineer without the Written Discharge from the Claimant or without the Claims of the Claimant pending resolution under Clause 67 of COPA could be valid when the Final Payment Certificate dated 31.08.2014 was considered to be invalid for the same reasons. The Respondent has also not mentioned the Clauses of the Contract which entitled the Respondent or the Engineer to re-open the Final Statement agreed to between the Engineer and the Claimant and also get it finalised unilaterally by the Engineer (RD-5, Page- 1) without seeking the consent of the Claimant.

xxviii. Further, the Respondent has in Para 27 of its amended SOD (RD-2) stated that it is the duty of the Respondent to check whether the Engineer has strictly scrutinized the final Statement in the light of contractual provisions and Good Industry Practices before releasing final payment to avoid loss to the Public Exchequer. There is no doubt that the Respondent has to ensure that there is no loss to Public Exchequer but the same has to be ensured by adhering to the provisions of the Contract. It is felt that the Respondent through thorough due diligence during the execution of the Contract could have ensured that there was no alleged over-payment. Sub-Clause 60.9 appears to have been included just to take care of such eventualities. Further, Clause 2.6 of GCC provides another opportunity to the Parties to have any decision, opinion, consent, expression of satisfaction, or approval, determination of value or action opened up, reviewed or revised.

xxix. Despite above, there is no doubt that along with the Final Statement agreed between the Engineer and the Claimant, the Claimant was also required to submit to the Respondent a written discharge confirming that the total of the Final Statement [Which includes both part (a) and part (b) of the said Final Statement, admissibility of Part (b) being decided by the Dispute Resolution mechanism), represents full and final settlement of all monies due to the Claimant. It is also a fact that the Claimant has not submitted the said "Written Discharge' to the Respondent along with the Final Statement The Claimant in its Additional Rejoinder dated 07.08.2019 (CD-11), stated that the Respondent had waived the requirement of Written Discharge by releasing part payments on the basis of Final Payment certificate dated 31.08.2014 issued by the Engineer and had also released the bank Guarantees.

xxx. The Respondent has vehemently contested this averment of the Claimant. It has stated that in order to constitute a waiver, there must be voluntary and intentional relinquishment of a right. It has further stated that waiver

has to be pleaded by taking up a specific plea of waiver, which the Claimant has not done. The Respondent has also relied on a number of judgments in support of its contentions.

xxxi. The Arbitral Tribunal agrees with the Respondent that the plea for waiver should have been set up in the pleadings made by the Claimant, which the Claimant has not done. It is also noted that release of part payment after finalization of Final Statement cannot construe waiver of the Contractual requirement of Written Discharge, especially when part payments were being made based on monthly bills of the Claimant throughout the Contract period and this continued till the Statement at Completion, which was treated as IPC-73. As far as release of Bank Guarantees is concerned, it is seen that as per Clause 10.2 of GCC (Page 181 of Contract), such securities are to be returned to the Claimant within 14 days of issue of the Defects Liability Certificate. Since, the Defects Liability Certificate was issued on 04.04.2014, the Respondent was bound to release the Bank Guarantees. It can therefore, be held that by not complying with the requirements laid down under Sub-Clause 60.12 of COPA (Page 235. of-Contract) of giving to the Employer, a Written Discharge confirming that the total of the Final Statement represented full and final settlement of all monies due to the Contractor arising out of or in respect of the Contract, the Claimant had defaulted. It can therefore, also be held that in the absence of the aforesaid Written Discharge, the Engineer was not entitled to issue a Final Payment Certificate under Sub- Clause 60.13 of COPA (Page 236 of Contract) and the Engineer had clearly erred in issuing the Final Payment Certificate.

xxxii. However, on a perusal of the Final Payment Certificate dated 31.08.2014, filed by the Claimant as CD-4, it is observed that the same is not a Final Payment Certificate, as envisaged under Sub-Clause 10.13 of COPA. Under the said Sub-Clause, the format of the Final Payment Certificate has been laid down. It requires the stating of.

(a) the amount which, in the opinion of the Engineer, is finally due under the Contract and,

(b) after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled under the Contract, other than Clause 47, if any, due from the Employer to the Contractor or from the Contractor to the Employer as the case may be.

xxxiii. Therefore, the Final Payment Certificate issued by the Engineer against Contractor's Final Statement which was accompanied by Final Statement of Quantities, numerous AMB Nos., MB Nos., Measurement Sheets, RFIs, As Built Plan & Profile, As Built Cross Sections and As Built Structure Drawings, was actually not the Final Payment Certificate envisaged under Sub-Clause 60.13 of COPA, but was in reality, the Final Statement agreed between the Engineer and the Claimant in terms of Sub-Clause 60.11 of COPA. In fact, the Respondent in Paras 41, 42 and 43 of its Amended SOD and Counterclaim has also termed it as a Final Bill. In the said Para 41, the Respondent states that 'Accordingly, Engineer after verification from IPCs, RFIs, MBs etc. corrected final bill dated 31.08.2014 and submitted revised final bill on 13.07.2017 and in Para 42, it states that on account of various corrections required to be carried out in the final bill dated 31.08.2014. In view of above it is held, that the said Final Payment Certificate against Contractor's Final Statement, issued by the Engineer on 31.08.2014, was termed incorrectly to be the 'Final Payment Certificate.. Actually, this document which is signed by both the Engineer and the Claimant was Part (a) of the Final Statement agreed between the Claimant and the Engineer, under Sub-Clause 60.11 of COPA and accordingly it attained a finality on 31.08.2014.

xxxiv. Since this part of Final Statement has not been challenged by any Party under Clause 67 of COPA as per requirements laid down under Clause 2.6 of the Contract, it has become absolute and has to be implemented.

xxxv. As far as the component of interest claimed by the Claimant in its SOC is concerned, it is noted that the same is claimed in accordance with Sub- Clause 60.8 of COPA.

xxxvi. Sub-Clause 60.8 (Page 234 of Contract), inter-alia mandates that the amount due to the Contractor under any Interim Payment Certificate issued by the Engineer pursuant to this Clause or to any other term of the Contract, subject to Clause 47, be paid by the Employer to the Contractor within 42 days after the Contractor's monthly statement has been submitted to the Engineer for certification, or in the case of Final Certificate pursuant to Sub Clause 60.13, within 84 days after the agreed Final Statement and written discharge have been submitted to the Engineer for certification.

xxxvii. It has been held herein above, that although the agreed Final Statement (incorrectly called the Final Payment Certificate) was submitted to the Respondent by the Engineer on 31.08.2014 (CD-4), the written discharge has not been submitted by the Claimant to the Engineer and the Respondent, so far. Therefore, the Claimant is not entitled to payment of any interest under Sub-Section 60.8 of COPA. In view thereof, the Claim of Interest claimed under Section 60.8 of COPA, is rejected.

27.0 Having deliberated on the Claims made by the Claimant, the Arbitral Tribunal deliberated on the admissibility of the Counterclaims made by the Respondent and observed that:

L The Respondent has not furnished any independent Statement of Counterclaim (SOCC).but has coalesced its Statement of Counter-Claim

with its Statement of Defence (SOD) made to refute the Claims made by the Claimant in its Statement of Claims.

ii. In its SOD and Counterclaim filed on 11.12.2017(RD-1), the Claimant has raised the following claims for adjudication:

a) Reject the Claim of the Claimant.

b) Allow Counterclaim of Rs. 2,79,52,299/-

c) Grant pre-arbitration, pendent lite and future Interest @ 24%. d) Cost of Arbitration Proceedings.

iii. Subsequently, on 14.07.2018 the Respondent through its amended SOD and Counterclaim (RD-2) modified its Claims for adjudication, as under: a) Reject the Claim of the Claimant.

b) Allow Counterclaim of Rs. 2,76, 12,569/-.

c) Grant pre-arbitration, pendent lite and future interest @24%. d) Cost of Arbitration Proceedings.

iv. In support of its Counterclaim, the Respondent has primarily relied on its contention that on the scrutiny of the final bill dated 31.08.2014, the Respondent NHAI observed many discrepancies in it and communicated these to the Engineer and Contractor for compliance.

v. Accordingly, the Engineer, after verification from IPCs, RFIs, MBS etc. corrected the final bill dated 31.08.2014 and submitted the Revised Final Bill on 13.07.2017 and thereafter, revised the Final Payment Certificate and submitted it on 31/12/2017. Based on that, the Respondent NHAI is entitled to make various recoveries from the Contractor.

