A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA (ICA) No.1 of 2023

(From the judgment dated 17.06.2022 passed by the Learned Single Judge, High Court of Orissa at Cuttack in Arbitration Petition No.1 of 2021 arising out of arbitral award dated 07.09.2020 as corrected on 17.11.2020 passed by the Tribunal consisting of Prof. Lawrence Boo BBM, Dr. Michael Pryles PBM and Mr. Malcolm Homes QC)

GMR Kamalanga Energy Ltd. **....** ***Appellant***

-versus-

SEPCO Electric Power Construction Corporation Tower, A, Chengcheng Mansion No.10567, Jingshi Road Jinan, Shandong, China. **....** ***Respondent***

Advocates appeared in the case:

For Appellant : *Mr. Ashok Kumar Parija, Senior Advocate*

Mr. S.P. Mishra, Senior Advocate assisted by Mr.Manav Gill, Advocate

Mr.Ciccu Mukhopadhaya, Senior Advocate

Mr.Anupam Rath, Advocate

Mr.Hriday Kochhar, Advocate

Mr.Navneet Dadhichi, Advocate

Ms.Aiswarya Ray, Advocate

Ms.Manisha Mishra, Advocate

Mr.Prashant Pakhidey, Advocate

Ms. Swastika Parija, Advocate

Mr. S. Satyakam, Advocate

Mr.Amritesh Mohanty, Advocate

Ms.Adhyasa Kar, Advocate

Mr. Nikhil Pratap, Advocate

Ms.Swadha Rath, Advocate

-versus-

For Respondent : *Mr.Jayant Mehta, Senior Advocate*

Mr.Gautam Misra, Senior Advocate

Mr. Samar Singh Kachwaha, Advocate

Ms.Ankit Khushu, Advocate

Mr.Prasenjeet Mohapatra, Advocate

Mr.Anupam Dash, Advocate

Mr.Adhiraj Mohanty, Advocate

Ms.Bhavna Chandak, Advocate

Mr.Raghav Bhatia, Advocate

CORAM:
THE CHIEF JUSTICE
DR.JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-02.08.2023
DATE OF JUDGMENT:-27.09.2023

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Dr. S.K. Panigrahi, J.

1. The present Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A&C Act") has been preferred against the judgment dated 17.06.2022 passed by the Ld. Single Judge, High Court of Orissa at Cuttack in Arbitration Petition No. 1 of 2021 arising out of the arbitral award dated 7.9.2020 (as corrected on 17.11.2020) passed by the Arbitral Tribunal consisting of Prof. Lawrence Boo BBM, Dr. Michael Pryles PBM, and Mr. Malcolm Homes QC (hereinafter referred to as "the Tribunal")

I. FACTUAL MATRIX OF THE CASE:

2. GMR Kamalanga Energy Ltd. (hereinafter referred to as "GKEL / Owner/ Appellant") and SEPCO Electric Power Construction Corporation (hereinafter referred to as "SEPCO / Civil Contractor / Respondent") came together in 2008 for the construction and subsequent operation of three 350 MW coal fired thermal power plants at Kamalanga village, Dhenkanal in Odisha. The Parties entered into four Agreements for the execution of the aforementioned Project, namely:

i. Agreement for Civil Works and Engineering, Erection, Testing and Commissioning (hereinafter referred to as the "CWEETC Agreement") dated 28.8.2008 and further amended on 26.5.2009, 31.5.2010, 15.2.2011, 4.4.2013.

ii. Guarantee and Coordination Agreement dated 28.8.2008 and further amended on 31.5.2010.

iii. Onshore Supply Agreement dated 28.8.2008 and further amended on 26.5.2009, 31.5.2010, 15.2.2011.

iv. Offshore Supply Agreement dated 28.8.2008 and further amended on 18.5.2009, 26.5.2009, 31.5.2010.

3. A fourth, 350MW, unit was added to the project by mutual consent of the parties on 31.5.2020 and the aforementioned agreements were, thereafter, suitably amended. It is pertinent to note, at this juncture, that work against the fourth unit was subsequently suspended due to issues faced in the execution of the project.

4. The present Respondent demobilized from the Project site without completing the project around January, 2015. Disputes had arisen between the parties in relation to the delays in construction and various technical issues relating to the construction and operation of the plant. Resultantly, on 30.3.2015, the Respondent served a 'notice of dispute' against the Appellant and initiated arbitration proceedings by its Notice of Arbitration dated 8.6.2015. An Arbitral Tribunal was constituted to adjudicate upon the disputes between the parties comprising of Prof. Lawrence Boo BBM, Dr. Michael Pryles PBM, and Mr. Malcolm Homes QC. As per the agreement between the parties, the Governing Law was English Law and the arbitration was to be decided in accordance with the Indian

A&C Act. The "seat" of arbitration was India though the "venue" was determined to be in Singapore. The relevant portion of the Agreement between the parties is reproduced hereinbelow for the sake of convenience:

> ***"21.4 Arbitration***
>
> *21.4.1 Any Dispute which has not been resolved by negotiation and mediation pursuant to Section 21.3 shall, following notice by either Party be exclusively and finally decided by arbitration in Singapore in accordance with the provisions of the (Indian) Arbitration and Conciliation Act, 1996 or any re-enactment or modification thereof. Save as specified in this Section 21.4.1, no arbitration provisions contained in any other law, shall apply to arbitration of any Dispute.*
>
> *21.4.2 Pursuant to Section 21.4.1, either Party may notify the other party by a written notice clearly stating all the Disputes to be decided by the arbitral tribunal, appointing its own arbitrator and calling upon the other party to appoint its arbitrator within thirty (30) days from the date of receipt of such notice.*
>
> *(i) Both the arbitrators appointed by the Parties shall then appoint the third arbitrator, who shall act as chairman of the tribunal, and if the chairman is not appointed within thirty (30) days of the date of appointment of the later of the two (2) arbitrators appointed by the Parties or if a Party does not appoint an arbitrator within (30)*

days of the date of receipt of the notice of the other party, the chairman and/or the arbitrator to be appointed by a Party (such Party having failed to appoint the arbitrator) shall be appointed in accordance with the provisions of the (Indian) Arbitration and Conciliation Act, 1996.

(ii) *Each arbitrator shall be and remain independent and impartial, and no arbitrator shall be of the same nationality as any Party.*

21.4.3 *The arbitrators shall drew up, and submit to the Parties for signature, the terms of reference within fifteen (15) days of the appointment of the third arbitrator. The terms of reference shall include a list of issues to be determined.*

21.4.4 *Neither Party shall be required to give general disclosure of documents, but may be required to produce documents which are relevant to the Dispute.*

21.4.5 *The arbitral proceedings shall be conducted in the English language.*

21.4.6 *[NOT USED]*

21.4.7 *The arbitral award shall be final and binding upon the Parties and enforceable by any court having jurisdiction for this purpose. The arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and a judgment upon the arbitral award may be entered in any court having jurisdiction.*

25.2 Choice of law

25.2.1 Governing law

This Agreement shall be governed by and construed in accordance with the laws of England. The United Nations Convention on Contracts for the International" Sale of Goods shall not apply to this Agreement."

5. The Arbitral Tribunal agreed to the terms and entered into reference on 17.10.2016. On 7.9.2020, it issued the Arbitral Award in relation to all matters except interest and costs. Then, on 17.11.2020, the Arbitral Tribunal issued a corrected award under Section 33 of the A&C Act, wherein it held that the present Appellant should pay approximately Rs.1100 crores to the Respondent. The Arbitral Tribunal issued the final award dated 24.6.2021 on the issues of interest and costs. The present arbitration is an International Commercial Arbitration governed by Part I of the A&C Act.

6. The present Appellant preferred a petition under Section 34 of the A&C Act against the aforementioned award as well as moved an application requesting a stay against the aforementioned award on multiple grounds before this Court. The same was registered as ARBP (ICA) No.1 of 2021.

7. On 1.9.2021, during the hearing of the Section 34 petition preferred by the present Appellant, the Single Judge heard the parties on the question of "admission" of the Section 34 petition and the stay application preferred under Section 36(2) of the A&C Act. Without any further hearing, the Learned

Single Judge dismissed the petition *vide* judgment dated 17.6.2022 under Section 34 of the A&C Act and held as follows:

> *"27. In the result, this petition under Section 34 of the Arbitration Act does not justify to be considered for a detailed hearing. Accordingly, the petition under Section 34 of the Arbitration Act is dismissed and in the circumstances there shall be no order as to costs.*
> *28. As the petition under Section 34 of the Arbitration Act is dismissed, no separate order is required to be passed under Section 17 of the Arbitration Act."*

8. Aggrieved, the present Appellant approached the Supreme Court in SLP(C) No. 12194 of 2022. The Supreme Court of India *vide* its order dated 25.7.2022 issued notice and stayed the operation of the Single Judge's judgment dated 17.6.2022. Subsequently, *vide* order dated 15.5.2023, the Supreme Court permitted the present Appellant to approach this Court by way of an appeal under Section 37 of the A&C Act. The relevant portion of order dated 15.5.2023 is reproduced hereinbelow:

> *"The present special leave petition is disposed of in terms of the following directions.*
> *1.The Chief Justice, Orissa High Court is requested to constitute a Commercial Appellate Division under Section 5 of the Commercial Courts Act, 2015 to hear the appeal under Section 37 against the order dated 17.06.2022 passed by Ld. Single Judge.*
> *2. The petitioner has undertaken to file a Section 37 Appeal, urging all contentions/grounds averred in the SLP, against the said order of the learned Single Judge within a period of 8 weeks (as prescribed in Section 13(1A) of the Commercial Courts Act,*

2015) from the date of constitution of the Commercial Appellate Division.

3. It is open to the parties to urge all contention, including objections by the petitioner and all other contentions of the respondent, on all aspects.

It is argued on behalf of the respondent that the financial condition of the petitioner and its holdingcompany are precarious. A pointed reference was made to the auditor's report of the petitioner as well as its holding company, which were brought on record.

Learned counsel also relied upon the general approach of this Court in regard to entertaining applications for interim stay or other interim relief, during the pendency of objections under Section 34 or even appeal under Section 37 to interdict the operation of the award and oppose the request for continuation of the interim order. It is submitted that by rights, the petitioner is under a duty to deposit the entire awarded amount.

Having considered the totality of circumstances, this Court is of the opinion that the interim order should enure and bind the parties till 30th June, 2023 to enable the Commercial Appellate Division to hear arguments on this aspect. Neither the interim order of this Court dated 25.07.2022 nor any contention urged on behalf of the parties for its continuation or vacation shall be considered conclusive and all rights and contentions, in this regard, are kept open. The special leave petition is disposed of in the above terms. Pending applications, if any, are disposed of."

9. Here, it is relevant to point out that this Court has been tasked by the Supreme Court to consider all contentions of the parties

with regards to the matter in hand in this appeal under Section 37 against the order of the learned Single Judge.

10. Now, the broad factual matrix leading up to the instant Appeal have been laid down, this Court shall endeavour to summarise the contentions of the Parties and the broad grounds that have been urged seeking the exercise of this Court's narrow jurisdiction available under Section 37 of the A&C Act.

II. APPELLANT'S SUBMISSIONS:

11. It is submitted by Learned Senior Counsel for the Appellant that issuance of notice is a condition precedent for the Respondent to make any claim for changes in the contract price or for seeking extension of time. The Learned Tribunal erroneously held that the Appellant is estopped from seeking enforcement of contractual notice provisions relying primarily upon its e-mail dated 18.3.2012 without appreciating the context in which it was sent. Thus, it is argued that the finding of the Tribunal that compliance with the contractual notice was waived with effect from March, 2012 is contrary to law. Further, in holding so, the Tribunal has prevented the Appellant from raising the plea of lack of contractual notice by the Respondent in various claims, such as those pertaining to, *inter alia*, Grid Synchronisation (Issue No.6), Fuel oil (Issue No.7), Coal (Issue No.8), UCT-PGT (Issue No.10); consequentially, the Tribunal allowed the Respondent's claims for extension of time and prolongation costs for delay which

were barred by the Respondent's admitted failure to issue notices. In that process, the Tribunal awarded prolongation cost of Rs.70-80 crores (approx.) which consequently led to reduction in the amount of liquidated damages recoverable by the Appellant from the Respondent by Rs.100 crore approximately.

12. While dealing with the issue, the Tribunal has treated the parties unequally by applying a different standard to each of the parties by disallowing the Appellant's counter-claim amounting to more than Rs.150 crores approximately at the threshold; on the basis that the Appellant had failed to serve notice even though such claim for default arose after March, 2012. Thus, by rejecting the claim of the Appellant in its counter-claim and allowing the same in favour of the Respondent, the total impact was approximately Rs.300 crores on the Appellant.

13. It is further submitted that the Tribunal has made out a case in favour of the Respondent, which was neither pleaded nor argued. It was not the case of the Respondent that there were separate agreements, which constituted estoppel, i.e., (a) that there was an agreement of 2010, which constituted an estoppel going forward all the way till end of the project execution; and alternatively (b) that if there was no agreement of March, 2010, then there was an agreement of March, 2012 which constituted an estoppel not to give any further contractual notices. Further,

the plea of the Respondent of waiver or estoppel arising out of events of March 2010 being rejected by the Tribunal (paragraph 226 of the award) the very basis of the Respondent's claim that an estoppel or waiver would be operative taking into consideration the events of March, 2012 could not have been accepted by the Tribunal, ignoring the Respondent's own case. Therefore, the Tribunal has made out an entirely new case in favour of the Respondent based on the events of March, 2012 to which the Appellant did not have any opportunity to respond to or lead evidence controverting it. Further, even if it is presumed that the Respondent had pleaded the case of waiver or estoppel based upon the events of March, 2012, then the Appellant would have produced further contractual notices issued by the parties based on events of March, 2012 and subsequent thereto.

14. It is also contended that the Tribunal has modified the contract between the parties by holding that parties had mutually waived the requirement to issue contractual notices. The Arbitral Tribunal failed to appreciate that the claim of estoppel would fail as it was inconsistent with and derogatory to the express language of Section 25.5.3 of the Amended CWEETC Agreement. It is *trite* law that an Arbitral Tribunal cannot act outside the four corners of the contract or against the express terms of the contract before it. The Tribunal has no jurisdiction to modify the terms of a contract as has been done in the

instant case. The Tribunal has failed to take into consideration that the E-mail dated 18th March, 2012 from Mr. Rao (the Appellant's representative) was a simple request to the Respondent to withdraw its letter of suspension and nothing more. But the Tribunal by an erroneous reading of the email came to a finding that Mr. Rao was asking the Respondent not to issue formal notices for any matter or claims in the future unconnected with suspension, *carte blanche*. Although in the meeting dated 13th March, 2012, the Respondent agreed to withdraw its letter of suspension by 14th March, 2012, but it was not done. In fact, the suspension was withdrawn only when the Appellant had established Letters of Credit (L/C) of 1266000 dollars and 11450000 dollars. Thus, it is argued that withdrawal of the suspension letter by the Respondent was on the basis of a positive action i.e. pending payments being made by the Appellant and not on the basis of the E-mail of March, 2012. Thus, the Tribunal has acted in excess of its jurisdiction by modifying/amending the notice clause in the Agreement and unilaterally re-writing the contract.