vi. The detailed explanation and the chart given in the additional documents filed by the Respondent in 19 volumes would reveal that the Respondent NHAI would be entitled to various amounts claimed on account of the various corrections required to be carried out in the final bill dated 31.08.2014, which were not supported by any proof/ evidence like RFIs, corresponding entry in the measurement books etc.

vii. The corrections in the final bill dated 31.08.2014 were carried out in accordance with the provisions of the Contract Agreement entered into between the Parties. It was found that on account of various discrepancies in the

quantities, rate of VO, Price Adjustment etc. claimed by the Contractor in the final bill, were corrected by the Supervision Consultant and accordingly the revised final bill was submitted on 13.07.2017 and further Revised Payment Certificate dated 31.12.17 showing recovery from the Contractor. Theoretical claims by the Claimant in final bill submitted by Supervision Consultant on dated 31.08.204 have been made without any recorded measurements/ evidence particularly for hidden work, which is not acceptable as per standard measurement practices of govemment works. The discrepancy in quantities amongst others includes, variations on account of new rates wrongly applied by the Supervision Consultant, non-applying of NHAI circular dated 15.02.2013 for price adjustment (WPIs linkage factor), correction in base rate considering September 2005 in place of October 2005 for foreign input (as the same base rate i.e. September 2005 has been considered for Indian inputs in all previous IPCs by the Engineer and same was also accepted by the Contractor). adjustment for variance in bitumen content, statutory deductions - income tax, state labour welfare tax, sales tax etc. on account of the aforesaid changes and other deductions, etc.

viii. On account of detailed exercise undertaken by the Respondent authority in reassessing the various interim payments made from time to time, including scrutinizing the final bill submitted by the Contractor, various discrepancies as above were noticed and so the Respondent, vide letter dated 15.05.2014, informed the Engineer and the Claimant regarding the guidelines for submission of the final bill. However, the same had not been followed by the Claimant.

ix. The Respondent vide various letters called upon the Contractor to provide the required compliances for the Contract Package, without which the Respondent NHAI was unable to finalise/ revise/ correct the final bill. The Respondent vide letter dated 09.05.2016 informed the Claimant that in view of the pending compliances at the end

of the Claimant, the claim of finalization of final bill was not possible to accept at that stage and further requested the Claimant to submit the required compliances of observations regarding final bill variations within 7 days, failing which no claim regarding pending final bill will be accepted by the NHAI in future.

X. The Respondent vide letters dated 11.06.2016, 13.08.2016, 17.10.2016 and 10.04.2017 requested the Claimant to provide full support and documents required to conclude the observations/ issues so that the Respondent can process and conclude the final bill along with the related issues. Further, the Respondent informed the Claimant that in absence of any support from Claimant, the Consultant may not be able to submit the required compliances and without providing compliances and Claimant's contentions are not accepted and completely denied as even written discharge certificate as per Clause 60.7 & 60.8 for considering final bill is still not submitted by the Claimant.

xi. The Respondent vide letter dated 28.09.2016, observed that after corrections in the final bill it is noticed that outstanding amount wrongly paid to the Contractor is to be recovered from the Claimant.

xii. The difference between the various quantities claimed by the Claimant have been corrected by the Respondent NHAI in the revised final bill dated 13.07.2017 on the basis of various RFIs, IPCs, Measurement Book records etc. Details of the disputed quantities in the various BOQ items have been detailed. Correction in Price adjustment has also been carried out and detailed.

xiii. During the scrutiny of the contemporaneous records, including the final bill as also the measurement books, various IPCs, it came to the notice of the Respondent authority that the price adjustment formula had not been correctly applied by the Contractor and also by the Engineer, in respect of foreign currency component. The price adjustment formula for foreign currency component

has been provided for in the Conditions of Particular Application, in Clause 70. Wrong application of the said formula resulted in over payment. As a result, the Engineer carried out fresh calculations in terms of letter dated 31.12.2017 and so deducted the excess amount in the revised final statement submitted on 31.12.17 and consequently, again Revised Final Bill dated 13.07.2017 which is termed as Second Revised Final Bill dated 31.12.2017.

xiv. Further, according to the Respondent, the submission made by the Clairmant that once the Engineer has issued a Final Payment Certificate, the only option available to the Employer is to challenge it by way of Dispute Resolution Mechanism prescribed under Clause 67 of COPA is meritless. The payment in case of Final Certificate issued pursuant to Sub- Clause 60.13 is to be made within 84 days after the agreed final statement and the written discharge have been submitted to the Engineer for certification". In the instant case, though final statement was submitted by the Contractor, no written discharge was submitted to the Engineer for certification and/ or not brought to the notice of the NHAI till date. As such the payment obligation of the Employer under Sub-Clause 60.8 would only arise, if the Contractor would have submitted an 'agreed' final statement and written discharge. Any Final Payment Certificate issued by the Engineer, without there being a written discharge issued by the Contractor. as per requirements of Sub-Clause 60.12 is of no consequence and cannot be accepted.

xv. Sub-Clause 60.13 in respect of Final Payment Certificate clearly stipulates that the amount due under the Contract to be stated by the Engineer is only an 'opinion' of the Engineer. The same, cannot be construed as the decision binding the Parties.

xvi. In the absence of the Written Discharge given by the Contractor, the Final Payment Certificate issued by the Engineer acquires no value, and it is always open for the Engineer to revisit the same to find out any discrepancies or

irregularities in the calculations leading to payments claimed by Contractor.

xvii. Even otherwise, the authority which is vested with the power to certify the final payment due to be paid to the Contractor, is expected to do the same after exercise of reasonable care and caution. In case authority subsequently determines that the amounts have been wrongly certified by it and that a different payment or calculations are correct ones, it is always open for that authority to revisit the Final Payment Certificate, if any to correct those errors, before any payment is actually made. The Contractor cannot be allowed to claim payment of incorrect amounts which were

wrongly certified by the Engineer and the mistakes were subsequently realized by him and corrections incorporated in the corrected/ revised Final Bill dated 13.07.2017 and 31.12.2017.

xviii. Therefore, the submission made by the Contractor that once a Final Payment Certificate has been issued, rightly or wrongly, it is not open for the Engineer to revisit and that disputes could only be adjudicated by taking resort to Clause 67, is absolutely incorrect. It is always open to the Engineer to revisit the calculations made and correct errors, if any, which are brought to the notice of Engineer.

xix. Once the Engineer itself was revisiting the calculations, to ascertain the genuineness of the payments claimed by the Contractor, there was no scope for the Employer to have initiated anything by resorting to Clause 67 of COPA, as there was nothing to be adjudicated at that stage. The Employer could not have had any grievance, once the Engineer was itself revisiting the calculations, to arrive at the correct figures.

xx. On the other hand, the Claimant, has stated that the Respondent is not entitled to the said Counterclaims as the same are unsubstantiated, baseless and barred by time. These Claims are only an afterthought to cover up Respondent's own defaults. The Respondent has failed to

state any particular pleadings in respect of its Counterclaim and has not stated any particulars, calculations and/ or justification in relation to the amount claimed as Counterclaim.

xxi. Under the Scheme of the Contract, the Respondent (being the author of the Contract) devised a mechanism to appoint an Independent Engineer for not only carrying out duties and responsibilities but also to make certain decisions, determinations and issue certificates including the Final Payment Certificate which decisions/ determinations/ certificates are not subject to any approval of the Respondent-NHAI.

xxii. In terms of Clause 2.6 of GCC, it was specifically agreed by and between the Parties that the Engineer was entitled to exercise his impartial discretion by giving his decision, opinion, or consent, expressing his satisfaction or approval as well as determining the values of the work done by the Contractor any even taking any action affecting rights and obligations of the Employer or Contractor. It was specifically agreed in this context that any such decision, opinion, consent, expression of satisfaction or approval, determination of value or action may be opened up, reviewed or revised only as provided in Clause 67 (Dispute Resolution Mechanism) of COPA and not otherwise.

xxiii. In terms of Clause 60.11 of COPA, the Claimant submitted its Draft Final Statement with all supporting documents to the Engineer on 24.06.2014. Pursuant to the Draft Final Statement, the Claimant gave clarifications and/ or made compliances as required by the Engineer for certification of Final Bill. Thereafter, the Engineer issued a Final Payment certificate only on 31.08.2014. The Respondent-NHAI acted upon the said Final Payment Certificate and released substantial payments. Even at that stage the Respondent did not challenge or dispute the said determination of the Engineer in terms of the Contract. Therefore, in case the Respondent- NHAI intended to open up, seek review of the said determination/ certificate given

by the Engineer, the only agreed recourse available to the Respondent was in terms of Clause 67 (Dispute Resolution) of COPA and as such their entire exercise of unilateral revision of Final Payment Certificate issued by the Engineer is completely contrary to the terms of the Contract and is without authority whatsoever.

xxiv. Admittedly, the Respondent did not invoke provisions of Clause 67 of COPA in relation to Final Payment Certificate dated 31.08.2014 issued by the Engineer within limitation period under law and therefore, the rights of the Respondent in this regard are completely foreclosed. The present Counterclaim is not only barred in time, but is also contrary to the procedure laid down under the Contract for invoking arbitration in respect of any claim.

XXXXV. It is clear from the terms of the Contract, that there is no right available to the Engineer or the Respondent to revise its Final Payment Certification upon the completion of the Contract, unilaterally and arbitrarily.

xxvi. The Respondent, at no point of time raised a dispute against any certification or determination of the Engineer as agreed between the Parties in terms of Clause 67 of COPA. In the absence of above the Respondent cannot be permitted to raise the said dispute in such a manner as stated in its Counterclaim, which is clearly an afterthought, to somehow escape its liabilities under the Contract

xxxvii. The amended Counterclaim of the Respondent were filed in these proceedings only on 25.07.2018 (being the date of the Order of the Arbitral Tribunal allowing the Application of the Respondent for amendment dated 09.06.2018). A perusal of the same would show that the same is based on alleged scrutiny of the Final Payment Certificate issued by the Engineer in terms of Sub-Clause 60.13 of COPA dated 14.08.2014, by the Respondent. It is the specific case of the Respondent that upon communications/ instructions given to the Engineer pursuant to such scrutiny by the Respondent-NHAI, the Engineer

revised the Final Bill of the Claimant on 13.07.2017 as well as 31.12. 2017, in which the Respondent is entitled to Counterclaims. It is further apparent from the documents placed on record that after a lapse of almost three years, the Engineer acted at the behest of the Respondent and unilaterally sought to revise the earlier Final Payment Certificate dated 31.08.2014 without withdrawing its earlier recommendations. Since the Contract between the Parties gives no such authority to the Respondent to revise the certification of the Engineer, which had attained finality in view of the express provisions of the Contract as well as the conduct of the Parties, the aforesaid revision or correction as alleged by the Respondent is non est in terms of the Contract as well as the law.

xxviii. In view of material on record, it is apparent that the Counterclaim of the Respondent is barred in time and thus, liable to be summarily rejected. Therefore, the issue of limitation needs to be decided as a preliminary issue before any consideration of the merits of the Counterclaims as the said claims are beyond the jurisdiction of this Arbitral Tribunal.

xxix. Regarding the issue of Counterclaims being barred by limitation, the Respondent has contended that it is wrong to suggest that the calculations done by the Engineer and the eventual Final Payment Certificate issued by the Engineer on 31.12.2017 after revisiting the entire calculations, is in any manner barred by limitation.

xxx. The Engineer, after having certified the payments initially on 31.08.2014, which even otherwise in the submission of the Employer was incorrect in the absence of Written Discharge by the Contractor, realized its mistake in carrying out the said calculations, and thereafter revisited the same over a period of close to 2 years. After having gone through the said calculations, the Engineer corrected the mistakes, and eventually certified payments on 31.12.2017 wherein the Respondent sought to recover Rs. 2,76,12,569/- from the Claimant. As such the cause of action in favour of

the Employer to recover any amounts from the Contractor on account of wrong calculations done earlier, which led to making of wrong payments which the Contractor was not entitled to, arose only after 31.12.2017 and not before that. Therefore, the claims cannot be stated to be barred by limitation.

xxxi. Since the Claimant did not submit the written discharge to the Respondent as per Sub-Clause 60.12 of COPA, the Respondent made the observations and communicated to the Engineer vide letter dated 15.10.2014, upon which the Engineer reviewed recommendation and contention and made corrections accordingly. Under his earlier the provisions of Supervision Consultancy Agreement Clause 10.(v) of TOR executed between NHAI & Supervision Consultant to assist the Employer in all matters pertaining to Contract Management. Further, as per Clause 10.(iii) of TOR, the Project Director of NHAI will have the authority to give directions to the Supervising Consultant in all routine matters related to the Contract management/ administration which will include among other things corrections in case of any laxity. During process of the final bill dated 31.08.2014 the Respondent observed that the Final Bill dated 31.08.2014 was not in order and therefore, Respondent requested the Supervision Consultant to review its submission in the light of observations brought out and conveyed to it. In view of the said letter the Engineer asked the Claimant to submit the documents required for verification of the submitted final bill, but the Claimant failed to provide any supporting documents, hence Engineer reconciled the quantity from RFIs, MBs & corrected accordingly as per Sub-Clause 60.9 of Contract Agreement and issued a revised Final Bill dated 13.07.2017 and 31.12.2017.

xxxii. During the oral arguments, the Claimant, as evidenced by its written synopsis (CD-14), had stated that the present Arbitration Proceedings have been initiated by the Claimant for implementation of the Final Payment Certificate dated

31.08.2014 and release of the amount certified by the Engineer in the Final Payment Certificate (CD-4) and it has not challenged the merits thereof or sought review of the said certification by the Engineer.

xxxiii. The Respondent has belatedly preferred its Counterclaim in these proceedings for the first time on 08.12.2017 (RD-1) and this date of filing the Counterclaim falls after the expiry of 3 years from the date of cause of action (which is the date on which the Final Payment Certificate was issued by the Engineer), which arose in favour of the Respondent for raising any dispute with respect to the said certificate. This Counterclaim has been raised by the Respondent without invoking the Arbitration Clause under the Contract or by issuing any notice in this regard.

xxxiv. In the instant case the Respondent had become aware of the Final Payment Certificate dated 31.08.2014 upon issuance of the same by the Engineer, in terms of Clause 2.6 of GCC, the Respondent was legally entitled to raise any dispute regarding any discrepancy in the said Final Payment Certificate within a maximum period of 3 years from that date i.e., latest by 31.08.2017, but not thereafter. As admittedly, the Respondent filed its Counterclaim challenging the said Counterclaim only on 08.12.2017, the said Counter-Claim was filed much beyond the limitation period of 3 years and is therefore, barred by law from being entertained.

xxxv. The Claimant has countered the assertion of the Respondent made during the Course of its oral arguments that its Counter Claims arose out of 'discovery of a mistake' in the Final Payment Certificate and therefore, in terms of Section 17 of Limitation Act, 1963, the cause of action for the Respondent arose only upon the said discovery of mistake on 13.07.2017 and 31.12.2017 ie., date on which the Revised Final Bills were issued by the Engineer, by alluding to Respondent's letter dated 15.12.2014 and the detailed note attached thereto which reveals that the Respondent was aware of some alleged discrepancies in the said Final

Payment Certificate as on 10.10.2014 itself or at least on 15.10.2014. Therefore, it cannot be said that the discovery of said discrepancies came to Respondent's knowledge only when Revised Final Bills were issued by the Engineer on 10.07.2017 and 31.12.2017. Also, on 15.10.2014, the Respondent was in position to easily ascertain the mistake, if any, in the Final Payment Certificate dated 31.08.2014. The limitation period of 3 years is therefore, deemed to commence at least on those dates and the Counterclaim had to be filed in Arbitration proceedings within 3 years limitation period, there from.