III. RESPONDENT'S SUBMISSIONS:

15. *Per contra*, it is submitted by Learned Senior Counsel for the Respondent that the scope of interference by the courts in an arbitration proceeding under Section 37 is narrower compared to scope of interference under Section 34 of the A&C Act. To

substantiate his submissions, Learned Senior Counsel has relied upon the judgments rendered by the Supreme Court of India in the case of ***Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd.***[1]and ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI.***[2]

16. Additionally, the Respondent also seeks to rely on various judgments of this Court as well the High Court of Tripura and the High Court of Delhi, namely, ***Kali Karnakar v. State of Tripura and Ors.,***[3]***Mahanagar Telephone Nigam Limited v. Fujhitshu India Private Limited,***[4] ***HCIL-Adhikarya-ARSS (JV) v. RAHEE-GPT (JV),***[5]***New India Assurance Co. Ltd. v. Orissa State Warehousing Corporation,***[6] and ***United India Insurance Company Limited v. SuryoUdyog Limited***[7]. It is submitted that while entertaining appeals under Section 37 of the A&C Act, the Court is not actually sitting as a Court of Appeal over the award of the Arbitral Tribunal, and therefore the Court ought not to re-assess or re-appreciate evidence. It is also stated that the Arbitral Tribunal is the final arbiter on facts as well as law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Section 34 or under Section 37 of the A & C Act.

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[1](2022) 1 SCC 753
[2](2019) 15 SCC 131
[3]2015 SCC OnLine Tri 923
[4]2015 SCC Online Del 7437
[5]2023 SCC OnLineOri 2406
[6]Orissa HC ARBA No. 24 of 2019
[7]Orissa HC ARBA Nos.39 and 41 of 2018

17. It is submitted that the impugned award is anunanimous one and has been rendered by the Arbitral Tribunal having three members of repute in the matter of arbitration. The petition is challenging the merit of the dispute and it is an attempt to persuade this Court to re-appreciate the evidence which is *ex facie* in the teeth of the scope of Section 34 of the Arbitration Act. The scope and ambit of Section 34 does not permit the Petitioner to seek factual, evidentiary or legal review of the findings of the award.

18. Amendment to Section 34 introduced in 2015 further restricts the scope of interference with the arbitral award on the ground of public policy under Section 34(2)(b)(ii) of the Arbitration Act on three heads, such as (i) fraud or corruption; (ii) contravention of fundamental policy of Indian law; or (iii) conflict with most basic notions of morality or justice (Explanation-1). An important caveat stressed upon is the clause added in Explanation-2 according to which 'no review on merits of the award is allowed'. Interference of the arbitral award on the ground of patent illegality is also not available in an international commercial arbitration in view of Section 34(2) of the Arbitration Act. Referring *proviso* to Section 34(2A) of the Arbitration Act, it is submitted that even a domestic award shall not be set aside merely on the ground of erroneous application of law or by re-appreciation of evidence. Thus, the merit of international commercial arbitral award is completely

beyond the scope of challenge under Section 34 of the Arbitration Act. That the Appellant endeavored to challenge the impugned award on the issue of bias, violation of natural justice and perversity. It is submitted that these terms, though on the face of it are attractive, are completely misplaced and are nothing but fanciful expressions to camouflage its attempt to seek a factual review of the award. In order to buttress the argument of 'bias', the Appellant made a desperate attempt to argue on the merit of the dispute, which is against the very scheme of the Arbitration Act. It is nothing but an attempt to circumvent the statutory prohibition to challenge an award on the ground of merit.

19. It was further submitted that the Tribunal in its finding of waiver and estoppel has limited the scope of applicability of waiver and estoppel to notices arising out of delays and costs, and not to all the notices required as per the terms of the Agreement. Learned Counsel for the Respondent further contended that the Tribunal has adhered to the principles of equity enshrined in the Indian Contract Act and correctly held that there was estoppel by conduct limited to notices arising out of delays and costs. It is submitted that the present Appellant has taken the benefit of the application of this estoppel by claiming costs for defects that were notified in the R173 Joint Protocol but raised an issue only when the Respondent was allowed certain claims on the self-same

standards. It was also brought to our notice that it is the Appellant itself who proposed adopting a "cooperative approach" with regards to issuance of notices.

20. It was also contended by the learned counsel for the Respondent that the Appellant contended that it was unable to present its case and therefore, the principle of natural justice has been violated. Inability to present its case refers to a situation where the evidence, documents or submission are accepted behind the back of the party and the party is deprived of an opportunity to comment on the same. This ground would cover facets of natural justice and fair hearing, but cannot be used to challenge an award on merits by nit-picking the facts. The breach of the principles of natural justice has to be made out distinctly.

IV. ISSUES FOR CONSIDERATION:

21. Having heard the parties, we have also perused the materials available on record, including the following documents filed by the Parties to aid the hearing of the present *lis* at hand:

i. By the Appellant:
   - Convenience Compilation dated 19.7.2023
   - Judgment Compilation dated 19.7.2023
   - Note of Arguments on behalf of the Appellant – Part I dated 19.7.2023
   - Compilation of Notices dated 20.7.2023
   - Note of Arguments on behalf of the Appellant – Part II and III dated 25.7.2023

- Additional Judgment Compilation dated 25.7.2023
- Written Submissions dated 7.8.2023

ii. By the Respondent:

- Brief Submissions on behalf of the Respondent dated 18.7.2023
- Note on Respondent's Oral Submissions Part I dated 27.7.2023
- Compilation of Documents on behalf of SEPCO dated 27.7.203
- Compilation of Judgments on behalf of SEPCO dated 27.7.2023
- Note on Respondent's Oral Submissions Part II dated 1.8.2023
- Relevant extracts of cross examination of Mr. Prudhoe submitted on 1.8.2023
- Relevant extracts of key judgments relied upon by the Respondent dated 2.8.2023
- Extracts from SEPCO's Post Hearing Submissions, Vol-9 submitted on 2.8.2023
- Post Hearing Submissions by the Respondent dated 11.8.2023

22. Accordingly, this court has identified the following issues to be determined which have emerged contentiously during the course of the hearing and is germane to finally decide the *lis* at hand;

A. **WHETHER THE TRIBUNAL INTERPRETED THE CONTRACTUAL PROVISIONS CORRECTLY IN ASSESSING THAT ISSUANCE OF CONTRACTUAL NOTICES IS A CONDITION PRECEDENT? IF SO, THEN**

CAN THE CONDITION OF ISSUANCE OF NOTICE BE WAIVED AND WHETHER A PARTY CAN CLAIM ESTOPPEL CONSEQUENT THERETO?

23. Before adverting to our analysis against the submissions, we consider it apposite to refer to Section 28 of the A&C Act. The same is reproduced herein below for ready reference:

> *"28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situate in India,—*
> *(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;*
> *(b) In international commercial arbitration,—*
> *(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;*
> *(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;*
> *(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.*
> *(2) The arbitral tribunal shall decide ex aequoet bono or as amiable compositeur only if the parties have expressly authorised it to do so.*
> *[(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account*

the terms of the contract and trade usages applicable to the transaction.]"

(Emphasis is ours)

24. The language used in Section 28 of the A&C Act uses the words "shall" and "in all cases" with reference to the Tribunal's bounden duty to "take into account the terms of the contract". Meaning thereby, that the Arbitral Tribunal while deciding the *lis* before it is bound to take into account the terms of the contract and the same shall bind it.

25. Now, adverting to the contentious clauses of the CWEETC Agreement relevant to this issue, the same are being reproduced herein below for the sake of convenience in their order as per their occurrence in the Agreement itself. The same are:

> ***"4.2.5 Procedure for claiming change in Contract Price***
>
> *4.2.5.1 As soon as reasonably practicable after the date of the notice given pursuant to Section 4.2.2, the Civil Contractor shall submit to the Owner detailed particulars of its claim for an increase in the Contract Price including details of costs (to the extent the Civil Contractor has complied with its obligations under Section 4.2.6).*
>
> *4.2.5.2 The Civil Contractor shall promptly submit such further particulars as the Owner may reasonably require to assess the validity of the claim or any item of it but the Civil Contractor shall, in any event. submit details of all costs reasonably and properly incurred*

by reason of one of the events referred to in Section 4.2.1 within thirty (30) days of such costs being incurred.

4.2.5.3 In any case where the Civil Contractor considers it is entitled to an increase in the Contract Price under this Section 4.2, it shall keep detailed contemporary records of the costs it incurs in relation to the matter in question and such records shall be open to inspection by designated representatives of the Owner at all reasonable times.

4.2.8 Adjustments to the Agreement

Any adjustment to the Contract Price pursuant to the procedure set out in this Section 4.2 or extension to any Milestones Date and/or Guaranteed Date of Completion pursuant to the procedure set out in Section 7.3 shall be recorded in a statement entitled "Adjustment to the Agreement" signed by both Parties - following agreement pursuant to Section 7.3 or Section 4.2 (as applicable) or resolution pursuant to Section 21.5 which shall specify. in the case of adjustments to the Contract Price, the Contract Price immediately prior to any such adjustment, the amount of such adjustment pursuant to such agreement or resolution and the revised Contract Price and in the case of any extension, the revised Milestone Dates and/or Guaranteed Date of Completion pursuant to Section 7.3.

25.1.4 Communications

25.1.4.1 All written communications required under this Agreement from or on behalf of the Owner will be sent to the Civil Contractor for the attention of the Civil Contractor's Project Manager or site manager for the Works. The

Civil Contractor shall, unless the Parties otherwise agree have no obligation to consider any written communication which is not sent in accordance with this Section 25.1.4.1.

25.1.4.2 Any written communication required to be given under this Agreement to the Owner by the Civil Contractor shall be sent by the Civil Contractor's Project Manager or site manager and any written Civil communication sent by any such person shall be binding on the Contractor. The Owner shall have no obligation to consider any written communication which is not sent in accordance with this Section 25.1.4.2.

25.5 No Waiver or Variation

25.5.1 No failure or neglect on the part of either Party to exercise its rights or remedies let under this Agreement and no single or partial exercise thereof shall preclude any further or other exercise of such rights and remedies.

25.5.2 Any delay, waiver or omission by either Party to exercise any right or power arising from any breach or default by the other Party in any of the terms or provisions of this Agreement shall not be construed to be a waiver of such breach or default or subsequent breach or default of the same or other terms, provisions or covenants.

25.5.3 Without prejudice to Section 4.2 and the issue of any Variation Order, no Variation, amendment, supplement, modification or waiver of this Agreement shall be effective unless in writing and signed by or on behalf of each Party."

(underlining is ours)

26. Here, it is relevant to summon the latin maxim of interpretation: *'Ex praecedentibus et consequentibus optima fit interpretatio.'* - the best interpretation is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. It is an accepted principle of construction that the sense and meaning of the parties in any particular part of instrument may be collected '*ex antecedentibusetconsequentibus*', every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that is possible.

27. The Supreme Court in ***Provash Chandra Dalui v. Biswanath Banerjee***[8] intricately dealt with the conundrums of contractual interpretation and in conclusion, Saikia, K.N. (J) opined that:

> *"10. In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply."*

28. The above cited principle of interpretation has universal application transcending national jurisdictions. A reference

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[8] 1998 Supp (1) SCC 487

could be made to the pronouncement made by the Supreme Court of Appeal of South Africa in ***Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd***[9] wherein it was pronounced that:

> *"It is trite law that the provisions of an agreement must be read and understood in the context within, and having regard to the purpose for which, the agreement was concluded. The point of departure is the language employed by the document. But the words must not be considered in isolation. A restrictive examination of words, without regard to the context or factual matrix, has to be avoided. Evidence of prior negotiations is inadmissible, but evidence relating to the surrounding circumstances and the meaning to be given to special words and phrases used by the parties, is admissible. No distinction is drawn between context and background circumstances. Words have to be interpreted sensibly so as to avoid unbusinesslike results."*

29. In light of the above mentioned ratios, we now move to issues more specific to the dispute at hand.

i. WHETHER THE CONDITION OF ISSUANCE OF CONTRACTUAL NOTICES CAN BE WAIVED?

30. The Appellant submitted that the requirement to give notice was a mandatory condition precedent as per the express terms of the contract and that the said requirement was not satisfied, thereby the Respondent could not make any claims pertaining

[9] (Unreported) [2020] ZASCA 58 (3 June 2020)

to (a) change in the contract price, (b) claiming additional costs, and/or (c) seeking extension of time.

31. In this regard, our attention was drawn to Article 4.2.5 and 7.3 of the CWEETC Agreement dated 28.8.2008 which has been reproduced above. We are also invited to peruse passages from the Arbitral Award, especially Paragraphs 206-215. The Tribunal has laid down its findings with respect to this issue in Paragraphs 208, 211 and 215 reproduced as hereunder:

> *"208. Although the provision did not expressly state that it was a condition precedent in contrast to language used elsewhere in the agreement noted above, the Tribunal finds that the parties have made their intention clear that they intended the clause to operate nonetheless as a condition precedent by expressly stating the consequences of failing to give the required notice.*
> *….211. The notice provision in relation to the entitlement in Section 6.7.1 to extend the Onshore Milestone dates is a condition precedent.*
> *….215. (The Offshore Supply Agreement) The Tribunal concludes that these notice provisions are condition precedent."*

32. The abovementioned finding/ conclusion was arrived at by the Tribunal upon its own independent interpretation of the terms of the contract that the requirement of issuance of notice was in fact a mandatory condition precedent under the provisions of the contracts. The Tribunal further goes on to note in Para 216 of the award the Claimant's alternate argument that:

> *"216. The Claimant did not submit that it had given notice in the required form and manner set out in any of the Agreements. Its alternate case was based on a claim that the Respondent had waived any obligation to give notice or, in the circumstances, the Respondent was estopped from insisting that the Claimant perform the obligation to give notice."*

33. The Tribunal having held that a perusal of the terms of the contract makes it clear that issuance of notice is a condition precedent therefore warrants no interference, the same being sound contractually and juristically. Thus, in so far as the first leg of the issue of whether the condition of issuance of notice is a condition precedent is concerned; there is no cavil between the parties to the *lis* and needs no further discussion.

34. This brings us to the next leg of the parties' submissions, whether the issuance of notice being a condition precedent could have been waived by the parties.

35. In this regard, we find it pertinent to refer to Article 25.5 which is interestingly titled as "**25.5 – No Waiver or Variation**". A bare perusal of the Article reveals that the parties, in fact, had a firm and explicit no waiver agreement, *ex facie*. Moreover, Article 25.5.3 specifically lays down that if any variation, amendment, supplement, modification or waiver of the Agreement is to be held to be effective, the same shall not be effective unless in writing and signed by or on behalf of each Party.

36. The Respondent submitted that the parties met in March, 2010 (Bhubaneswar Meeting) and the Appellant orally requested the Respondent to withdraw a notice dated 23.01.2010 and further to not to issue any more contractual notices. It was the Respondent's case that this Meeting in March, 2010 is that when the parties allegedly decided to adopt a co-operative approach and forgo the condition of issuance of notices. Subsequently, the Respondent submitted that it did not act on its notice of 23.1.2010 and the terms of this representation or decision were not recorded and neither referred to in any future correspondence nor established in evidence, as has also been recorded by the Tribunal in Paragraph 225 of the Arbitral Award.

37. The Tribunal having gone through the events that transpired in the Meeting of March, 2010, in Paragraph 226 of the Arbitral Award goes on to say that;

> *"226. Having regard to this state of evidence, the Claimant has not established any proper basis for a waiver or estoppel arising out of the events at the meeting or during the break at the meeting in 2010. There may have been discussion but the evidence is vague and uncertain as to the contents of the discussion."*

38. The Appellant has contended that the Tribunal has rendered contradictory findings at different instances. If the Tribunal chose to rebuff the Respondent's case wherein the Meeting of March, 2010 which demonstrated intention of the parties doing

away with the condition for issuance of notice; then given the evidence on record, the Tribunal should not have taken into consideration of the meeting in Jinan on 13.3.2012 (Jinan Meeting) wherein the Appellant apparently asked the present Respondent to withdraw a notice sent to them on 7.3.2012 pertaining to suspension of some works as demonstrative of the parties intention to do away with the condition of issuance of notices. In this regard our attention is drawn to Paragraphs 228 to 233 of the Arbitral Award which are reproduced hereinbelow:

> *"228. The notices were followed by a meeting attended by Mr Xu, Mr Rao and others in Jinan on 13 March 2012. Mr Rao asked Mr Xu to withdraw the notice on the basis that certain outstanding payments would be made and the Respondent would ultimately resolve the Claimant's entitlements at a later stage without the need for contractual notices. Mr Xu and other members of the senior management team acceded to his request and said that they would do so by 14 March 2012. The Claimant's minutes of the meeting record at Item 18: "Suspension letter issued by President Liu Chuanming should be withdrawn to avoid parties' verbal jousting."*
>
> *229. On 18 March 2012 Mr Rao emailed Mr Xu and said: "Warm greetings. ... You have confirmed in the meeting and subsequently in the late evening that SEPCO II would send a simple letter of withdrawal of suspension letter by J4" which is yet to be received. In case I do not receive the same immediately I may have to refer the letter to the departments concerned. [The Respondent] had many*

occasions to issue such letters to SEPCO II several times but always had cooperated to ensure that your site team perform. "(underlining added)

230. This email was effectively saying that the parties have resolved this dispute and the Claimant has agreed to withdraw with the formal notice issued in this case. The Respondent had other opportunities to give the Claimant formal notices but the Respondent always co-operated with the Claimant to ensure performance of the work and have not issued formal notices. Mr Rao is effectively asking, why doesn't the Claimant also adopt the same co-operative approach of not issuing formal notices so that together the parties can resolve any differences that might arise. It is an invitation to the Claimant by the Respondent to do what the Respondent has been doing. The Claimant accepted the invitation. There were no formal contractual notices subsequently issued by the Claimant. This email having regard to the context in which it was sent and what was said at the previous meeting, amounts to a written representation by the Respondent to the Claimant that it has not, and does not intend to strictly rely upon the formal notice provisions and would prefer that the Claimant also adopt the same more cooperative approach and not issue formal notices with legal submissions in future.

231. The Claimant by email dated 29 March 2012' acceded to the Respondent's request and said: "On the payment problem, you introduced that $1266000 and $11450000 for the L/C has been established, and you promised opened a L/C of $32000000 before March 25th. In view of our friendly cooperation. We give up to suspend supply and work according to issuing notification suspension of certain supply and work on March 7th ..." (underlining added). This email in response tacitly, if not expressly,

accepts the Respondent's invitation to adopt a co-operative approach rather than a strict one of issuing and relying on formal notices and serving written submissions.

232. Third, the co-operative approach was evident and reinforced when the Respondent granted the Claimant an extension of time at the November 2012 Jinan Meeting. The Respondent did not raise or suggest that the absence of contractual notices was a barrier to any extension of time for the Milestones for Units 1, 2 and 3.

233. Fourth, there were numerous meetings and correspondence with the Claimant about delay and the Claimant's claims for additional money. Consistent with the Respondent's request, the Respondent did not generally raise the contractual notice provisions with the Claimant. Mr Rao gave evidence that confirmed that during his time as managing director (from commencement to the Jinan meeting) it was the "mutual wish" of the parties "that difficulties that arose should be resolved informally by discussion and agreement." The Claimant acted to its detriment by not putting in formal notices as required by the contracts."

(Underlining is ours)

39. We note that the Appellant has strongly relied on Article 25.5 of the CWEETC Agreement and stated that the terms of the contract do not envisage at any occasion for waiver given the specific and unambiguous "No Waiver" clause. Moreover, it was submitted that the said "No Waiver" clause could only have been varied/amended/modified solely in accordance with Article 25.5.3 of the CWEETC Agreement which postulates the twin condition of the same being in writing and being signed

by both parties. These twin conditions having not been met, there is no question of variation of the "No Waiver" clause by conduct or orally.

40. Our attention was further drawn to the English law principle as laid down by the Supreme Court of the United Kingdom in the case of ***Rock Advertising Ltd. v. MWB Business Exchange Centres Ltd.***[10] where Lord Sumption, in the majority opinion, had established that the 'No Oral Modification Clause' in a contract shall be interpreted strictly and parties to the contract cannot waive the 'No Oral Modification Clause' impliedly by making an oral modification to the terms of the contract. Any amendment arising out of the contract, as well as where parties seek to remove the 'No Oral Modification Clause' from the contract, shall strictly be in writing. In effect, the majority held that the parties can exercise their party autonomy to the extent they have allowed themselves in the contract. However, Lord Briggs, while concurring with Lord Sumption to some extent, provided another school of thought. In the minority opinion, he concurred that parties through an oral modification cannot implicitly waive the 'No Oral Modification Clause'. However, he opined that parties can waive the 'No Oral Modification clause' orally by acknowledging the same in the oral amendment. The relevant paragraphs of the judgement are reproduced below:

[10] [2016] UKSC 24

"16. The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see Actionstrength Ltd v International Glass Engineering InGl En SpA [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker).

23. This basic concept, that parties to a contract have complete freedom by further agreement to "unbind" themselves as to their future conduct, is in principle applicable not merely to their substantive mutual

obligations, but also to any procedural restraints upon which they may agree, including restraints as to how they may vary their existing contractual relationship. It is therefore fully applicable to the constraint upon their future conduct imposed by a NOM clause. No-one doubts that parties to a contract containing a NOM clause are at liberty thereafter to remove it from their bargain, temporarily or permanently, by a compliant written variation, following which it will not inhibit them from agreeing further variations purely orally.

24. The critical questions for present purposes are, first: whether the parties can agree to remove a NOM clause from their bargain orally and, second: whether, if so, such an agreement will be implied where they agree orally upon a variation of the substance of their relationship (which the NOM clause would require to be in writing) without saying anything at all about the NOM clause. Must they be taken so to have agreed by the very fact that they have made the substantive variation orally? Lord Sumption would answer the first question in the negative, so that, for him, the second question would not arise. For the reasons which follow, I would answer the first question in the affirmative, but not (generally at least) the second. The outcome on the present facts is the same. In this case the alleged oral agreement to vary the Licence said nothing whatsoever about the NOM clause (of which both Mr Idehen and Ms Evans were probably entirely unaware), and I would not treat it as having been done away with by necessary implication. The result is that their alleged agreement as to the terms of a variation had no immediately binding force, any more than an agreement made subject to contract. This will probably be the outcome on any comparable or likely fact-set since, leaving aside

emergencies, once the parties focus on the obstacle presented by the NOM clause, they would almost certainly remove it by a simple written variation, or indeed make the whole of the substantive variation itself in writing. "

41. Strictly looking at the express terms of the Agreement between the parties which forbids waiver or any oral modification of the terms or modification by conduct of the self-same terms, we are taken aback to note the finding of the Tribunal as arrived at in Paragraph 238 of the Arbitral Award. The same is reproduced hereinbelow:

"238. The Tribunal finds that an equitable estoppel arose in March 2012 because the Respondent by its words in the email dated 18 March 2012, having regard to the context in which it was sent, expressly and by its conduct represented that the formal notice provisions in the Agreements were not, and would not be, strictly relied on by it and encouraged and invited the Claimant to adopt the same co-operative approach and to not issue formal notice of claims. The Tribunal is satisfied that the Claimant has thereafter, to the knowledge of the Respondent acted to its detriment by relying on the representation and Respondent's conduct, by not issuing formal notices. An estoppel arises because there is evidence of reliance by inference drawn from the terms of the Claimant's reply email dated 29 March 2012 emphasised above, from the evidence of Mr.Xu in relation to his earlier discussions with Mr.Rao and from the reaffirmation at the November 2012 Jinan Meeting. It would be unjust and inequitable having regard to all the circumstances, including the inconsistency arising out of the benefits obtained by the Respondent in the CERC proceedings, to allow

> *the Respondent to deny a claim because the Claimant, to the knowledge of the Respondent, followed a co-operative approach as a result of the Respondent's invitation to the Claimant to do so in March 2012.*"
>
> *(Underlining is ours)*

42. The Tribunal, therefore in conclusion, if we may attempt to sum up, held that there was waiver "by conduct" of the Appellant against the mandatory condition precedent and the same attracted the principle of estoppel binding the parties.

43. Let us refer to certain Sections of Indian Contract Act, 1872 for a clarificatory purpose. Section 62 stipulates that "*If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.*" On the other hand, Section 63 of the Indian Contract Act provides that "*Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.*" We'd like to emphasise on the word "agree" used in Section 62 of the Indian Contract Act. For any alteration to the terms of the contract, there must be an agreement – or *consensus ad idem* between the parties to do the same. The intention of the parties to alter the terms of the contract has to be forthcoming, evident and unambiguous. It is to be noted that in Section 63 of the Indian Contract Act, a principle of English Law has been codified into the law which provides for

dispensation of a promise either in part or in whole without any consideration therefore. This proposition which finds its origin in English Law has been frowned upon by the superior Courts in India as will be discussed hereinafter.

44. In ***JagadBandhu Chatterjee v. Nilima Rani*** [11], the Supreme Court held:

> *"5. In India the general principle with regard to waiver of contractual obligation is to be found in Section 63 of the Contract Act. Under that section it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be necessary to constitute waiver. This Court has already laid down in WamanShriniwasKini v. RatilalBhagwandas& Co. [WamanShriniwasKini v. RatilalBhagwandas& Co., 1959 Supp (2) SCR 217 : AIR 1959 SC 689] , SCR p. 226 that: (AIR p. 694, para 13)*
>
> *'13. … waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right.'*
>
> *It is well known that in the law of pre-emption the general principle which can be said to have been uniformly adopted by the Indian courts is that acquiescence in the sale by any positive act amounting to relinquishment of a pre-emptive right has the effect of the forfeiture of such a right. So far*

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[11] (1975) 1 SCC 445

> *as the law of pre-emption is concerned the principle of waiver is based mainly on Mohammedan Jurisprudence. The contention that the waiver of the appellant's right under Section 26-F of the Bengal Tenancy Act must be founded on contract or agreement cannot be acceded to and must be rejected."*

45. In ***P. Dasa Muni Reddy v. P. Appa Rao***[12], the Apex Court dealt with the issue of the principle of waiver to state that every act of waiver has to be a voluntary relinquishment of a right and that the same has to be expressly understood in the same tone and tenor by both the parties mutually. The relevant passage is reproduced hereunder:

> *"13. … Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by*

[12] (1995) 1 SCC 725

one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent."

46. In ***All India Power Engineer Federation v. Sasan Power Ltd.***[13], after taking into consideration the aforementioned judgements, the Supreme Court held:

"21. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. …"

47. In ***Chrisomar Corpn. v. MJR Steels (P) Ltd.***[14], the Supreme Court while approving the Calcutta High Court's view in

[13](2017) 1 SCC 487

[14](2016) 16 SCC 117

Juggilal Kamlapat v. N.V. Internationale Crediet-En-Handels Vereeninging 'Rotterdam'[15]held that:

> *"39. We approve of the said judgment as laying down the correct law on the expression "alter" in Section 62 of the Contract Act. In order that a contract that is altered in material particulars fall under Section 62, it must be clear that the alteration must go to the very root of the original contract and change its essential character, so that the modified contract must be read as doing away with the original contract. If the modified contract has no independent contractual force, in that it has no meaning and content separately from and independently of the original contract, it is clear that there is no new contract which comes into being. The original terms continue to be part of the modified contract except to the extent that they are inconsistent with the modifications made."*

48. Now, the relevant question is whether the parties intended to agree to alter the terms of the contract with regards to the condition of issuance of notices, waiver and the no oral modification clause.

49. However, before we proceed, it will do us good to remember in words which have since become classic, Lord Wright in ***Hillas & Co. Ltd. v. Arcos Ltd.***[16] prophetically foresaw the perils of a court of law misconstruing the correspondences of business by divorcing them from their true meaning and being susceptible

[15]1952 SCC OnLine Cal 250
[16]1932 All ER Rep 494 (HL)

to the pitfall of rewriting of a business contract. Lord Wright has stated:

> *"… Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verbaitasuntintelligendaut res magisvaleatquampereat. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except insofar as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract."*

50. In this respect, it is also relevant to refer to paragraph 16 in the case of ***MMTC Ltd. v. Vedanta Ltd.***[17], which reads thus:

> *"16. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is*

[17] (2019) 4 SCC 163

within the arbitrator's jurisdiction to consider the same. [See McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]; Pure Helium India (P) Ltd. v. ONGC [Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593] and D.D. Sharma v. Union of India [D.D. Sharma v. Union of India, (2004) 5 SCC 325].]"

51. In our opinion, the entire finding of the Arbitral Tribunal is based on the premise that the Parties have made some reference to adopting a "cooperative approach" when it comes to issuing notices. Let us examine the correctness of this finding while being fully aware, that neither under Section 34 nor under Section 37 of the Arbitration Act, this Court is entitled to re-appreciate the evidence. However, while this Court's hands are tied in re-appreciating the evidence, the Court does have the power to examine the evidence on record to see whether the Tribunal has arrived at a finding based on 'no evidence' and 'ignorance of vital evidence'.

52. Having gone through the evidence on record pertaining to the events that transpired at the Meetings of both March, 2010 and March, 2012, this Court is unable to find any substance, evident or unambiguous conduct whether by words or manner, which unequivocally indicates that the parties intended to completely forgo the condition of issuance of notices.