xxxvi. The Claimant has relied on the following judgements to submit that the matter has to be decided on the scope and intent of the terms of Contract and cannot create or write a term which is not contained in the Contract or agreed between the Parties:

a) Rajasthan State Industrial Development & investment Corporation & Anr. Vs. Diamond and Gem Development Corporation Ltd. & Anr. (2013) 5 SCC 47023 24 (CJ-2)

b) Ssangyong Engineering & Construction Co. Ltd. Vs. National Highway of India, 2019(3) Arb. LR. 152 (SC), (CJ-16)

xxxvii. On the other hand, during the oral arguments, the Respondent, as evidenced by its written synopsis (RD-9), had stated that unless and until the observations made by the NHAI were taken into account by the Engineer and accounted for by assigning a value, either increase or decrease, and also the exact amount of difference, it was not possible for NHAI to file Counterclaim. Section 17(1)(c) provides that in case of suit for relief on the ground of mistake, the period of limitation does not begin to run until plaintiff had discovered it. The mistake in respect of amounts claimed under the Counterclaim were only discovered when a negative payment was certified by the Engineer for the first time on 13.07.2017 and thereafter on 31.12.2017. Therefore, the period of limitation commenced from 13.07.2017 ie., the

date on which the Respondent discovered the mistake of the Engineer w.r.t. the Final Payment Certificate dated 31.08.2014 issued by the Engineer. In view thereof the present case is squarely covered by Section 17 of the Limitation Act and so the starting point of limitation should be the date when the mistake is discovered and in the present case the mistake was discovered only when the Engineer issued revised final bill dated 13.07.2017. Therefore, the date of discovery of mistake is 13.07.2017 and not prior to it. Accordingly, the present Counterclaims by NHAI are well within the period of limitation.

xxxvii. In support of its contention on 'Limitation, the Respondent has relied on the following judgements:

a) Ajmer Vidyut Nigam Ltd. vs. Rahamatullah Khan (2020) SCC Online SC 206 Para 5, 7 and 9.

b) Sri Balaji Agro Industries vs. Managing Director (2017) SCC On Line Kar 4430, Para 17, 18, 19, 20, 21, 22 and 24.

c) Confer Da Confraria De sam Miguel E santas Almas of church or varca vs. Filomena Fernandes (2016) SCC Online Bom 5399: Bombay High Court at Goa, Para 5.

d) Food Corporation of India vs. Municipal Committee (2018) SCC Online P&H 1161, Punjab & Haryana, Para 13,14,15,16 and 17. e) Mahabir Kishore & Ors. Vs. State of Madhya Pradesh [(1989) 4 SSC1]. Supreme Court of India, Para 7, 8, 11, 13, 19, 22, 27 and 28.

xxxix. The Respondent has also relied on provisions of Section 72 in the Indian Contract Act, 1872, which deals with liability of person to whom money is paid or thing delivered, by mistake or coercion. The principle of unjust enrichment requires restitution.

28.0 Discussions and Findings of the Arbitral Tribunal, on whether the Counterclaims raised by the Respondent are barred by limitation:

i. It is observed that the Claimant has raised a preliminary objection on the admissibility of the Counterclaim of the Respondent, as according to it, these claims have been raised after the expiry of the Statuary Limit provided in law for raising the Claims and are therefore, barred by limitation.

ii. It is noted that as per Section 21 of the Arbitration and Conciliation Act 1996, the arbitral proceedings in respect of a particular dispute are stated to commence on the date on which a request for the dispute to be referred to arbitration is received by the Respondent. It is also noted that in the instant Arbitration, the matter of Counterclaim was first brought before the Arbitral Tribunal when the Statement of Defence was filed by the Respondent on 08.12.2017 (RD-1): No other material has been brought before the Arbitral Tribunal by the Respondent to suggest that a request to refer the dispute in respect of the Counterclaim, as envisaged under Section 21 of the Arbitration and Conciliation Act, was made by it prior to 08.12.2017. Therefore, the date of filing the Counterclaim must be reckoned as 08.12.2017.

iii. One of the primary contentions of the Respondent to counter the averment of the Claimant is that the Authority which is vested with the power to certify the Final Payment due to be paid to the Contractor, is expected to do the same after exercise of reasonable care and caution. In case the Authority subsequently determines that the amounts have been wrongly certified by it and that a different payment or calculations are the correct ones, it is always open for that Authority to revisit the Final Payment Certificate, and to correct those errors, if any, before any payment is actually made. The Contractor cannot be allowed to claim payment of incorrect amounts which were wrongly certified by the Engineer and the mistakes were subsequently realized by him and corrections incorporated in the corrected/revised Final Bill dated 13.07.2017 and 31.12.2017.

iv. However, in support of its above contention, the Respondent has not indicated the Clause of the Contract

under which the power to revisit the Final Payment Certificate has been vested either with the Engineer or the Respondent. There is no dispute that the Final Payment due to be paid to the Contractor, is expected to be determined after exercise of reasonable care and caution but that has to done at the time and methodology envisaged in the Contract, which in the instant case falls under Sub- Clause 60.11 of COPA.

v. There is also, no doubt that Clause 2.6 of GCC, gives the Engineer full authority to give his decision, opinion, consent, express his satisfaction or approval and determine the value of the work done by the Claimant and even take any action which may affect the rights and obligations of the Respondent or the Claimant. There is also no doubt that any such decision, opinion, consent, expression of satisfaction or approval, determination of value or action may be opened up, reviewed or revised as provided in Clause 67 (Dispute-Resolution Mechanism) of COPA. The Parties have not been able to allude to any other Clause in the Contract that even remotely suggests of any other mechanism to do so.

vi. Therefore, if the Respondent subsequently considers that the amounts have been wrongly agreed to between the Engineer and the Claimant, in the Final Statement or have been wrongly Certified by the Engineer, it has the option to take action under Clause 2.6 of GCC. In any case, the Engineer has no authority under this Contract, to unilaterally revisit the Final Statement agreed to between the Engineer and the Claimant or the Final Certificate issued by the Engineer and revise either of them.]

vii. The second main Contention of the Respondent is that the Payment in case of Final Certificate issued pursuant to Sub-Clause 60.13 is to be made within 84 days after the "agreed final statement and the written discharge have been submitted to the Engineer for certification" and in the instant case, though Final Statement was submitted by the Contractor, no written discharge was submitted to the Engineer for certification and/ or not brought to the notice

of the NHAI till date. As such the payment obligation of the Employer under Sub-Clause 60.8 would only arise, if the Contractor would have submitted an 'agreed' Final Statement and written discharge. Any Final Payment Certificate issued by the Engineer, without there being a written discharge issued by the Contractor, as per requirements of Sub-Clause 60.12 is of no consequence and cannot be accepted.

viii. This issue regarding the issuance of Final Payment Certificate by the Engineer, without the submission of written discharge has already been discussed in earlier paragraphs and it was held that:

> *"The Final Payment Certificate issued by the Engineer against Contractor's Final Statement, which was accompanied by Final Statement of Quantities, numerous AMB Nos., MB Nos., Measurement Sheets, RFIs, As Built Plan & Profile, As Built Cross Sections and As Built Structure Drawings, was actually not the Final Payment Certificate envisaged under Sub-Clause 60.13 of COPA, but was in reality, the Final Statement agreed between the Engineer and the Claimant in terms of Sub-Clause 60.11 of COPA. In fact, the Respondent in Paras 41, 42 and 43 of its Amended SOD and Counterclaim has also termed it as a Final Bill. In the said Para 41, the Respondent states that *Accordingly, Engineer after verification from IPCs, RFIs, MBS etc. corrected final bill dated 31.08.2014 and submitted revised final bill on 13.07.2017 and in Para 42, it states that on account of various corrections required to be carried out in the final bill dated 31.08.2014. In view of above it is held, that the said Final Payment Certificate against Contractor's Final Statement, issued by the Engineer on 31.08.2014, was termed incorrectly to be the 'Final Payment Certificate'. Actually, this document which is signed by both the Engineer and the Claimant was Part (a) of the Final Statement agreed between the*

Claimant and the Engineer, under Sub-Clause 60.11 of COPA and accordingly it attained a finality on 31.08.2014."

ix. Therefore, the non-submission of the Discharge Certificate only affects the issuance of the Final Payment Certificate under Sub-Clause 60.13 of COPA and Payment of Interest under Sub-Clause 60.8 of COPA but has no bearing on the agreed Final Statement which attained finality on 31.08.2014.