53. We note, had that been the case, neither of the parties would have issued any notices nor attempted to vary the terms of the

Agreement in line with Article 25.5 of the CWEETC Agreement for the remaining duration of their relationship. Tellingly, however, the same is not true. Our attention has been drawn to numerous documents on record before the Tribunal i.e.:

i. Notice issued by the present Respondent under Clause 6.1.4.2(iii) dated 19.12.2013 pertaining to payment due.

ii. Notice issued by the present Appellant under Section 6.1.5 of the amended CWEETC Agreement dated 10.6.2013 rejecting the RRT Test for Unit 1.

iii. Notice issued by the present Appellant under Section 7.5 of the amended CWEETC Agreement dated 18.12.2013 pertaining to de-scope of the balance works in the O&M building, etc.

iv. Fourth Amendment of the CWEETC Agreement dated 4.4.2013 which was signed by both parties. (The Fourth Amendment of the CWEETC Agreement dated 4.4.2013, signed by both the parties pertained to an agreement for Transfer Tower No. 2. The Amendment was in pursuance of Clause 4.2.8 of the CWEETC Agreement wherein the procedure for amendment of the contract price was laid out. The parties specifically agreed that all the other terms and conditions of the Agreement, together with all rights and obligations of both the parties shall continue to

remain in force and shall continue to be binding on the Parties in Clause 6.2 of the Amendment)

54. The aforementioned records reveal that the Respondent had agreed to withdraw its letter of suspension by 14.3.2012, but the same was not withdrawn on 14.3.2012 nor even by the email dated 18.3.2012 of the Appellant. It was withdrawn only on 29.3.2012 when the present Appellant had established a Letter of Credit (L/C) of $1,266,000 and $11,450,000. It was submitted that the withdrawal of the suspension letter by the Respondent was on the basis of positive actions taken by the Appellant towards making outstanding payments. Pursuant to which the Respondent was obligated to withdraw the suspension, and not on the basis of its reliance on any purported representation made by the present Appellant in its email dated 18.3.2012 to waive any notice provisions.

55. Furthermore, in light of the terms of the agreement which explicitly bars waiver or variation variation/modification by conduct or orally without satisfying the twin conditions postulated therein - we are unable to accept that the Tribunal could have arrived at its conclusion of waiver and estoppel in the manner in which it did.

56. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to shock the conscience of the Court where the Arbitral Tribunal has failed to act in terms of the contract or

has ignored the specific terms of a contract. However, a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a contract, while adjudicating a dispute. An error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.

57. In ***PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust***[18], the Supreme Court referred to and relied upon ***Ssangyong Engg. & Construction*** (supra) and observed as follows:

> *"85. As such, as held by this Court in SsangyongEngg. & Construction [SsangyongEngg.& Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category."*

[18] (2018) 18 SCC 716

58. In ***PSA Sical Terminals*** (supra), the Apex Court has clarified that the role of the arbitrator was to arbitrate within the terms of the contract. He has no power apart from what the parties had given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction. The Hon'ble Supreme Court in fact referred to and relied upon its earlier judgment in ***Army Welfare Housing Organisation v. Sumangal Services (P) Ltd***.[19] wherein it was held that:

> *"43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debitojustitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject matter of reference."*

59. This view was also taken by the Hon'ble Supreme Court in ***Satyanarayana Construction Co. v. Union of India***[20], and more recently by the Hon'ble Supreme Court in ***Indian Oil Corporation Limited v. Shree Ganesh Petroleum Rajgurunagar***[21].

60. The case in hand, in our opinion is not a situation where the Tribunal has merely misinterpreted the terms of the contract in a certain way, instead, the Tribunal has chosen to completely

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[19](2004) 9 SCC 619
[20](2011) 15 SCC 101
[21](2012) 1 SCC 463

ignore the existing mandatory terms of the contract. In doing so, the Tribunal has effectively rewritten the contract; altering its very nature which it is not permitted to do for it is a creature of the same contract. Furthermore, as the law stands today, it is the exclusive domain of the arbitrator to interpret the contractual provisions or construe the facts of the case in a certain way. However, while arriving at such a decision, the arbitrator is not permitted to travel beyond the four-corner of the contract. An Arbitrator is akin to an umpire in the game of cricket which is equally bound by the rules of the game as is applicable to the players and he cannot do justice to the losing team, signal 'out' when the batter has clearly hit the ball beyond the boundary limit of the ground; going against the game itself.

61. In a commercial contract, the parties do have the liberty to unbind themselves of any obligation that the contract bestows upon them. In the present contracts as well, while there is a 'No Oral Modification clause' and a 'No waiver clause', there is also a provision which prescribes the manner and method for amendment of any of the clauses of the contract. Issuance of notice, being a condition precedent, could not have been waived without the parties following the manner and method for amending the relevant clauses which envisage the issuance of notices as being a condition precedent as per Clause 25.5.3 of the CWEETC Agreement and Clause 4.2.8 of the CWEETC

Agreement, both of which were followed at the time of the 4th Amendment of the CWEETC on 4.4.2013.

ii. WHETHER THE PARTIES CAN CLAIM ESTOPPEL IN THE GIVEN CIRCUMSTANCES?

62. The rule of estoppel is based on the maxim: "***Alleganscontraria non estaudiendus***" meaning a person alleging contradictory facts should not be heard. It is based on the principle that it would be most inequitable and unjust that if one person, by a representation or by conduct amounting to a representation has induced another to act, the person who made the representation should not be allowed to deny or repudiate the effect of his former statements, to the loss and injury of the person who acted on it. Waiver is either a form of estoppel or an election.

63. The doctrine of estoppel by conduct means that 'where one by words or conduct wilfully causes another to believe in the existence of certain state of things and induces him to act on that belief, or to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at that time.' The fundamental requirement as to estoppel by conduct is that the estoppel must concern an existing state of facts. The second requirement of an estoppel by conduct is that it should be unambiguous. Finally, an estoppel cannot be relied on if the result of giving effect to it would be something that is prohibited by law. Estoppel is only

a rule of evidence. One cannot claim the foundation of an action upon estoppel. Estoppel is important as a step towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.

64. Moreover, it needs to be understood that the rule of estoppel is a doctrine based on fairness. It postulates the exclusion of the truth of the matter. All for the sake of fairness. The Supreme Court in ***Pratima Chowdhury v. Kalpana Mukherjee,***[22] identified four salient preconditions before invoking the rule of estoppel which are as follows:

(i) Firstly, one party should make a factual representation to the other party.

(ii) Secondly, the other party should accept and rely upon the aforesaid factual representation.

(iii) Thirdly, having relied on the aforesaid factual representation, the second party should alter his position.

(iv) Fourthly, the instant altering of position, should be such, that it would be iniquitous to require him to revert back to the original position.

Therefore, the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position in such manner that it would be unfair to restore the initial position.

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[22] (2013) 5 SCC 196

65. The Supreme Court in ***B.L. Sreedhar v. K.M. Munireddy***[23], Arijit Pasayat J. captured the notional and statutory essence of the doctrine of estoppel:

> *"13. Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Indian Evidence Act, 1872 (in short "the Evidence Act") which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. (See Sunderabai v. Devaji Shankar Deshpande [(1952) 2 SCC 92 : AIR 1954 SC 82] .)*
>
> *30. If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that which they otherwise might have abstained from, he cannot question the legality of the act he had sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."*

66. In ***Provash Chandra Dalui v. Biswanath Banerjee*** (supra), the Supreme Court dealt with the issue succinctly and has observed as follows :

> *"24. The essential element of waiver is that there must be a voluntary and intentional relinquishment*

[23] (2019) 1 SCC 355

of a known right or such conduct as warrants the inference of the relinquishment of such right. It means the forsaking the assertion of a right at the proper opportunity. The first respondent filed suit at the proper opportunity after the land was transferred to him, and no covenant to treat the appellants as thika tenants could be shown to have run with the land. Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estopped. An estoppel may result though the party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in question. Nothing of the kind could be proved in this case to estop the first respondent."

67. A representation made by one party to another to waive of contractual provisions would, therefore, be precedent to an estoppel arising against the party making such a representation. In the case in hand, the Tribunal has gone beyond the four-corner of the contract and completely ignored the contractual provisions. The contract between the parties has a "no waiver clause" apart from having a 'No Oral Modification Clause'. It also contains within it, a system or procedure that can be resorted to in case any amendment to the contract has to be carried out. As the parties had followed the procedure laid down in Clause 25.5.3 after the November, 2012

meeting, they cannot be said to have forgone the procedure for amendment of contract at any point of time. The parties have, therefore, very evidently not elected to waive of the requirement for notices at any point of time. As it flows, if there is no waiver, there can be no estoppel in the present case.

68. Even if we assume that there had been a "mutual" waiver of the condition precedent to issue notices, even then, as a natural corollary, both the parties would be equally entitled to receive the benefit of the same principle in the adjudication of their claims by the Tribunal. However, our attention was drawn to the following Paragraphs of the Arbitral Award dealing with the various issues it had framed:

> *"239. Furthermore, the provisions of the Agreement do not prevent, once the Agreement has been terminated, a party from bringing a claim for damages for a breach of the Agreement. The right of the Contractor under Section 7.3.1(iii) to an extension of time where there has been delay in the achievement of a Milestone Date, a PGT or the Guaranteed Date of Completion of the Power Station by reason of any breach of the Agreement by the Owner, does not prevent the Contractor from bringing a claim for damages for breach of contract.*
> *…374. <u>As the condition precedent has not been satisfied, the Claimant is not entitled to maintain this claim under the express terms of the Agreement.</u>*
> *…375. The Claimant brings an alternative claim for damages for breaches of the implied terms of the Agreement which are not subject to a condition precedent requiring notice.*

…505. As this claim arose after March 2012 (the time of events giving rise to the Respondent being estopped from insisting on compliance with the notice provisions) the Tribunal's ruling that the notice provisions amount to a condition precedent, does not apply to this claim. (Grid Synchronization (Issue no.6))

…549. As this claim arose after March 2012 (the time of events giving rise to the Respondent being estopped from insisting on compliance with the notice provisions) the Tribunal's ruling that the notice provisions amount to a condition precedent, does not apply to this claim. (Fuel Oil (Issue no.7)

…610. As this claim arose after March 2012 (the events giving rise to the Respondent being estopped from insisting on compliance with the notice provisions) the Tribunal's ruling that the notice provisions amount to a condition precedent, does not apply to this claim. (Coal (Issue no.8))

…752. The Respondent asserted that as no application for an extension of time, an adjustment of the Contract Price and/or a Variation has been made, the claim is barred for lack of notice, As noted above, as this claim relates to events after March 2012, the Respondent is estopped from relying on an obligation to give notice.

…1348. The Respondent also submits that even if the requisite notice was not provided, the Respondent, is nonetheless entitled, to damages at Common Law for the Claimant's breach of contractual warranties. The Respondent's R-173 claims are asserted on the basis of Section 10, or in the alternative, as a claim for damages for breach of Warranty by the Claimant under Common Law. The Tribunal does not accept that the Respondent can obtain damages at Common Law equivalent to and as an alternative to its Defect claims under Section

10. The Respondent in effect submits that, had the contract not been terminated for the Respondent's breach, it could not claim a Defect if the requisite notice had not been given, but as the contract has been terminated, the Claimant has an obligation to pay equivalent monetary compensation to the Respondent. It is almost equivalent to saying that on account of the Respondent's breach, the Respondent is no longer required to prove the requisite notice in order to be paid damages or monetary compensation on account of the Claimant's breach of warranty, The Respondent would be obtaining a benefit as a result of its own breach of contract. Nevertheless, the parties have both proceeded on the apparent common assumption that claims could be brought on account of rights under the contract which accrued before termination could be enforced in these proceedings.

…1400. This alleged Defect identifies that a backup mechanical hydraulic governing system was not provided with the Turbine Generator.

…1401. The EPC Technical Specification (Book 1, Part B, Vol II, Section BE, subsection 2.1, clause 1.2) states that "The turbine generator shall be equipped with a fault tolerant microprocessor-based digital electro-hydraulic control (DEHC) governing system of proven design and operational capability backed-up by mechanical hydraulic governing system...."

Respondent's position

…1402. The failure to provide a backup mechanical hydraulic governor for the Turbine Generator is a Defect as seen in the EPC Technical Specifications where the requirement was clearly outlined.

Claimant's position

…1403. This alleged Defect was not notified.

Tribunal's analysis

…1404. A digital electro hydraulic turbine governing system may be very reliable, state of the art and does not require a hydraulic back up system. But that is what was agreed to be supplied and it is no answer to say that it is not needed for the operation of the Power Station.

…1405. It is an omission in the Works but there is no liability as the Respondent did not give the requisite notification of the alleged Defect. There is no liability unless a Defect is shown to exist in the requisite period and that contractual notification of the Defect was given to the Claimant during the relevant warranty period. These two elements are essential regardless of the nature of the alleged Defect.

…1406. The Schedules to the EPC Technical Specification state that the approved manufacturers for motorised valve actuators are Rotork, Auma and SIPOS. In contravention of the EPCTechnical Specification, the motorised valve actuators that the Claimant provided are not from Rotork, Auma or SIPOS. The Claimant installed valve actuators from Geartork, which is not an approved vendor.I167 At least 85 actuators have been replaced and the Respondent claims a further 205 actuators will be replaced.

Respondent's position

…1407. The Respondent submits that as the alleged Defect relates to a deviation and /or omission from the Works, no notice is required for this Defect as the Claimant must know what it constructed.

Claimant's position

…1408. This alleged Defect was not notified. There is no liability unless a Defect is shown to exist in the requisite period and contractual notification was given to the Claimant during the relevant warranty

period. These two elements are essential regardless of the nature of the alleged Defect.
Tribunal's analysis
…1409. It is an omission in the Works and a Defect but there is no liability as the Respondent did not give the requisite notification of the alleged Defect. There is no liability unless a Defect is shown to exist in the requisite period and contractual notification was given to the Claimant during the relevant warranty period. These two elements are essential regardless of the nature of the alleged Defect.
1410. This claim is dismissed."

(underlining is ours)

69. The Appellant's case is that the Tribunal has applied a different standard for the Parties which has had a significant impact on the overall financial result as most of the Appellant's counter claims for defects have been rejected on a threshold basis and the Appellant has failed to serve notice even though all these claims for defects arose after March, 2012 (i.e. the period when the Tribunal vocalised that the contractual requirement for issuance of notices was waived by the parties). In response, the Respondent contended that the Tribunal in the impugned Award did not intend to mean that the parties had meant to waive of all contractual requirements for issuances of notices, the parties had only agreed to waive of only a "certain kind" of notice i.e. the contractual condition precedent for issuance of notices to the extent of the issue of delays.

70. We find this difference is artificial, ambiguous, ill-conceived, and contrary to records. The Tribunal has nowhere clarified that the waiver of requirement of issuance of notices was limited to certain kinds of notices and not to the entire contract. There is no resonance of the same anywhere in the impugned Award and the Respondent has also been unable to pin point any such intention of the Tribunal. Furthermore, it is pertinent to mention that the Tribunal's finding on waiver of the notice provisions is based on the Respondent's withdrawal of its notice for suspension of works on account of the Appellant's alleged failure to make payments in respect of invoices and did not relate to claims pertaining to delays.

71. A bare perusal of the abovementioned facts and principles of law, *ex facie*, makes it evident that issuance of notice was a condition precedent. There was a 'No Waiver clause' in the agreement between the parties. The said clause, as other clauses of the agreement, could only be amended upon following the procedure laid down in Clause 25.5.3 of the Agreement. The said procedure having not been followed, the conduct of the parties also does not show that there was an intention to waive off the requirement of issuance of notice as they had adhered to the requirement on multiple occasions thereafter. Therefore, no reasonable man could have come to the conclusion that the Appellant had by its conduct attempted

to waive of the requirement of issuance of notice and, therefore, it was estopped from claiming otherwise. The said finding in this regard arrived at by the Tribunal, therefore, shocks the conscience of the Court. We are aware that if two views are possible on an interpretation of a contractual clause, there would not be any justification in interfering with the Award specially when the view by the Tribunal so taken is a possible or plausible one, however, in the present facts of the case, we have no doubt that the view taken by the Tribunal is neither possible nor plausible.

72. Moreover, it is but discernible that a different standard for the two parties has, in fact, been adopted. Despite holding that parties had given a go by to the formal notice provisions in March 2012, most of the present Appellant's counter claims for defects, amounting to more than Rs.150 crores (approx.) have been rejected on preliminary basis that the present Appellant had failed to serve notices even though all such claims for defects arose after March 2012. This court cannot turn a blind eye to such a glaring example of unequal treatment which would shock the conscience of any court. Thus, it is quite clear that the Tribunal has not adopted a consistent/equal approach insofar as this issue of notice provisions is concerned.

B. WHETHER THE TRIBUNAL BASED ITS ANALYSIS AND FINDINGS ON MISTAKEN FACTS?

73. It was the Respondent's claim that the Appellant did not supply specific quality of Coal as agreed between the parties and, therefore, it was in breach of the CWEETC Agreement. In this regard, we consider it important to reproduce Paragraph 606 of the Arbitral Award.

> *"606. In relation to the quality of coal, the Respondent agreed that, initially, there were two parameters relating to coal, Design Coal and Range of Coal.338 Further that they served two distinct purposes.339 However, the Respondent submits that the parties agreed to amend the parameters for Design Coal and Range of Coal, along with introducing a third parameter "Worst Coal", which was recorded in the Respondent's letter to the Claimant dated 28 February 2009. In that letter, the Respondent confirmed that "all the equipment shall be designed / sized to handle the worst coal (GCV 3000 Kcal/Kg), without restriction on the steam and power output of the unit." Further, the amended parameters were summarised as follows:*

Quality characteristic(as received)	Design Coal	Range of Coal
Moisture	11.9%	9 —12%
Ash content	41.6%	35 — 45%
Gross Calorific value (kCal/kg)	3,300	3,000 — 3,300

74. The table affixed at the end has been wrongly recorded. A reference was made to the citation affixed to the Table in the Arbitral Award which refers to "Respondent's Opening Para 113 (O/5/39) and Respondent's PHR Para 246 (R/11/65-66)" made available to us in the Convenience Compilation. The Range of Coal as regards the Moisture Quality is clearly stipulated to be 9-15% but has been recorded as 9-12% by the Tribunal in the Arbitral Award.

75. Basing its analysis and finding on an erroneous figure, despite referring to the correct document, led to an incorrect finding as the expert's analysis on the total moisture of the coal supplied (At Paragraph 649 of the Arbitral Award) is between 13.7% and 14.6% and the mean value being 13.8% which is less than the agreed upon 15% moisture. Although the Appellant's case was always that the Range of Coal had been increased to 7-15% and the quality of coal, therefore, supplied during the concerned period was within that range, the Tribunal applied the unamended specifications of 9-12% to conclude against the Appellant. This also establishes the dangerous trend of the Tribunal in ignoring material facts to hold the findings against the Appellant, as otherwise there is no reason for the Tribunal not to have considered the range of moisture content to be 7-15% and not 9-12% or to wrongly quote the submissions despite acknowledging the amendment. While the original Agreements provided for a range of moisture content to be 9-

12% as the Tribunal also held; it was subsequently modified and amended to 7-15% as the range of coal for moisture and 16.5% as the worst coal having the least calorific value. The Tribunal has grossly erred in concluding that the delay caused due to mill choking and bunker chuting is attributable to the Appellant due to higher moisture content in the range of coal as agreed between the parties. This finding ought to be set aside and the same would also inadvertently have an effect on the number of days of liquidated damages that the Parties would be entitled to recover for.

C. WHETHER THE TRIBUNAL'SINTERPRETATION OF THE CONTRACTUAL PROVISIONS SHOCKS THE CONSCIENCE OF THE COURT?

i. IN ASCERTAINING THAT THE RESPONDENT WAS ENTITLED TO DELAY RELATED DAMAGES FOR PROLONGATION AND OR DISRUPTION COSTS GIVEN THE EXPRESS TERMS OF THE CONTRACT.

76. For the sake of convenience, the relevant Clauses of the CWEETC Agreement necessary to be referred to for adjudication of this issue are reproduced hereinbelow:

> ***"16.4 Payment for termination of Works under Section 16.1 and Section 16.3***
>
> *16.4.1 If the Owner terminates the carrying out of the Works pursuant to Section 16.1. or the Civil Contractor terminates the Works under Section 16.3 then subject to compliance by the Contractor with its obligations under Section*

16.1.2, the Owner shall within forty-five (45) days of receipt by the Owner of the invoice therefor, pay to the Civil Contractor, as the Civil Contractor's sole and exclusive remedy in respect of such termination, the aggregate of the following amounts (without duplication), which exceeds such amounts as have been already paid to the Civil Contractor for the performance of Works until the date of payment under this Section 16.4:

(i) such part of the Contract Price as may properly be apportioned to the Works properly performed till the date of termination,

(ii) any out-of-pocket expenses reasonably incurred by the Civil Contractor directly as a result of such termination;

(iii) reasonable and unavoidable cancellation charges imposed by the Subcontractors as a result of termination of their Subcontracts following termination by the Owner pursuant to Section 16.1;

(iv) the Costs incurred by the Civil Contractor in protecting the Works and leaving the Site in a safe condition;

(v) the Costs incurred by the Civil Contractor in the removal of the Constructional Plant from the Site and in the repatriation of any of the personnel of the Civil Contractor and Subcontractors; and

(vi) the actual and reasonable costs of any Materials which have been dispatched or have been delivered to the Site, subject to the Civil Contractor providing the Owner with satisfactory documentary evidence of the same.

16.4.2 The Civil Contractor's right to payment of the amounts specified in Section 16.4.1 is subject to the condition precedent that all Subcontractors shall have been paid in full for all amounts owing to them through the date of payment, and the Civil Contractor shall execute and deliver all such papers as the Owner reasonably requires for the purpose of assigning to and vesting in the Owner all rights, title and interests of the Civil Contractor in and to all Subcontract relating to the Works with respect to which payment has been made free of Il hens. charges and encumbrances of any sort.

16.4.3 Upon any termination pursuant to Section 16.1 or Section 16.3, the Performance Bond shall be released to the Civil Contractor. Within forty five (45) days of termination the Parties shall estimate the payments to be made to the Civil Contractor in accordance with the provisions of this Agreement. If pursuant to such estimation any amounts are owed to the Civil Contractor then the Advance Payment Bond shall be released to the Civil Contractor by the Owner.

22.1 Accounting Records

The Civil Contractor shall maintain full, complete and detailed fiscal and other records, books and accounts pertaining to the Works in accordance with Indian generally accepted accounting principles and in the English language. The Owner shall have the right to obtain independent third parties (such third party being mutually agreed to between the Parties) to inspect and audit, during business hours, all of such records, which may be required for verification of extra claims lodged

by the Civil Contractor, if in dispute. Such records, books and accounts shall be preserved by the Civil Contractor for a period of three (3) years after Final Acceptance of the Power Station at no additional cost to the Owner."

(underlining is ours)

77. When the parties entered into an agreement in 2008, only three units were envisioned. In May 2010, a fourth unit was brought within the purview of the agreements. However, all the works stood suspended in the said Unit 4 by the Respondent on 15.8.2011. On 27.4.2017, in its Statement of Claims at Paragraph 576, the present Respondent made a claim for CNY 248,833,587 as the cost of purchased equipment and abortive and/or additional work caused by the suspension of Unit 4.

78. In its Statement of Defence and Counter Claims, dated 3.9.2017 at Paragraph 18.3.11, the Appellant puts the Respondent to strict proof of the alleged costs of all the manufactured equipment as claimed by it. In the Reply to the Statement of Defence and Counter Claims, the Respondent *vide* Paragraph 515 has stated that the Respondent would provide particulars of the loss in due course.

79. However, interestingly, no such particulars were provided and the Appellant was constrained to move an application for production of documents which were relevant for ascertaining the cost of purchased equipment, storage and maintenance costs of the equipment that were purportedly manufactured

but not delivered for Unit 4. Despite having undertaken to provide these documents, the Respondent failed to honour the promise and stated that instead of calculating its claim under this head as per the actual cost, they would use the billing breakup (hereinafter referred to as "BBU") whereby no documents or material would be required to be produced. The Appellant objected to the same stating that the BBU are documents which are unilaterally submitted by the Respondent and hence not verifiable. It was further contended by the Appellant that the Respondent should provide proof that the equipment for which it claims for prolongation costs was "actually manufactured" and had been in storage for the last seven years, especially considering no such claim or intimation was made to the Appellant prior to filing of the Statement of Claim.

80. In this regard, we consider it relevant to refer to the following paragraphs of the Arbitral Award.

> *"…160. The Tribunal does not accept the Claimant's submission that as a result of such extension of time being granted to the Claimant, the Claimant, "without more, ... is also entitled to prolongation costs in the sum of ... (approximately USD 11 million and) it can also claim what it says are its direct costs in the sum of 1NR 67.6 Mn, CNY 17.5 Mn and USD 480,000." <u>The Claimant is not entitled to its prolongation costs as of right</u>*
>
> *…161. It was a compromise agreement to address the risk of delay liquidated damages and did*

not identify which of the pre-existing claims for delay had been granted, or the extent to which any such individual claim may have been granted. If the Claimant were to subsequently pursue claims for prolongation costs caused by particular events prior to the November 2012 Jinan meeting, the Claimant bore the onus of establishing all elements justifying a contractual entitlement to a claim for prolongation costs.

…162. Further, insofar as those pre-existing claims relate to delay events that occurred both before and after the Jinan Meeting, it is necessary to consider whether the Claimant is also entitled to claim for events that "were known at the time of the meeting even if the effect of the event giving rise to the claim continued after November 2012". The only such claim is for an extension of time of 6 days after November 2012 for an alleged change in law.

…163. The Tribunal agrees with the Respondent that as the alleged changes in the applicable law occurred in 2009, some 3 years before the November 2012 Jinan meeting, the extent of delay arising out of any such changes were, or should have been, taken into account. The Tribunal agrees that therefore no such claim for delay is possible now.

Findings

…164. In relation to the questions posed by Issue I, the Tribunal finds that the effect of the November 2012 Jinan Agreement regarding:

(a) the agreed Milestone Dates for completion of the project, was that (i) SEPCO was granted an extension of time, pursuant to the terms of the Contracts, and (ii) the original Milestone dates were not replaced with Replacement Milestone dates.

(b) SEPCO's claims for time prior to this date was that all such were resolved, but it had no effect on, and did not address or resolve, SEPCO's claims for money arising prior to this date.

(c) It did not give rise to any automatic entitlement to prolongation costs. If the Claimant seeks prolongation costs in respect of matters before and after the November 2012 Jinan Agreement, the Claimant is required to establish all of the contractual elements which are required to give rise to an entitlement to prolongation costs, including requisite procedural notices, and the reasons for and length of, any critical delays. "

(underlining is ours)

81. Paragraph 161 of the Arbitral Award unequivocally states that the Claimant bore the onus of establishing all elements justifying a contractual entitlement to a claim for prolongation costs. We may further refer to the following portions of the Arbitral Award keeping Article 22.1 of the CWEETC Agreement in mind. The relevant paras from the arbitral award are as follows;

"806. Part II: Assessment. The Respondent submits that the Claimant has failed to establish what its prolongation costs are. In those circumstances the Respondent submits that Tribunal should not speculate as to the costs but must simply dismiss the claim. However Mr Ellison and Mr Jain "agree with the overall approach followed by"Mr Prudhoe in assessing prolongation. Their disagreement rests on access to all of the documents used by Mr Prudhoe. They have also identified double counting in relation

to the travelling costs and salary for Guondian Shandong staff.

…807. The Claimant relies on Mr Prudhoe's analysis, and contends it should be preferred as his Mandarin fluent assistants audited the Claimant's ledgers and were satisfied that the records contain the costs for the project that are claimed.

…808. Mr Prudhoe explained that the audited financial statements cover many projects and the total costs are confidential. He said that it was not practical to reconcile the costs in the project cost ledgers which were provided with the audited financial statements. Mr Prudhoe was satisfied from the audit that the ledgers as adjusted contain the costs incurred in the project. The Claimant maintains two separate costs accounts for the project, one in respect of the Amended CWEETC Agreement and Onshore Supply Agreement and one in respect of the Offshore Supply Agreement. He revised his assessment to remove the double counting. Mr Prudhoe produced extracts from the Claimant's project cost ledgers of categories of costs which he attached to his first report. Mr Prudhoe has assumed some delays are the responsibility of the Claimant and has excluded those costs. He has prepared daily rates to apply in the windows of time on the basis that the delays may not be agreed.

…809. Mr Prudhoe's Mandarin fluent assistants audited the Claimant's ledgers and are satisfied that the records contains the costs for the project. Mr Ellison did not undertake any such audit and accordingly assessed such items at nil value.

…810. The Tribunal considers that the evidence is sufficient to establish the prolongation costs incurred by the Claimant.

…831. The Respondent has not engaged with this claim at all. The Respondent submits that the Claimant has not established what its prolongation costs are. The claim for prolongation costs fails for lack of evidence and "must simply be dismissed."

…919. There is no dispute that the Claimant is entitled to be paid for the cost of Unit 4 equipment that was delivered or installed. The Respondent accepts that the Claimant is entitled to the "cost of all works completed prior to the date of suspension of the Unit 4 works which it is accepted is August 2011 "and reasonable and unavoidable cancellation charges imposed by sub-contractors as a result of the termination of their subcontracts.

…923. The Claim for damages is made on a costs incurred basis, and in the alternative, on the basis that the Claimant has lost the amount that would have been paid by the Respondent to the Claimant had the work been performed.

…925. This claim was quantified at CNY 248,833,587 and related to 30 items which had been delivered to site but which had not been installed and 30 items that had not been delivered at all. Subsequently, the claim was changed to delete the claim in respect of the 30 items delivered to site. The number of undelivered items of equipment increased from 30 to 41.

926. The Claimant in the course of these proceedings made its claim on the alternative and different basis namely for damages for breach of contract. The Claimant in its PI-IS claimed "the value of the amount for Unit 4 equipment and materials manufactured but not delivered to Site, plusprofit on these elements."739 It was made on the basis that the Claimant should be put back in the position it would have been but for the Respondent's breach of contract. Had the contract been performed,

the Claimant would have received the equipment, supplied it to the Respondent and "would have been paid for the value of the Unit 4 equipment in accordance with the terms of the Offshore Supply Agreement, and have made a profit, assessed at 5% (including overheads)."740 This alternative analysis is only applicable where but for the breach, the equipment would have been supplied and delivered to the Respondent and the Respondent would have paid the Claimant the value of the equipment.

927. The alternative claim is available in a typical case to allow a claimant to recover the benefits that it would have received had the contract been performed. However, in the present situation the parties have agreed in Section 9.3 that neither party shall be liable to the other for any indirect, incidental or consequential damages or anticipated profits whether as a consequence of the negligence of a party or otherwise.

928. The Respondent accepts that any costs incurred by the Claimant are recoverable but submits that the other claim put forward was a false claim and asks that the Tribunal dismiss the claim in its entirety.