x. The third main contention of the Respondent with regards to the period of limitation is that this period commenced only on 13.07.2017 Le., on the discovery of a mistake by the Claimant. The Respondent has averred that unless and until the observations made by the NHA! were taken into account by the Engineer and accounted for by assigning a value, either increase or decrease, and also the exact amount of difference, it was not possible for NHAI to file Counterclaim. Section 17(1)(c) provides that in case of suit for relief on the ground of mistake, the period of limitation does not begin to run until plaintiff had discovered it. The mistake in respect of amounts claimed under the Counterclaim were only discovered when a negative payment was certified by the Engineer for the first time on 13.07.2017 and thereafter on 31.12.2017. Therefore, the period of limitation commenced from 13.07.2017 i.e., the date on which the Respondent discovered the mistake of the Engineer w.r.t the Final Payment Certificate dated 31.08.2014 issued by the Engineer. In view thereof, the present case is, squarely covered by Section 17 of the Limitation Act and so the starting point of limitation should be the date when the mistake is discovered and in the present case the mistake was discovered only when the Engineer issued revised final bill dated 13.07.2017. Therefore, the date of discovery of mistake is 13.07.2017 and not prior to it. Accordingly, the present Counterclaims by NHAI are well within the period of limitation.

xi. The Claimant has countered this assertion of the Respondent by alluding to Respondent's letter dated 15.10.2014 and the detailed note attached thereto which reveals that the Respondent was aware of some alleged discrepancies in the said Final Payment Certificate on 10.10.2014 itself or at least on 15.10.2014. In any case, on 15.10.2014, the Respondent was in a position to easily ascertain the alleged mistake, if any, in the Final Payment Certificate dated 31.08.2014. It therefore, cannot be said that the discovery of said discrepancies came to Respondent's knowledge only when Revised Final Bills were issued by the Engineer on 13.07.2017 and 31.12.2017 and that in terms of Section 17 of Limitation Act, 1963, the cause of action for the Respondent for its Counter Claims arose only on 13.07.2017 and 31.12.2017. The limitation period of 3 years is therefore, deemed to commence at least on those dates and the Counterclaim had to be filed in Arbitration proceedings within 3 years limitation period, therefrom.

xii. During the oral arguments, as evidenced by its written synopsis (RD-9), the Respondent had contended that as per Clause 10.(iv) of TOR of the Supervision Consultancy Agreement executed between NHAI & Supervision Consultant, the Supervision Consultant was required to assist the Employer in all matters pertaining to Contract Management and as per Clause 10.(iii) of that TOR, the Project Director of NHAI had the authority to give directions to the Supervising Consultant in all routine matters related to the Contract management/ administration, which among other things included corrections in case of any laxity. Therefore, during process of the final bill dated 31.08.2014, when the Respondent observed that the Final Bill dated 31.08.2014 was not in order, the Respondent requested the Supervision Consultant to review its submission in the light of observations brought out and conveyed to it.

xiii. Further, during its oral arguments, the Respondent, had also stated that unless and until the observations made by

the NHAI were taken into account by the Engineer and accounted for by assigning a value, either increase or decrease, and also the exact amount of difference, it was not possible for NHAI to file Counterclaim. The mistake in respect of amounts claimed under the Counterclaim were only discovered when a negative payment was certified by the Engineer for the first time on 13.07.2017 and thereafter on 31.12.2017. Therefore, the period of limitation commenced from 13.07.2017 i.e., the date on which the Respondent discovered the mistake of the Engineer w.r.t. the Final Payment Certificate dated 31.08.2014 issued by the Engineer.

xiv. It is not disputed that where the suit or application is for relief from the consequences of a mistake, as per Section 17(1)(c) of the Limitation Act 1963, the period of limitation will begin to run only after the applicant has discovered the mistake or could with reasonable diligence have discovered it. However, the issue to be deliberated upon is when was the mistake in the instant case discovered or when, with reasonable diligence could it have been discovered. It has been submitted by the Claimant that the Respondent was well aware of the alleged mistakes on 10.10.2014 itself or latest by 15.10.2014 when the alleged mistakes were pointed out by the Respondent to the Engineer and the Claimant. This was much before 13.07.2017 or 31.07.2017, the dates when the mistakes are claimed to be discovered by the Respondent and so no relief can be granted to the Respondent by invoking Section 17(1)(c) of the Limitation Act 1963.

xv. There is also no doubt that the Final Statement as agreed between the Engineer and the Claimant (inappropriately stated as held in previous paragraphs, to be the Final Payment Certificate) is dated 31.08.2014 and the Respondent has for the first time raised the Counterclaim on 08.12.2017 (RD-1). Therefore, as per Section 3 of the Limitation Act 1963, the said Counterclaims for disputing

the said Final Statement dated 31.08.2014, not raised prior to 31.08.2017 were required to be dismissed.

However, since the Respondent has claimed extension of the period of Limitation under Section 17(1)(c) of the Limitation Act 1963, the same has been examined as per Section 17(1)(c) of the Limitation Act 1963, prior to taking a view on the applicability of limitation on the Counterclaims.

xvi.From the records placed before the Arbitral Tribunal, it cannot be disputed that on 10.10.2014 itself, the Respondent became aware of the alleged mistakes in the Final Statement dated 31.08.2014, agreed between the Engineer and the Claimant (CD-5, Page 558). Even by granting the benefit of doubt to the Respondent, it is clear that date of discovering the said alleged mistakes could not be reckoned beyond 15.10 2014 (CD-5, Page 547).

xvii. Having become aware of the alleged mistakes on 15.10.2014, in order to seek relief, the Respondent was bound to raise the dispute on or before 15.10.2017 in terms of Section 21 of the Arbitration and Conciliation Act, 1996. The actual amount to be claimed could then be got assessed through the Engineer under the Supervision Consultancy Agreement executed between it and the Consultancy Firm or through any other agency and brought before the adjudicating authority for redressal. The Respondent has failed to establish that the Supervision Consultancy Agreement executed between the Respondent & the Supervision Consultant referred to by it, is applicable to the Contract between the Claimant and the Respondent and binds the Claimant in any manner.

xviii. The Respondent has also relied on provisions of Section 72 of the Indian Contract Act, 1872, which deals with liability of a person to whom money is paid or thing delivered, by mistake or coercion. The principle of unjust enrichment requires restitution.

xix. Therefore, even after considering the plea of the Respondent under Section 17(1)(c) of the Limitation Act

> *1963, that the period of limitation shall not begin till the Respondent discovered a mistake, it is held that the Counterclaim had to be filed on or before 15.10.2017. As such, the plea for its Counterclaims filed by it on 08.12.2017 is held to be filed after the prescribed period of limitation and is barred by Limitation.*

72. The perusal of the above cited paragraphs makes it evident that in order to adjudicate upon the dispute, the learned Arbitral Tribunal delved into the steps which were required to be taken by the parties, i.e. the petitioner, respondent as well as the independent engineer for raising the bills and releasing the payments as per the contract and to examine the actions of the parties.

73. As per Sub-Clause 60.1 of the Contract, the Contractor was required to submit a statement to the Engineer by 7th of each month for the work executed up to the end of the previous month. The said statement shall be in a tabulated form and approved by the Engineer and it should demonstrate the amounts the Contractor considers himself entitled to. It should further include the estimated value of Temporary and Permanent Works up to the end of the month in question, determined as per Sub-Clause 56.1 at base unit rates and prices in local currency and the actual value certified for payment for the Temporary and Permanent Works executed up to the previous month's end, at base unit rates and prices in local currency.

74. Furthermore, Sub-Clause 56.1 of COPA stipulates that the Engineer shall ascertain and determine the value of the Works by measurement in accordance with the Contract and shall give a reasonable

notice to the Contractor's authorized agent in case there is any part of the Work to be measured, to assist in such measurements and provide all required details. The Engineer shall prepare records and drawings as the work progresses for measuring Permanent Works through records and drawings. The Contractor, when called upon in writing, shall within 14 days, meet the Engineer to examine the records and accordingly when the contractor agrees to the same, he shall sign them. In case the Contractor does not agree, the records and drawings shall nevertheless be considered correct.

75. It is unequivocally established that according to Sub-Clause 60.1 of the COPA, the respondent was obligated to provide the Engineer with a statement detailing the amounts it believed to be owed for work completed up to the end of the previous month. These amounts, as outlined in Sub-Clauses 56.1 of the GCC and 57.1 of the COPA, were to be calculated based on measurements taken at the site under the Engineer's supervision and agreed upon by the respondent's representative. Therefore, the statement required from the respondent was expected to include, among other things, the estimated value of all work completed during the relevant month, determined in accordance with the aforementioned sub-clauses, i.e., based on site measurements of completed work, as well as the actual value of all work certified by the Engineer up to the end of the preceding month.

76. Moreover, as per sub-clause 60.2 of COPA it is stipulated that the engineer shall ascertain the amount due to contractor within 5 days of the receipt of the monthly payment from the contractor and then recommend the same to the employer to release upto 75% of the net payment against

monthly statement. It was further stipulated that the said monthly statement shall be approved or amended by the engineer in such a way that it reflects the amount due to the contractor as per the contract after deduction, other than the amount pursuant to clause 47, which may have become payable by the contractor to the employee and within 21 days of receipt of the monthly statement, ascertain the amount due to the contractor as well as deliver to the contractor and the employer and IPC certifying the amounts due to contractor after adjusting the payment already released to the contractor against the said monthly statement.

77. Furthermore, it is also established that the valuation of work carried out at the site is determined by actual measurements and based on records of working drawings. Accordingly, the assertion of the petitioner that the valuation of work is determined and certified by the Engineer through IPCs is based on the actual executed quantities and not as per the estimated quantities outlined in the BOQs.

78. Sub-Clause 60.9 of COPA grants authority to the Engineer to amend any previous IPC issued by him. Additionally, the Engineer is empowered to exclude or reduce the value of any work in an IPC if it is deemed unsatisfactory.

79. Consequently, the learned Arbitral Tribunal held that the petitioner's assertion that Sub-Clause 60.9 of COPA enables the Engineer to rectify any errors or oversights that may have occurred during the issuance of IPCs, despite the requirement for IPCs to be issued by the Engineer following thorough assessment and site measurements is valid. It further held that this clause serves as a mechanism for both the Engineer and the parties involved, namely the respondent and the

petitioner, to address any inaccuracies that may have inadvertently arisen. It affords the Engineer the opportunity to adjust or decrease the value of any work in an IPC that does not meet their satisfaction.

80. The learned Tribunal pointed out that as per paragraph 28 of Statement of Claim, the respondent highlights that throughout the execution of the Contract, the Engineer never made any revisions, corrections, or modifications to any of the IPCs that had been previously certified by the Engineer and subsequently paid by the petitioner. The aforesaid statement by the respondent was neither contested, nor does the petitioner provide any evidence to refute the same. Accordingly, the learned Tribunal inferred that the Engineer did not make any amendments or adjustments to any IPCs throughout the duration of the Contract and Sub-Clause 60.9 of COPA allows for corrections or modifications to the Final Statement agreed upon between the Engineer and the respondent under Sub-Clause 60.11 is incorrect. Sub-Clause 60.9 of COPA is restricted to modifications/amendments can be made to IPCs and the same does not extend to the Final Statement.

81. Sub-Clause 48.1 of the Contract outlines the process for obtaining a Taking Over Certificate (TOC). It mandates the Contractor to notify the Engineer when the Works are substantially completed and pass the prescribed tests, who then shall issue the TOC or provide written instructions within 21 days for any outstanding work.

82. Sub-Clause 60.10 of COPA of the Contract mandates that within 84 days of receiving the Taking Over Certificate for the entire Works, the Contractor must provide the Engineer with six copies of Statement at

Completion. This statement, along with detailed supporting documents in the form approved by the Engineer:

(a) the final value of all work completed as per the Contract up to the date mentioned in the Taking Over Certificate,

(b) any additional sums the Contractor believes are owed, and

(c) an estimate of future amounts anticipated to be due under the Contract.

83. In the impugned award, the learned Tribunal noted that the Engineer issued a TOC in accordance with Clause 48.1 of GCC upon substantial completion of the work, on 6th April, 2013 and w.e.f. 12th March, 2013. Consequently, as per Sub-Clause 60.10 of COPA, the respondent on 28th May, 2013 submitted a Statement of Completion with all supporting documents to the Engineer as well as a copy to the petitioner. Pursuant to the same, the Engineer on the basis of the aforesaid statement ascertained the value of the work done and certified the amount payable till the date of TOC, through an IPC, vide his letter dated 10th June, 2014 and 90% of the ascertained amount was released by the petitioner to the respondent. After issuance of Statement of Completion, the Engineer issues a Defect Liability Certificate under Sub-Clause 62.1 of the COPA which stipulates that the work under the Contract cannot be deemed completed until the Engineer signs and delivers a Defects Liability Certificate to the Employer alongwith a copy to the Contractor. This certificate confirms that the Contractor has fulfilled his obligations to execute, complete the Works as well as rectified any defects to the Engineer's satisfaction. The Engineer must issue this certificate within 28

days of expiry of the Defects Liability Period or after the completion of any instructed works, whichever is later.

84. Subsequently, as per Clause 60.11 of COPA, within 56 days of issuance of Defects Liability Certificate, the Contractor is required to submit six copies of Draft Final Statement along with detailed supporting documents in a form approved by the Engineer which include the following:

(a) the value of all work done in accordance with the Contract; and

(b) any further sums which the Contractor considers to be due to him under the Contract.

85. In case if the Engineer disagrees or is unable to affirm to any of the parts of the Draft Final Statement, the Contractor is required to provide further information for the purpose of making changes in the aforesaid statement as agreed upon by the Contractor and the Engineer. In case there is a dispute pertaining to the changes made by the Engineer in the Draft Final Statement prepared by the Contractor, the Engineer shall issue IPC only for those parts which are undisputed. Furthermore, the disputed portion of the Draft Final Statement shall be settled as per Clause 67. Pursuant to the settlement of the dispute, the Final Statement shall be agreed upon by the parties.

86. The learned Arbitral Tribunal noted that pursuant to the expiry of the Defect Liability Period on 12th March, 2014, the Engineer, *vide* letter dated 4th April, 2014 issued a Defects Liability Certificate in accordance with Clause 62.1 of the GCC which acknowledged that the respondent had fulfilled its obligations to execute and complete the works and rectify any defects to the satisfaction of the Engineer. Subsequently, as required

by Sub-Clause 60.11 of COPA, the respondent submitted six sets of Draft Final Statement along with all supporting documents to the Engineer, and a copy thereof to the petitioner, on 24th June, 2014. Based on this Draft Final Statement, the Engineer issued a Final Payment Certificate *vide* letter dated 31st August, 2014 expressing that the Engineer had determined the total amount owed to the respondent after taking into consideration all previous payments made.

87. The petitioner referred to Sub-Clause 60.11 of COPA in its written submissions during oral arguments asserting that if any aspect of the Draft Final Statement remains unresolved, encompassing both Clause 60.11 (a) or (b), only an Interim Payment Certificate may be issued. The petitioner further acknowledges that, in the present case, there were several disputes between the parties both at the time of the Draft Final Statement as well as at the time when the purported Final Payment Certificate dated 31st August, 2014 was issued. In light of the aforesaid submissions, the petitioner contends that Clause 60.11 of COPA pertains to the presence of disputes and does not elucidate upon the determining authority to resolve those issues. Consequently, as long as disputes persist, a Final Payment Certificate under Sub-Clause 60.13 cannot be issued. The learned Tribunal further opined that the arguments presented by the respondent's counsel can be interpreted as an acknowledgment of existence of the dispute.

88. As per the facts of the impugned award, the learned Arbitral Tribunal observed that the respondent had agreed to all the changes suggested by the Engineer, hence, there is no dispute persisting between the Engineer and the respondent regarding the Draft Final Statement.

Therefore, the Final Statement agreed to between the Engineer and the respondent becomes final.

89. Sub-Clause 60.12 of the Contract states that upon submitting the Final Statement, the Contractor must provide the Employer, with a copy to the Engineer, a written discharge confirming that the total amount in the Final Statement constitutes complete settlement of all monies owed to the Contractor under the Contract. However, this discharge only becomes effective after payment under the Final Certificate issued in accordance with Sub-Clause 60.13 as has been made and the Performance Security referred to in Sub-Clause 10.1 has been returned to the Contractor.

90. Sub-Clause 60.13 of the Contract pertains to the issuance of the Final Payment Certificate which states that within 28 days of receiving the Final Statement and the written discharge, the Engineer must provide the Employer (with a copy to the Contractor) a Final Payment Certificate. The said certificate shall outline:

(a) The Engineer's determination of the final amount owed under the Contract, and

(b) The balance due from the Employer to the Contractor or vice versa, after accounting for all previous payments made by the Employer and all sums owed under the Contract, excluding those outlined in Clause 47.