929. The Claimant primarily relies on settlement agreements made with each of the suppliers of undelivered Unit 4 equipment in support of both bases upon which it claims damages. The settlement agreements are put forward as a compromise agreement pursuant to the principle in Biggin& Co Ltd v Permanite. [1951] 2 KB 314. In that case,, unlike the present, the party entered into a settlement agreement which compromised its claims.

930. Here the claimant has obtained settlement agreements that are more in the nature of a witness statement in standard form by the Claimant and the supplier. A typical example of thedocument'

records; (i) the original subcontract; (H) the subcontract was performed until it was suspended in August 2011; (iii) thereafter the materials and equipment were stored; (iv) the supplier suffered loss and the parties wish to settle the related matters. The parties agree

(i) they have inspected the equipment and "confirm" the equipment was prepared and manufactured as set out in appendix 1, (ii) the equipment cannot normally be used and the supplier should dispose of the equipment to mitigate the loss and the disposal income is purportedly stated, (iii) the parties agree to settle by the Claimant paying the settled amount to the supplier less the disposal income, after the conclusion of the arbitration; and (iv) the Claimant agrees to pay for the storage charges.

931. As noted by the Respondent, the terms of the settlement agreements do not state or record the actual amount due and owing to the supplier" or payable under the settlement agreement." The Claimant contends that the completion ratio, if endorsed by a decision of the Tribunal, would be the basis on which the suppliers would be paid. The suppliers would be paid no matter what. The settlement agreements were obtained in or around July 2018.

932. Shortly afterwards, when the factual witness statements exchanged, the amount claimed was not claimed as the "amount of account payable" but became "BBU value." This caused the amount claimed to increase from CNY 248,833,587 (page 57 of Mr Prudhoe's First Report {E/15/64}) to CNY 317,072,901 (page 65 of Mr Prudhoe's First Report{E/15/72}). Mr Prudhoe explains in his report the change or development of the assessment of the claim from one of cost incurred by the Claimant including any storage charges,

administration costs and Credit for salvage value, to one of the value of the equipment on the BBU basis cost to the Respondent. The reason for the change was made apparent when he freely admitted in cross examination; "My assessment, in my view, is the proper way, even though it is different to the claim.""

933. The Tribunal rejects the suggestion that a false claim was constructed or put forward. The assessment was undertaken diligently and in an open and transparent manner. The multitude of variations in, and the inconclusiveness of, the settlement agreements however is such that they do not establish a basis on which to assess the claim of the costs incurred by the Claimant including any storage charges and any salvage value in the equipment.

934. The Claimant did prepare an itemised Status List of the undelivered equipment as at 24 October 2011.746 There is no suggestion that this critical document was not accurate. This evidence and the evidence from some of the suppliers when approaches made to those suppliers at the time of the hearing, does establish that the Claimant nonetheless has a liability to third party suppliers for undelivered equipment in respect of which it is entitled to compensation.

…937. The Tribunal finds that the Claimant is entitled to damages on account of costs claimed by third parties for undelivered equipment as a result of the cancellation of Unit 4 calculated as follows:

Equipment manufactured but not delivered; CNY 256,830,000 — 2,100,000 = 254,730,000

Storage charges on equipment; CNY 254,730,000 x 50% = 127,365,000

Plus storage charges g 5%; CNY 127,365,000 x 5% = 6,368,250

Less credit for salvage value; CNY 254,730,000 x 33.3% = 84,825,090
Costs claimed by Third Parties; CNY 254,730,000 + 6,368,250 — 84,825,090 = CNY 176,273,160"

82. Before we advert to our discussion, at the time of oral submissions, the Respondent sought to clarify that the details of the costs along with excerpts of the ledgers were provided to the Appellant and the Tribunal in the form of a Report authored by Mr. Jonathan Prudhoe. In response, the Appellant drew our attention to the following portion of the Quantum Report of Mr. Jonathan Prudhoe dated 20th December, 2018, reproduced hereinbelow:

"16.2.13 On 27 and 28 September 2018, my assistant carried out an audit in Singapore with SEPCO's personnel, Mr. Manoj, on SEPCO's onshore cost accounting system.
…16.2.29 On 15 to 16 November 2018, my assistant carried out an audit at SEPCO's office in Jinan on SEPCO's offshore cost accounting system."

(underlining is ours)

83. Our attention was further drawn to the Respondent's Post-hearing Submissions, especially Paragraph 501, reproduced hereinbelow:

"501. The prolongation costs fall into a number of separate categories, as set out below. The differences between the quantum experts are relatively small, and are set out in the Quantum Joint Statement. In essence Mr Ellison is of the view that he does not

disagree with Mr Prudhoe's approach, but assesses the sums at nil on the basis of (1) Mr McIntyre's views; and (2) an alleged lack of evidence. In relation to point (2), Mr Prudhoe's Mandarin fluent assistants had audited SEPCO's ledgers and are satisfied that the records contain the costs for the projects. Mr Ellison has not undertaken any such audit, and accordingly assessed many items at nil value. SEPCO contends that Mr Prudhoe's assessment is to be preferred."

84. Therefore, the Appellant contends that the only evidence in respect of the Respondent's claims for prolongation costs was the report of Mr. Prudhoe, who had not provided any background documents to the Tribunal or GEL's experts in support of his assessment. He had only perused extracts from the Respondent's project cost ledgers indicating only the categories of costs. The ledgers were not produced in its entirety. Moreover, access to the ledgers was refused on the ground of confidentiality of total costs. It was then contended that Mr. Prudhoe had not even conducted the audit himself, but had relied on an audit conducted by his assistant who was not even called upon to depose in the arbitration proceedings.

85. It is quite perplexing to note that no evidence of prolongation cost has been led or dealt with and the accounts have not been provided by the party who is claiming the cost apart from some ostensible 'Settlement Agreements' entered into with the alleged subcontractors in a standard format; in or around July,

2018. These settlement agreements do not indicate any payment actually having been made or due to the subcontractors except for a promise that should the Respondent recover any money, some payment would be released to the subcontractors. The basis of the these claims is said to have been conducted by Mr. Prudhoe's assistant; who in turn claims to have seen the accounts relevant to making such a claim for prolongation cost. All such assertions fall within the often frowned upon and dangerous realm of "hearsay evidence" which is inadmissible.

86. It is disquieting to note that neither Mr. Prudhoe nor the Tribunal have seen these accounts despite multiple requests by the Appellant to place such documents on record. When Mr. Prudhoe and the Tribunal have both not seen the relevant accounts directly, reliance on the version of some assistant who has not deposed to prove the veracity of the contents of the records turning out to be unreliable. It is settled law that proof of "actual payment" must be pleaded, proved and established unambiguously as has been consistently laid down by the judgments of the Supreme Court[24].

87. Even as per the contractual scheme of Section 16.4, the Respondent would have been entitled to make a claim for Unit-4 equipment and also other prolongation costs insofar as third-

[24] *See* ONGC v. Saw Pipes (2003) 5 SCC 705; Mecamidi S.A. v. FlovelMG Holdings Private Limited, 2021 SCC OnLine Del 9414.

party payments were concerned and to receive payment. Therefore, under Section 16.4.1 only if it had satisfied the condition precedent requiring that all sub-contractors shall be paid in full for all amounts owed to them. The erroneous finding by the Tribunal has enabled the Respondent to receive an award for damages for the Unit 4 equipment (Issue no.12) for a sum of more than Rs.200 Crores (approx.), even though the Respondent has, in fact, admittedly made no payments to the sub-contractors. In effect, the Tribunal has proceeded to award a claim for which "no proof of payment" was produced, the same is a vexing position taken by the Tribunal which cannot be sustained. The Tribunal has ignored the specific terms of the contract which amounts to a jurisdictional error.

88. It is trite to consider the observation made by the Supreme Court in ***Associated Engineering Co. v. Govt. of A.P.***[25] which is reproduced as follows:

> *"21. These four claims are not payable under the contract. The contract does not postulate — in fact it prohibits — payment of any escalation under claim No. III for napa slabs or claim No. VI for extra lead of water or claim No. IX for flattening of canal slopes or claim No. II for escalation in labour charges otherwise than in terms of the formula prescribed by the contract. This conclusion is reached not by construction of the contract but by merely looking at the contract. The umpire travelled totally outside the permissible territory and thus*

[25] (1992) 1 SCC 93

exceeded his jurisdiction in making the award under those claims. This is an error going to the root of his jurisdiction : See JivarajbhaiUjamshiSheth v. ChintamanraoBalaji [(1964) 5 SCR 480 : AIR 1965 SC 214] . We are in complete agreement with Mr Madhava Reddy's submissions on the point.

24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill and Boyd's Commercial Arbitration, 2nd edn., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, 4th edn.,para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

28. In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary. [See the principles stated in Anisminic Ltd. v. Foreign Compensation Commission [(1969) 2 AC 147 : (1969) 1 All ER 208] ; Pearlman v. Keepers and Governors of Harrow School [(1979) 1 QB 56 : (1979) 1 All ER 365] ; Lee v. Showmen's Guild of Great Britain [(1952) 2 QB 239 : (1952) 1 All ER 1175] ; M.L. Sethi v. R.P. Kapur [(1972) 2 SCC 427 : (1973) 1 SCR 697 : AIR 1972 SC 2379] ; Managing Director, J.& K. Handicrafts v. Good Luck Carpets [(1990) 4 SCC 740 : AIR 1990 SC 864] ; State of A.P. v. R.V. Rayanim [(1990) 1 SCC 433 : AIR 1990 SC 626] . See also Mustill and Boyd's Commercial Arbitration, 2nd edn., Halsbury's Laws of England, Vol. II, 4th edn.].

29. The umpire, in our view, acted unreasonably, irrationally and capriciously in ignoring the limits and the clear provisions of the contract. In awarding claims which are totally opposed to the provisions of the contract to which he made specific reference in allowing them, he has misdirected and misconducted himself by manifestly disregarding the limits of his jurisdiction and the bounds of the contract from which he derived his authority thereby acting ultra finescompromissi."

89. The Tribunal, in the present case, also has transgressed its limits by completely ignoring the contractual agreement between the parties. This is squarely in conflict with the sweep of the expression "fundamental policy of India" as judicially carved out by the Supreme Court in ***State of Rajasthan and Anr. v. Ferro Concrete Construction Pvt. Ltd.***[26], where an award which used the Statement of Claims amount and nothing more, was held to be illegal and beyond the jurisdiction of the Tribunal. The Supreme Court has also echoes similar sentiments in ***Ferro Concrete Construction*** (supra) which is extracted hereinbelow:

> *"55. While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable."*

90. Further reliance can be placed on the High Court of Delhi's judgment in ***ZemanTechnogroup v. Union of India***[27] where RavindraBhat J. had opined that:

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[26] (2009) 12 SCC 1

[27] 2016 SCC OnLine Del 10371

> *"7. As far as Zeman's appeal is concerned, we notice that the Tribunal in all relevant parts of its findings, held that no proof of injury or the extent of it, to indicate the yardstick which could form the basis of compensation had been led by the claimant. The Single Judge in our opinion quite correctly concluded that the figure of 20% was merely an assumption.* ***It goes without saying that one who claims any relief is under a primary obligation to support it with appropriate evidence****. The reliance on A.T. Brij Paul Singh (supra) or any other decision, in our opinion, is not apt because those were rendered in the context of breach of construction contracts. The Court rulings largely were based upon the settled principles of construction of such contracts and the nature of the profit, indicated by a long line of authorities and even by experts. In this case, however, there is no such evidence. Those principles cannot be imported uncritically. Moreover, it was within the claimant's claim to support its submission with regard to the extent of injury suffered by placing on record its consistent pattern of profits in similar contracts or the industry practice as it were. Its failure to do so, therefore, cannot result in an arbitrary figure transmitting into a margin of profit. We also notice that the recent judgment in KinnariMullick v. GhanshyamDassDamani, (2018) 11 SCC 328, set outs extremely limited circumstances whereby the Court can require re-adjudication and the conditions applicable. Those conditions too do not apply in this case."* (The emphasis is ours)

91. It is thus clear that the basis on which the Tribunal has awarded the said claim in question is impermissible in Indian Law given the unequivocal position of law as discussed

hereinabove. An award in conflict with or in derogation of law declared by a superior court will be violative of the fundamental policy of Indian law.

ii. IN ASCERTAINING THAT THE AGREEMENTS EXCLUDED THE COMMON LAW RIGHT OF TERMINATION, SUCH AS ACCEPTANCE OF REPUDIATORY BREACHES.

92. For the sake of convenience, the relevant Clauses of the CWEETC Agreement necessary to be referred to for adjudication of this issue are reproduced herein below:

> ***"4.16 Exclusivity***
>
> *The Owner and the Civil Contractor agree that the provisions relating to the Contract Price and termination rights set out in this Agreement are comprehensive and exclusive and take into account all relevant risks relating to the Works, whether foreseeable or not."*
>
> *(underlining is ours)*

93. On this point a reference may be made to the following relevant paragraphs of the Arbitral Award:

> *"961. Although the Agreements contain a termination mechanism, the mechanism is not a comprehensive or exclusive regime. In the present case, where the Contractor terminates because the Owner repudiates the Agreement, the Agreement does not provide a termination mechanism even though the parties did, in contrast, provide a termination mechanism to the Owner if "the Civil Contractor repudiates or abandons this Agreement."*

> *963. Furthermore, Section 16.3.1 of the Amended CWEETC Agreement expressly provides that the Claimant's contractual right to terminate for default "is without prejudice to any other right or remedy the Civil Contractor may have under the Agreement or applicable Law or in equity..." Consequently, the Tribunal finds that the Claimant's common law remedies were not excluded."*
>
> *(Underlining is ours)*

94. The Tribunal has held that although the Agreements contain a termination mechanism, the mechanism is not a comprehensive or exclusive regime. It has held that the common law right of termination was not excluded by the provisions of the Agreement. The same, in fact, is directly contrary to the express provisions of Section 4.16 of the Amended CWEETC Agreement as well as the Amended Onshore Supply Agreement all of which specifically state that the "*termination rights set out in this Agreement are comprehensive and exclusive and take into account all relevant risks relating to the Works, whether foreseeable or not.*".

95. Therefore, by holding that the Respondent had the right to terminate the agreements on account of the alleged repudiatory breaches of the Appellant, and disregarding the otherwise express provisions of the contract; the Tribunal has re-written the Agreements by exceeding its jurisdiction, especially when, it is no longer *res integra* that an Arbitral Tribunal is bound by the terms of the contract by virtue of it being a creature of the

contract as well as the statutory mandate of Section 28 (3) of the A&C Act. If the Arbitrator gives an award by ignoring the terms and conditions of the contract and by travelling beyond the terms and conditions of the contract, the award is liable to be set aside.