91. The petitioner submitted that due to unresolved disputes between the parties, issuance of a Final Payment Certificate under Sub-Clause 60.13 was not possible. According to the petitioner, the Engineer could issue an IPC only for the undisputed portions of the final statement hence, the issuance of a Final Payment Certificate is contingent upon the resolution of disputes in accordance with Clause 67.

92. In light of the aforesaid submissions, the learned Tribunal was of the opinion that the petitioner had not clarified how the Revised Final Payment Certificate issued by the Engineer without a written discharge from the respondent or without resolving claims under Clause 67 of the Contract could be considered valid when the Final Payment Certificate dated 31st August, 2014, was termed invalid for similar reasons. It further opined that the petitioner was unable to substantiate that any Contract clause which empowers the petitioner or the Engineer to revise the Final Statement as agreed upon by the Engineer and the respondent, however, the same was unilaterally finalized without the respondent's consent.

93. The learned Arbitral Tribunal held that the petitioner by exercising diligence could have ensured absence of any alleged over-payment during the Contract's execution. Moreover, Sub-Clause 60.9 of COPA aims at addressing such contingencies and Clause 2.6 of the GCC offers another avenue for the parties to revisit or revise any decisions, opinions, consents, expressions of satisfaction, approvals, value determinations, or actions done by the Engineer.

94. Despite the aforementioned, it is evident that in addition to the Final Statement agreed upon by the parties, the respondent was obligated to provide a written discharge to the petitioner thereby confirming that the total amount in the Final Statement (comprising both parts (a) and (b), with the admissibility of part (b) being subject to the Dispute Resolution Mechanism) constitutes full and final settlement of all payments due to the Claimant. It is also worth noting that the respondent has not submitted this "Written Discharge" to the petitioner alongside the Final Statement. In its Additional Rejoinder dated August 7, 2019, the respondent asserted

that the petitioner had waived the requirement of the Written Discharge by releasing partial payments based on the Final Payment certificate dated 31st August, 2014, issued by the Engineer, and had also released the Bank Guarantees.

95. The petitioner vehemently denied the aforesaid assertion made by the respondent. It further submitted that for a waiver to be valid, there must be a deliberate and voluntary surrender of a right. Additionally, the petitioner contends that waiver must be explicitly pleaded by raising a specific claim of waiver, which the respondent failed to do.

96. The learned Arbitral Tribunal concurs with the petitioner's argument that the respondent should have raised the plea of waiver in its pleadings, which it failed to do. Moreover, the Tribunal observed that the release of partial payment subsequent to the finalization of the Final Statement did not constitute a waiver of the contractual requirement for a Written Discharge, particularly when partial payments were regularly made based on the respondent's monthly bills throughout the Contract duration, extending until the Statement of Completion, designated as IPC-73.

97. The Tribunal further opined that since the Financial Statement was not disputed/ challenged by the party under Clause 67, therefore the Financial Statement was deemed to be final. Therefore, the petitioner shall pay the amount as quantified in the Final Payment Certificate to the respondent. Moreover, the learned Tribunal rejected the counter claim of the petitioner on the ground that the subsequent certificates dated 13th July, 2017 and 31st July, 2017, could not be taken into consideration as

the respondent raised objection to the certificate dated 31st August, 2014 much prior to the issuance of the subsequent certificates in the year 2017.

98. Now this Court will to advert to adjudication of the impugned award.

99. The petitioner has contended that the respondent is not entitled to claim any amount as per the aforesaid Final Payment Certificate since the Engineer revised its earlier certification as it was found that there were some errors in the claims of the respondent pertaining to certain rate of materials etc. Accordingly, the Engineer corrected the various quantities claimed by the respondent in the revised bill dated 13th July, 2017.

100. It was further noticed by the petitioner that the price formula was incorrectly applied by the respondent as well as the Engineer pursuant to which the Engineer carried out fresh calculation, Accordingly, *vide* letter dated 31st December 2017 the engineer issued the second Revised Final Bill.

101. In rival submissions, the respondent has vehemently refuted the contentions of the petitioner submitting to the effect that the final bill dated 31st August 2014 was certified by the Engineer as empowered by the contract. It is further submitted that the certification was based on Final Statement agreed between the respondent and the Engineer as per sub-clause 60.11 of COPA.

102. It is contended that the petitioner had given partial payments to the respondent on the basis of the said certificate and therefore, they cannot raise a claim to challenge the same subsequently.

103. The perusal of the impugned award depicts that the petitioner has been directed to pay the due amount solely on the ground that the said

certificate is the final statement, however, reference to the relevant provisions of the contract makes it abundantly clear that it is completely silent on the aspect of payment to be made on the basis of the Final Statement.

104. The learned Tribunal has wrongly rendered its decision on the issue of final payment statement between the Engineer and the respondent whereby, it had interpreted Clause 60 of the COPA holding the certificate dated 31st August, 2014 as the final statement and the same was allegedly not challenged by the petitioner.

105. In paragraph 26(xxxiii) and (xxxiv) of the impugned award, the learned Tribunal also categorically held that the certificate dated 31st August, 2014 was not a Final Payment Certificate, and construed the same as the final statement as the steps such as issuance of discharge certificate were not complied with by the respondent herein. Therefore, it is amply clear that the learned Tribunal agreed with the contention of the petitioner that certificate dated 31st August, 2014 cannot be termed as the final certificate of payment.

106. The material on record clearly suggests that the learned Tribunal was apprised about the pending disputes between the parties, therefore, any certificate issued during the pendency of a dispute would not amount to Final Payment Certificate, and deciding the issues in favor of the respondent is a mistake of law.

107. Furthermore, despite holding that the certificate dated 31st August, 2014 was not a Final Payment Certificate, the learned Tribunal erroneously directed the payment to be made to the respondent on the

basis of same, hence, contradicting itself and granting a relief not provided for under the contract.

108. Now coming to another contention raised by the petitioner, i.e. the violation of the principle of natural justice. As per the submissions made by the petitioner, the learned Tribunal erred in completely ignoring their contentions and therefore, the same amounts to violation of the principle of natural justice.

109. In rebuttal to the said contention of the petitioner, placing reliance on paragraph 26 of the impugned award the learned counsel for the respondent submitted that the learned Tribunal duly considered the contentions of the petitioner where the learned Tribunal concluded that the certificate dated 31st August, 2014 is a final statement as the same is not challenged by any of the parties.

110. As mentioned in the earlier paragraphs, the principle of natural justice is an integral aspect for fair adjudication of the dispute between the parties as the same allows the parties to be heard and ensures that they are provided equal opportunity. The Act also provides for adherence to the principle of natural justice and therefore, the Arbitral Tribunals are duty bound to abide by the same and its violation is considered a ground for setting aside the Arbitral award.

111. In ***Vijay karia and Others vs Prysmian Cavie Sistemi SRL And Others***[10] the Hon'ble Supreme Court categorically held that the complete ignorance of submissions of a party would lead to non-enforceability of

[10] **(2020) 11 SCC 1**

the Arbitral award. The relevant parts of the said judgment are reproduced herein:

> *"**81.** Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, the expression "was otherwise unable to present his case" occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In short, this expression would be a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties. Read along with the first part of Section 48(1)(b), it is clear that this expression would apply at the hearing stage and not after the award has been delivered, as has been held in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] . A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award unenforceable on the ground that a party has been unable to present his case. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48.*
>
> ***82.** All the cases cited by Mr Nakul Dewan are judgments based on the language of the particular statute reflected in each of them — for example, Section 68 of the Arbitration Act, 1996 (UK), Section 23(2) of the Hong Kong Old Arbitration Ordinance (Cap 391), Section 24(b) of the*

International Arbitration Act (Singapore) and Section 48(1)(a)(vii) of the Arbitration Act, 2002 (Singapore), all of which are differently worded from Section 48(1)(b). Each of these statutes deal with a breach of natural justice which, as we have seen, is a wider expression than the expression "unable to present his case". Thus, it is not possible to hold that failure to consider a material issue would fall within the rubric of Section 48(1)(b).