96. It is also apposite to note that at this juncture the Tribunal came to a finding that the Respondent by its correspondence in late 2014 and the demobilisation of its commissioning team from the work site on or around 24 January 2015, accepted the repudiatory breaches by the Appellant and brought the Agreements to an end. The relevant passage reads as follows;

> *"965. The Tribunal finds that the Claimant by its correspondence in late 2014 and its demobilisation of its commissioning team from the Site on or around 24 January 2015, accepted the repudiatory breaches by the Respondent and brought the Agreement to an end. The Respondent had by its repudiatory conduct evinced a clear intention not to comply with the Agreement. At the time the Tribunal finds that Respondent, by its conduct, acted in clear breach of the Agreement and such conduct both individually and collectively amounted to a repudiatory breach of the Agreement and a clear indication by the Respondent that it no longer intended to be bound by the Agreement.*
>
> *967. The Tribunal finds that the EPC Agreements were terminated by SEPCO accepting repudiatorybreaches of the Amended EPC Agreements by GKEL in January 2015."*

97. With such finding, the Tribunal has awarded to the Respondent a prayer which in fact had been abandoned in the first place. The Respondent in its post-hearing submissions had invited the Tribunal to find that the Agreements were brought to an end by its letter dated 31st March, 2016 and not January, 2015. By holding that the Respondent had the right to terminate the agreement under common law, the Tribunal has re-written the Agreements to overcome the express terms of Section 16, holding that they would not be applicable and the Respondent's entitlement to payments on account of termination would not be limited by the provisions of Section 16.4.1 of the Agreement. Such an act of the Tribunal does not pass muster and shocks the conscience of the court.

iii. IN ASCERTAINING THAT THE RESPONDENT WAS LIABLE TO RECEIVE 5% OF CONTRACTUAL PRICE UPON COMPLETION OF THE TESTS?

98. For the sake of convenience, the relevant Clauses of the CWEETC Agreement necessary to be referred to for adjudication of this issue are reproduced herein below:

> ***"6.1 Testing***
>
> ***6.1.1 Startup and Acceptance Tests***
>
> *6.1.1.1 The commissioning, start in and testing and acceptance of Unit 1, Unit 2 and Unit 3 along with the Power Station shall be as per the provisions of this Article 6 and the Technical Specifications; provided that the commissioning, start-up, testing and acceptance of the entire Power Station shall*

occur upon the commissioning, start-up, testing and acceptance of Unit 3 or the last Unit to be commissioned and accepted, as the case may be. The tests and operations to be conducted by the Civil Contractor for this purpose shall be as under:

(i) Mechanical Completion of works, systems, each Unit and the Power Station;

(ii) Initial Operation; and

(iii) Acceptance Tests, which shall include the Unit Characteristic Test, Reliability Run and Performance Guarantee Test.

6.1.1.2 *During all testing, each Unit or the Power Station will be operated within normal operational design limits of the equipment, in accordance with the manufacturers' recommendations (as indicated in the respective operation and maintenance manuals) and in a manner consistent with the practices of a Reasonable and Prudent Contractor and Reasonable and Prudent Operator for long-term operation. During the tests and for all times when the Power Station or Unit operation is interconnected with the Grid. the instructions of the SLDC or the RLDC, as the case may be. will, be binding and the Power Station or Unit will be operated according to the applicable Grid Code, provided however, that the grid conditions will not require the Civil Contractor to cause operation of the Power Station or any Unit thereof beyond the technical limits.*

6.1.1.3 *The Civil Contractor shall conduct all tests as a Reasonable and Prudent Contractor and*

Reasonable and Prudent Operator. Further all such tests shall be conducted in accordance with this Agreement (including the Technical Specifications). Design Documentation, O&M Manuals, and all warranties of vendors, manufacturers and insurance policies.

6.1.2.5 Acceptance of Mechanical Completion Report.

If the Owner is not satisfied that the respective Unit or the Power Station is Mechanically Complete it may endorse the Mechanical Completion Report accordingly, stating in what way such Unit or the Power Station is not Mechanically Complete in accordance with this Agreement. The Civil Contractor shall then remedy the deficiencies as necessary and shall repeat the procedures described hereinabove.

6.1.4 Acceptance Tests

6.1.4.1 Test Conditions

The test conditions are particularly described in the Technical Specifications. During the Acceptance Tests, the respective Unit or the Power Station, as the case may be, will be operated from the Power Station control room with systems normally operated in the modes as provided in the Technical Specifications.

All systems must be ready for normal and continuous operation. The use of temporary equipment will not be allowed unless approved by the Owner. During testing, the respective. Unit or the Power Station, as the case may be, will be operated with requisite staffing where the operating functions will be conducted by the Owner's operating staff who will report to and be under the responsibility,

control and supervision of the Civil Contractor (who shall remain responsible for meeting the requirements of and achieving the tests) till Take Over of the respective Unit or the Power Station, as the case may be. The respective Unit or the Power Station, as the case may be, will run in a normal manner with no equipment shutdown to reduce auxiliary load. Where redundant capacity is provided.only equipment required for normal operation shall be in operation

6.1.4.2 Notice for Acceptance Tests and Owner's right to reschedule

(i) The Civil Contractor shall give at least thirty (30) days (but not more than sixty (60) days) prior notice to the Owner of the anticipated schedule prior to the beginning of such Acceptance Tests, together with a time schedule for each of the tests comprising the Acceptance Tests ("Performance Test Notice"). Such schedule shall be subject to the approval of the Owner. If the Acceptance Tests are not expected to begin by the date specified in the Performance Test Notice, the Civil Contractor shall be required to notify the Owner as under:

(a) In case the Acceptance Tests are delayed by not more than seven (7) days, Civil Contractor shall notify the Owner of the revised date at least two (2) days in advance: and

(b) in case the Acceptance Tests are delayed by more than seven (7) days. Civil Contractor shall

notify the Owner of the revised date at least seven (7) days in advance.

In any such event (under paragraph (a) and (b) above), there will be no adjustment to any of the Milestones and Guaranteed Date of Completion and any additional costs suffered by the Civil Contractor shall be to the Civil Contractor's account.

(ii) Notwithstanding the above, the Owner shall have the right to suggest alternative dates for the conduct of Acceptance Test (including for reasons related to any electrical output demands of the Power Procurers) and the Civil Contractor shall accommodate any such request by the Owner. In the event of such rescheduling effected at the request of the Owner, the Owner shall provide the Civil Contractor with an equitable adjustment to the Detailed Programme and/or Project Schedule for any delay caused by such rescheduling pursuant to this Agreement and reimburse any Costs incurred by the Civil Contractor.

(iii) In the event each of the Units is capable of successfully conducting the Reliability Run or Performance Guarantee Test. but the Civil Contractor is unable to perform the test due to reasons not attributable to the Civil Contractor or any Subcontractor. the portion of the Contract Price due upon Reliability Run or Performance

Guarantee Test of such Unit shall be paid to the Civil Contractor not later than three (3) months after the date upon which it was otherwise available for a Reliability Run or a Performance Guarantee Test: provided that the Civil Contractor shall not be relieved from its obligation to perform the Reliability Run or Performance Guarantee Test in accordance with this Agreement. For such period of suspension.the Civil Contractor shall be entitled to obtain from the Owner a Variation Order covering reasonable costs due to suspension and appropriate adjustment to the Project Schedule, the relevant Milestone Dates and the Guaranteed Date of Completion in accordance with this Agreement.

(iv) If the Civil Contractor is unable to conduct the Reliability Run or Performance Guarantee Test for the last Unit due to reasons not attributable to the Civil Contractor or any Subcontractor for more. than six (6) months after the date upon which it was otherwise available for a Reliability Run or a Performance Guarantee Test. the Civil Contractor shall be entitled to demobilize from the Site.

6.1.4.3 The Civil Contractor shall not perform or undertake any Acceptance Test. if. all conditions and requirements that must be fulfilled under this Agreement have not been duly fulfilled, including those related to Works necessary for the safe performance of

any Acceptance Tests or Works that are incomplete or defective.

6.1.4.4 No materials equipment system incorporated into the Power Station shall. be operated during any Acceptance Tests in excess of the limits allowed by its manufacturer to maintain the warranties such materials equipment system.

6.1.4.5 The Civil Contractor shall cooperate with the Owner to allow the Owner's Representative. Owner's engineer, the Independent Engineer or any third party expert appointed by the Owner.the Power Procurers or the Lenders to attend, monitor and witness any and all of the Acceptance Tests.

6.1.4.6 Test Reports

(i) The Civil Contractor shall submit to the Owner (with copies to the Independent Engineer) a written report for each of the Acceptance Tests, stating:

(a) in the case of the Reliability Run, observations and recordings of various parameters measured in respect of the Reliability Run, the dates of start and finish of the Reliability Run, recordings of all details of interruptions that occurred, adjustments made and any repairs done during the period of Reliability Run,

(b) in the case of Unit Characteristic Tests, sufficient test data to establish the level of performance achieved with respect to the required levels of performance

and status regarding meeting of other required functional parameters as per the Technical Specifications.

(c) in the case of Performance Guarantee Tests. details of actual measurements of guaranteed parameters- accompanied by sufficient test data, adjustment to the test results for change in test conditions with respect to the agreed parameters and by reference to the agreed correction curves, all in accordance with the Technical Specifications (and subject to such limitations as may be provided under this Agreement) to demonstrate the level of performance attained with respect to each of the tested parameters.

(ii) The detailed format for the test reports will be prepared by the Civil Contractor and approved by the Owner during the detailed engineering stage. The reports would contain at the minimum the details shown in the Technical Specifications.

(iii)<u>If the results of the Acceptance Tests do not meet the requirements of this Agreement (including - applicable Laws), including the Technical Specifications, the Civil Contractor shall at its own risk and cost take all remedial and rectification measures and continue to re-perform and retest till all requirements for successful completion</u>

of the tests as per the provisions of this Agreement are satisfied.

(iv) *The Civil Contractor shall, within seventy-two (72) hours after the completion of each of the Reliability Run and Unit Characteristic Tests, provide a written report to the Owner for its approval either by facsimile of otherwise by same day delivery. The reports would be in the form as described above and would certify that the tests have been conducted in accordance with this Agreement.*

The Owner shall respond to such reports within two (2) Business Days, either agreeing to the conclusions of the test reports or in case of its disagreement with the matters contained in such reports providing in reasonable detail the reasons for such disagreement.

In case the Owner disagrees with the matters contained in such reports. the Owner will notify the reasons therefor in accordance with the provisions of this Agreement, including the Technical Specifications, to the Civil Contractor and the Civil Contractor shall re-perform and re-test, as applicable and as advised by the Other Contractors in order to respond properly to the objections raised by the Owner and may thereafter again deliver the relevant written report for the approval.

The Reliability Run and the Unit Characteristics Test shall be deemed to

have been successfully completed only after the Owner has agreed in writing to such test report or the test is deemed to have been successfully completed in accordance with this Article 6 and the Technical Specifications. In case the Owner does not respond to such test reports submitted by the Civil Contactor within two (2) Business Days from the date of receipt the reports from the Civil Contractor, the Civil Contractor shall be entitled to an extension of the Project Schedule and shall be reimbursed at actuals any additional Costs incurred by the Civil Contractor on account of such delay by the Owner in responding to the test reports; provided that in case the Owner provides no response to such test reports on or before twenty-one (21) days from the date of receipt of the tests reports from the Civil Contractor then such tests shall be deemed to have been passed.

6.1.5 Reliability Run

6.1.5.1 Reliability Run is to be conducted only after successful completion of the Initial Operation and have to be successfully completed prior to the commencement of the Unit Characteristics Tests.

All necessary adjustments shall be made to the respective Unit While operating over the full range enabling the respective Unit to be made ready for the Reliability Run. The Reliability Run shall only be carried out provided the respective Unit is fully available for full toad operation. The duration of the Reliability Run

shall be as specified in the Technical Specifications.

6.1.5.2 *The Reliability Run shall be considered successful provided that the requirements set forth in the Technical Specifications have been satisfied.*

6.1.5.3 *For the determination of the period of the Reliability Run the time of actual operation shall be measured. In case the duration of actual continuous operation during the test period as per the Technical Specifications is discontinued for cause's attributable to the Owner, the Civil Contractor would have been deemed to have operated the Unit(s) or the Power Station at the required load during such period of discontinuation. "However, in such cases the Owner can, at its option, require the period of the test to be extended appropriately in which case the Civil Contractor would be eligible for an extension of the relevant Milestone "Date or Guaranteed Date of Completion by an equivalent period and any additional costs reasonably incurred by the Civil Contractor for such extension shall be reimbursed.*

However, should any test that is part of the Reliability Run (as set forth in the Technical Specification) be discontinued due to any default of the Civil Contractor, or any Subcontractor, such test shall be conducted again. Should any failure (other than that of an entirely minor nature) due to or arising out of faulty design, materials, or workmanship or omissions.incorrect erection or improper operating instructions occur in any part or all of the respective Unit or the Power Station, as the case may be, in a

manner that prevents safe commercial use of the respective. Unit or the Power Station, as the case may be, a Reliability Run period of fourteen (14) days shall be conducted after the defect has been remedied. The onus of proving that any failure is not due to faulty design, materials and workmanship shall lie solely with the Civil Contractor.

6.1.5.4 *Reliability Run would be deemed to have been successfully completed only after the Owner has agreed in writing to such test report or the test is deemed to have been successfully completed in accordance with this Section 6.1.*

6.1.6 Unit Characteristic Tests

6.1.6.1 *The Unit Characteristic Tests are to be carried out to demonstrate compliance of the respective Unit or the Power Station, as the case may be, with the required functional capabilities as per the agreed parameters and will be conducted in accordance with and as particularly described in the Technical Specifications.*

6.1.6.2 *Unit Characteristic Tests would be deemed to have been successfully completed only after the Owner has agreed in writing to a satisfactory test report or the test is deemed to have been successfully completed in accordance with Section 6.1.4.6(iv) and the Technical Specifications.*

6.1.7 Performance Guarantee Test

6.1.7.1 *General conditions for Performance Guarantee Test*

The Performance Guarantee Test would be conducted to determine the level of achievement of the Performance Guarantees

for the purpose of Take Over of the respective Units or the Power Station, as the case may be. The Performance Guarantee Test for the Power Station shall be successfully completed alongwith the Performance Guarantee Test for the last Unit. The Performance Guarantee Test would be conducted over a continuous period of seventy-two (72) hours without any interruption. The Performance Guarantee Tests for each Unit and the Power Station shall be successfully completed within a period of two hundred and twenty (220) days from the respective dates of successful completion of the Reliability Run. The Performance Guarantee Tests may be carried out for a maximum number of three (3) tests only. Further, provided that the cumulative aggregate shut-down period for preparing to conduct the three (3) tests shall not exceed a period of nineteen (19) days.

The Power Station or any Unit thereof will not be deemed ready for the Performance Guarantee Test if any of the following conditions exists:

(a) the Reliability Run and the Unit Characteristic Tests have not been successfully completed as per the provisions of this Section 6.1;

(b) the Owner has given notice, to the Civil Contractor, specifying the reasons therefor in accordance with this Agreement. that the Works necessary for the safe performance of such tests have not been performed or are incomplete or defective.

6.1.7.2Performance Guarantee Test procedure

The procedure including the definitions, calculation method to he used, method of correction of test results for change in guaranteed reference conditions, the instrumentation to be installed, the instrument accuracy class, and the items, which specifically require preparation and agreement. are particularly provided for in the Technical Specifications. The Civil Contractor will prepare a detailed test procedure based on such Specification and submit the same for review and approval by the Owner during the detailed engineering phase.

6.1.7.3 Codes and Standards to be used

The Performance Guarantee Test shall be carried out, at no additional cost. or expense to the Owner, as per the performance test codes set forth in the Technical Specifications.