83. *Having said this, however, if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counterclaim in its entirety, the award may shock the conscience of the Court and may not be enforced, as was done by the Delhi High Court in Campos [Campos Bros. Farms v. Matru Bhumi Supply Chain (P) Ltd., 2019 SCC OnLine Del 8350 : (2019) 261 DLT 201] on the ground of violation of the public policy of India, in that it would then offend a most basic notion of justice in this country [In Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213 this Court cautioned that this ground would only be attracted with the following caveat : (SCC pp. 199-200, para 76)"76. However, when it comes to the public policy of India argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. ... However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."] . It must always be remembered that poor reasoning, by which a material issue or claim is rejected, can never fall in this class of cases. Also, issues that the Tribunal considered essential and has addressed must be given their due weight*

> *— it often happens that the Tribunal considers a particular issue as essential and answers it, which by implication would mean that the other issue or issues raised have been implicitly rejected. For example, two parties may both allege that the other is in breach. A finding that one party is in breach, without expressly stating that the other party is not in breach, would amount to a decision on both a claim and a counterclaim, as to which party is in breach. Similarly, after hearing the parties, a certain sum may be awarded as damages and an issue as to interest may not be answered at all. This again may, on the facts of a given case, amount to an implied rejection of the claim for interest. The important point to be considered is that the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counterclaims of the parties, enforcement must follow."*

112. The above cited paragraphs make it evident that when no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and results in a denial of justice to the prejudice of the party, the same would amount to violation of principle of natural justice.

113. Upon perusal of the material on record, i.e. the written statements filed by the petitioner, it is made out that the petitioner had raised objections to the said certificate by filing various documents showing discrepancies in the certificate, therefore, the finding of the learned Tribunal regarding that no challenge has been made to the certificate does not hold water and the material on record depicts a contrary situation.

114. In the written submissions, the petitioner had pointed out discrepancies in the quantities/variation items and questioned the

authenticity of the payment raised on the basis of 'as built drawings' and not the actual measurements, therefore, leading to questioning of the certificate issued on 31st August, 2014 by the petitioner.

115. In the impugned award, even though the learned Tribunal appreciated the submissions advanced by the petitioner with regard to discrepancies and fallacies in the certificate, the non-adjudication of the same has resulted in violation of rights of the petitioner, therefore, this Court deems it appropriate to hold that the said situation is a clear violation of the principle of natural justice.

116. Furthermore, the finding of the learned Tribunal regarding non-challenge to the certificate dated 31st August, 2014 is not correct as the statements filed by the petitioner clearly shows that the challenge was made to the said certificate and various discrepancies were contended with respect to the same.

117. The term 'public policy' has been given a broader meaning by the Hon'ble Supreme Court in a catena of judgments. As discussed earlier, the judgment rendered by the Hon'ble Supreme Court in ***Associate Builders v. DDA (supra)*** duly expounded the said term holding that non-adherence to the principles of natural justice would amount to violation of the public policy.

118. In view of the same, this Court is of the view that non-adjudication of the dispute regarding the perversity in the statement/certificate dated 31st August, 2014 tantamounts to breach of public policy as the said issue is the bone of contention between both the parties and should have been adjudicated by the learned Tribunal.

119. In light of the same, this Court is satisfied that the operative part of the impugned award suffers from illegality which goes to the root of the matter and cannot be termed trivial in any manner.

120. Having dealt with the substantive issues, this Court also deems it appropriate to deal with another issue with regard to passing of another award by the same Tribunal having a view exactly contrary to the one taken in the impugned award.

121. In C-5, the learned Tribunal held the issue against the respondent whereby, the same certificate was held to be not a Final Payment Certificate rather an interim one, therefore, holding the petitioner not to be liable to make any payment on the basis of a certificate that has not attained finality.

122. Furthermore, in the said award, the learned Tribunal also held that the claim of the petitioner is not time barred, a finding exactly opposite to the one given in the impugned award, whereby, the counter claim of the petitioner has been dismissed on the issue of limitation.

123. In ***National Highway Authority of India v. Progressive-MVR (JV)***[11] the Hon'ble Supreme Court delved into the aspect of two contrary opinions given by the Arbitral Tribunal and held as under:

> *"**40.** Once we interpret the formula in the manner indicated above, the necessary consequences would be to hold that the Arbitral Tribunal(s) did not decide the cases with the correct application of the formula and further that the claim for price adjustment in respect of bitumen laid by the contractors was not correct. Therefore, it can be held that the award(s) are contrary to the contractual terms. At the same time, this outcome poses a dilemma inasmuch as in*

[11] **(2018) 14 SCC 688**

these cases, the Arbitral Tribunal has taken a particular view and when this was a plausible view, keeping in mind the parameters of judicial review of the Court in exercise of powers under Section 34 of the Act, normally the Court would not interfere with such awards. However, as already indicated above, such a situation has arisen because of conflicting awards given by the Arbitral Tribunals themselves, which has provoked this Court to take a final view in the matter, necessitated by the aforesaid reason. If one takes into consideration the theory that one applies the principle mechanically i.e. that a plausible view is not to be interfered with, then it may lead to very anomalous situation. In such an eventuality, view taken by a particular Arbitral Tribunal in favour of the contractor would be upheld as plausible view. Likewise, the Court will have to uphold the view taken by a particular Arbitral Tribunal in favour of NHAI as well as a plausible view. Therefore, the purpose is to avoid such a situation which cannot be permitted as it would result in upholding both kinds of arbitral awards interpreting the same clause, whether they go in favour of the employer or they go in favour of the contractor. When the exercise is done keeping in view these considerations and outcome thereof is not determined, interest of justice would also demand that this result has to be applied to the pending cases, which have not attained finality. Therefore, in these peculiar circumstances, we hold that the principle of issue estoppel will apply only in those cases where matters have attained finality and no judicial proceedings are pending. In all those cases, including the present one, where awards are challenged on this particular aspect, this judgment will govern the outcome."

124. Upon perusal of the above cited paragraphs, it is made out that acceptance of contrary views leads to an anomalous situation and therefore, the Courts need to decide the finality of the said issue.

125. As per the pleadings filed by the petitioner, the award passed in C-5 is also under challenge, however, the said issue has not been adjudicated, therefore, leaving the question open till date.

126. In the said award, the same Tribunal has held that the certificate issued on 31st August, 2014 cannot be deemed to be final one as the issuance of discharge has not been done by the respondents, therefore, not complying with the procedure laid down in the contract agreed between the parties leading to dismissal of their claim.

127. Even though this Court does not want to comment upon the findings of the learned Tribunal in the other award, the application of principles in the impugned award makes it evident that the learned Tribunal committed serious errors in the same and wrongly interpreted the contract, thereby, committing clear violation of the fundamental policy of this country.

128. Therefore, this Court is of the considered view that the findings arrived at by the learned Tribunal in the impugned award are incorrect and in complete violation of the principles of natural justice. Furthermore, even though the award passed in the other dispute by the same Tribunal is not being relied upon to arrive at the instant findings, this Court is of the clear view that the antithesis reasoning cannot be upheld in any manner.

CONCLUSION

129. The issue regarding interference in the international arbitration is no more *res integra* as the same has been dealt with by the Hon'ble Supreme Court in various cases where the scope of interference has been

clarified and restricted only to the instances where the award in question is against the public policy of the country.

130. As discussed in the foregoing paragraphs, the term public policy has been subject to judicial interpretation where the Hon'ble Supreme Court deemed it necessary to hold that the said term would be restricted to the domestic and not the international paraphernalia.

131. In the present case, the petitioner has made out a case to prove that the impugned award suffers from illegality as the same is against the public policy of this Country. There are multifold reasons for the same, *firstly*, the Tribunal erroneously directed payment of the due amount on the basis of same despite holding that the certificate dated 31st August, 2014 was not a final payment certificate, a conclusion contrary to its own findings. *Secondly*, the non-adjudication of the contentions raised by the petitioner is a clear violation of the principles of natural justice and *thirdly*, the contrary opinions given by the same Tribunal in similar factual scenario creates a bizzare situation and the same cannot be permitted under the law.

132. In view of the same, this Court deems it appropriate to set aside the award dated 26th June, 2021 since the same is in contravention of the settled position of law and, therefore, against the public policy of the country.

133. In light of the foregoing discussions, the instant petition bearing No. 340/2021 is allowed and impugned award dated 26th June, 2021 is set aside and the dispute is remanded back to the Arbitral Tribunal for fresh adjudication.

134. Pending applications, if any, also stands disposed of.

135. Judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

APRIL 8, 2024
rk/av/db