6.1.7.4 Instrumentation

All test instrumentation (other than Power Station instrumentation) required for the Performance Guarantee Test pursuant to the Technical Specifications shall be arranged by the Civil Contractor at its own cost.

6.1.7.5 Guaranteed Parameters

The determination of the level of achievement of the Performance Guarantees would be done only when the respective Unit or the Power Station, as the case may be, is operating under steady state operations.

The Performance Guarantee parameters which will be tested measured during the Performance Guarantee Test would be as set forth in the Technical Specifications as detailed in Sub section-VIII of Volume-II. Section-2A of Part-B (for BTG) and Part C (for BOP).

6.1.7.6 Corrections to Test results

The Performance Guarantee parameters, as measured during the Performance Guarantee Test, will be adjusted only for such reference conditions and fuel specifications as specifically provided in the Technical Specifications for such correction and using correction curves as provided therein.

6.1.7.7 Performance Guarantee Test Report

(i) The Civil Contractor shall after the completion of Performance Guarantee Test submit (by facsimile or otherwise by same day delivery) a report ("Performance Test Report") to the Owner for its review and approval. The reports shall be in a format as specified in this Agreement and shall also include a certification from the Civil Contractor that the Performance Guarantee Test was conducted in accordance with this Agreement.

(ii) The Owner shall respond to the Performance Test Report submitted by the Civil Contractor within seven (7) days of receipt of such Performance Test Report ("Owner Response Period").

(iii) If the Owner disagrees with matters contained in the Performance Test Report, the Owner's response shall set forth in reasonable detail the reasons for such disagreement and the Civil Contractor shall perform such corrective measures as in its judgment may be required, including any necessary re-testing. if applicable, to respond properly to the objections

raised by the Owner and may thereafter again deliver such Performance Test Report.

(iv) *The Performance Guarantee Test shall be deemed to have been successfully completed only after the Owner has agreed in writing to the Performance Test Report or the test is deemed to have been successfully completed in accordance with this Section 6.1 and the Technical Specifications. In case the Owner does not respond to such test reports submitted by the Civil Contactor within the Owner Response Period, the Civil Contractor shall be entitled to an extension of the Project Schedule and shall be reimbursed at actuals any additional Costs incurred by the Civil Contractor on account of such delay by the Owner in responding to the test reports.*

(v) *Without prejudice to the provisions of Articles 7 and 8, the Civil Contractor shall have the right to re-run the Performance Guarantee Test, but only after giving thirty-six (36) hours prior written notice to the Owner.*

6.1.7.8 Results of Performance Guarantee Test

(i) *If, after the Owner's review of the Performance Test Report. the Owner agrees with the resubs of such report and is satisfied that the Civil Contractor has achieved at least the Minimum Performance Standards, it will issue, within the Owner Response Period. a certificate to that effect ("Minimum Performance Standards*

Certificate"), and, if the Civil Contractor, has in addition to achievement of the Performance Guarantees also satisfied the conditions specified in Section 6.1.7.8 (ii), a certificate confirming that the Performance Guarantees have been met ("Performance Guarantee Certificate"). In each such case, the date of the relevant certificate shall be the date of the corresponding Performance Test Report submitted by the Civil Contractor.

In case the Minimum Performance Standards are not achieved, the Civil Contractor shall, subject to Section 6.1.7.1, take all remedial measures necessary and continue to test and re-test until such Minimum Performance Standards are achieved subject to time limitations as provided under this Agreement.

(ii) When the Civil Contractor has in relation to any Unit, or the Power Station, completed the following, the Civil Contractor may apply for the Performance Guarantee Certificate of such Unit or the Power Station:

(a) the respective Unit or the Power Station, as the case may he, has been completed in accordance with this Agreement. except. in the reasonable opinion of the Owner, in minor respects that will not affect the safe, efficient and full use thereof for the

purpose contemplated by this Agreement.

(b) all Delay Liquidated Damages due under Section 7.4 have been paid to the Owner:

(c) [NOT USED

(d) the Performance Bond is fully valid and in effect until the period prescribed in terms hereof:

(e) all parts in respect of the respective Unit or the Power Station, as the case may be, which are supplied by the Other Contractors. have been properly and securely stored at the Site in accordance with the requirements of this Agreement or the Civil Contractor has provided the Owner with a copy of the documentation relating to the replacement at the cost replacement. at the cost and expense of the Civil Contractor. in accordance with this Agreement (including re-order documentation), of any such parts consumed pursuant to the commissioning and testing obligations and obligations during the Warranty Period or the Extended Warranty Period, as the case may be, but which have not been delivered prior to the satisfaction of the

requirements " of Sections 6.1.7.8(a) to (d) (inclusive):

(f) the Owner is satisfied acting reasonably that the respective Unit of the Power Station, as the case may be, can be safely and reliably placed in operation, with a normal complement of spares and personnel, for their intended purposes of the generation of electricity in accordance with all applicable Laws, this Agreement (including the Technical Specifications) and the O&M Manuals;

(g) the respective Unit or the Power Station, as the case may be, is fully and properly interconnected and synchronised with Grid, and all features and equipment of the respective Unit or the Power Station, as the case may be, have been demonstrated to be capable of delivering electric power and capacity into the Power Procurers' system in accordance with this Agreement (including the Technical Specifications);

(h) the Civil Contractor shall have completed the training of the Owner's nominated personnel in the operation and maintenance of the respective Unit or the Power Station, as the case may be. in accordance

with the terms and conditions of this Agreement;

(i) all Civil Contractor's Permits required to be obtained by the Civil Contractor have been obtained and handed over to the Owner (wherever necessary);

(j) the Owner has received from the Civil Contractor all manuals required to be provided by the Civil Contractor under this Agreement for the Owner to start-up. operate and maintain the respective Unit or the Power Station, as the case may be, in a safe, efficient and effective manner;

(k) the Civil Contractor has provided to the Owner, the instrument lists, all tools in respect of the Power Station required to be provided under this Agreement, to be received with the supply of any equipments, and all left- over start-up and commissioning spares and consumables. provided that the Owner will make available ai no extra cost such commissioning spares to the Civil Contractor in case the same is required by the Civil Contractor for the performance of its warranty obligations hereunder:

(l) [NOT USED]

(m) *all waste materials and rubbish have been removed from the Site or the relevant part thereof*

(n) *the Owner shall have received any relevant assignments with respect to surviving warranties provided by Subcontractors, if applicable:*

(o) *the Civil Contractor has provided to the Owner a certificate confirming that no Subcontractor Sub-contractor has any liens. encumbrance or security interest on, or claims with respect to title to, the properties and assets of the Power Station or the Owner; and*

(p) *all damages determined as payable in accordance with the provisions of this Agreement have been paid to the Owner.*

(iii) *In case the Minimum Performance Standards have not been achieved the Civil Contractor shall continue to perform its obligations hereunder, including any remediation, replacement and retesting to achieve the Minimum Performance Standards in accordance with the provisions of this Agreement. In the event the Minimum Performance Standards have been achieved but the Performance Guarantees have not been achieved, then the Civil Contractor shall have the right, in accordance with and subject to the provisions of this Section 6.1.10*

elect to correct the shortfall in the Performance Guarantees or to pay the Performance Guarantee Liquidated Damages in accordance with the provisions of this Agreement.

Subject to Section 6.1.7.1. if the Minimum Performance Standards or the Performance Guarantees have not been achieved at the first Performance Guarantee Test conducted after the successful completion of the Reliability Run to determine the achievement of the Performance Guarantees, the Civil Contractor shall undertake remedial action (the period of shutdown for such remediation not to exceed nineteen (19) days less the period of shutdown for the first Performance Guarantee Test) within a period not exceeding two hundred and twenty (220) days from the successful completion of the Reliability Run. The Civil Contractor shall give the Owner not less than fifteen (15) days notice in writing of the period during which the Civil Contractor would undertake remedial action to achieve the Minimum Performance Standards or the Performance Guarantees, and such notice shall be given together with a revised Detailed Programme setting forth the actions, proposed to be taken by the Civil Contractor, the times schedule for such remedial action and the analysis of the impact that such remedial action would have on the operation and maintenance of the

respective Unit or the Power Station (by way of reduced availability etc.). as the case may be ("Corrective Action Plan").

If the Minimum Performance Standards have been achieved but the Performance Guarantees have not been achieved within fifteen (15) days after the receipt of the Minimum Performance, Standards Certificate, the Civil Contractor may at its options: provide to the Owner a written notice that the Civil Contractor shall not take action to correct the shortfall in the Performance Guarantees in which event, the Civil Contractor would be obliged to pay Performance Liquidated Damages as per Article 8: provided that, in case the Owner so requires, prior to payment of any Performance Liquidated Damages, the Civil Contractor shall as a Reasonable and Prudent Contractor undertake atleast one (1) remediation rectification measure for achieving the Performance Guarantees in accordance with a Corrective Action Plan agreed between the Parties.

The Civil Contractor shall be deemed to have elected not to take. any such corrective action to achieve the Performance Guarantees if it fails to provide any notice to the Owner within fifteen (15) days after the Performance Guarantee Test at which the Minimum Performance Standards were achieved.

The Civil Contractor shall consult and co-operate with the Owner in putting into effect any such corrective action in a manner that will cause the least disruption to the operation and maintenance of the respective Unit or the Power Station, as the case may be.

All measures taken under any Corrective Action Plan, or otherwise to make good any performance shortfall shall be at the sole cost and risk of the Civil Contractor.

(iv) The Owner may, acting reasonably, notify within five (5) days, of its disagreement (setting out its reasons), with the actions, time period and/or scheduling specified in the Corrective Action Plan and the Civil Contractor shall resubmit a revised Corrective Action Plan within seven (7) Business Days, failing which the Civil Contractor shall be deemed to have elected not to take any corrective action in, respect of shortfall in the Performance Guarantees. In circumstances where the Owner has continued to operate the respective Unit or the Power Station, as the case may be, and has not provided Unit Power Station outage to the Civil Contractor or for any time period and/or schedule specified and agreed to between the Owner and the Civil Contractor for any Corrective Action Plan then the time period specified in such Corrective Action Plan shall be extended till such time the Owner has

provided outage of the Unit Power Station to the Civil Contractor for the number of hours as per the agreed Corrective Action Plan. The Civil Contractor shall, at all times keep the Owner informed of the progress of any Corrective Action Plan.

(v) In the event the Civil Contractor has taken any corrective and remedial action with respect to the respective Unit or the Power Station, as the case may be, then, prior to the expiry of the period of two hundred and twenty (220) days from the date of successful Completion of the Reliability Run, the Civil Contractor shall conduct the Performance Guarantee Test in accordance with the provisions of this Article 6. If the results of the Performance Guaranteed Test fail to achieve Performance Guarantees, the results of the most recent test conducted to establish the Performance Guarantees preceding the end of the aforesaid period of two hundred and twenty (220) days from the successful completion of the Reliability Run shall be deemed för the purposes of this Agreement as the final results for the test in question.

(i) [NOT USED]

(ii) [NOT USED]

(iii) The obligation of the Civil Contractor under this Section 6.1.7 is in addition to and not in substitution of its actual liability, if any, to pay any Performance Liquidated Damages.

7.1 Operation and Completion

7.1.1 The Civil Contractor guarantees that it shall achieve each Milestone by the Milestone Date specified therefor and shall achieve successful completion of the Performance Guarantee Test for each Unit and the Power Station by the Guaranteed Date of Completion.

7.1.2 [NOT USED]

7.1.3 No Milestone Date or Guaranteed Date of Completion shall be extended for any reason except as provided in Section 7.3.

7.3 Delay and Extension of Time

7.3.1 If the achievement of any Milestone will be, or has been, delayed beyond the Milestone Date specified therefor or the successful completion of the Performance Guarantee Test for any Unit or the Power Station will be, or has been delayed, beyond the Guaranteed Date of Completion by reason of:

(i) Change of Law

(ii) suspension of the Works under Sections 15.1 or 15.3;

(iii) in respect of the Works or this Agreement, any breach by the Owner and any failure to prevent a breach of this Agreement by the Owner or any person engaged by the Owner (including any contractor engaged by the Owner on the Site in connection with the Transmission Lines and or coal transportation system from the mine but excluding the Civil Contractor. any Subcontractor and the Other Contractors), unless such breach of this Agreement or failure results from any

act. omission or breach of this Agreement by the Civil Contractor or any Subcontractor:

(iv) an Event of Force Majeure to the extent the provisions of Article 11 permit a delay.

(i) a Variation Order issued by the Owner (except where such variation is caused by a breach of this Agreement by the Civil Contractor or any Subcontractor) in circumstances where any modification to any Milestone Date or Guaranteed Date of Completion has not been agreed pursuant to Article 12 and including any delay associated with dismantling or rectification where the Civil Contractor has proceeded with a Variation upon the Owner's notification pursuant to Section 12,7.2(fi)(b) and the determination of the relevant Dispute under Section 12.7.2(i)(a) is in favour of the Civil Contractor and such determination requires dismantling or rectification works:

(ii) additional testing or uncovering, making openings, reinstating and making good are ordered by the Owner pursuant to Sections 2.8.3 and 2.8.6 respectively except in circumstances where the results of such additional test or uncovering or making openings shows that the workmanship or materials tested or

the previously executed Works are not in accordance with this Agreement;

(iii) *compliance by the Civil Contractor with any (a) decision, instruction or order of the Owner, in accordance with Section 2.6, to the extent such decision, instruction or order is subsequently determined pursuant to Article 21 not to be in accordance with this Agreement, applicable Law or the Governmental Permits or required the Civil Contractor to perform its obligations otherwise than as a Reasonable and Prudent Contractor: and (b) determination pursuant to Article 21 which requires the Civil Contractor to undertake any dismantling or remediation works;*

(iv) *compliance by the Civil Contractor with any requirements resulting from (a) the disapproval of any Design Documentation or comments on any Design Documentation pursuant to Section 18.3 by the Owner in respect of which there was a Dispute and the determination in respect of such Dispute was in favour of the Civil Contractor: and (b) such determination which necessitate amendments or variations having to be made to such Design Documentation and or Variations having to be made to*

any part of the Works which were carried out pursuant to such Design Documentation (prior to such amendments or variations to such Design Documentation being made pursuant to such determination):

(v) *delay in release of the Advance Payment by the Owner, beyond a period of seven (7) days from the date of issue of the Notice to Proceed, provided that the Advance Payment Bond has been submitted by the Civil Contractor in accordance with the provisions of this Agreement on or before the date of issuance of the Notice to Proceed;*

(vi) *any stoppage in the Works for a period greater than seven (7) consecutive days or a cumulative period of thirty (30) days caused by any disturbance from villagers occurring outside the boundary of the Power Station; and*

(vii) *any other reasons expressly provided in this Agreement for which the Civil Contractor is entitled for an extension of time;*

then subject to the satisfaction of the conditions set out in Section 7.3.2. the Civil Contractor shall be entitled to such extension to the relevant Milestone Date and/or Guaranteed Date of Completion as shall be fair and reasonable taking

into account all the circumstances of such delay.

7.3.2 *Unless otherwise specified in this Agreement, within seventy-two (72) hours (or such other period as may be agreed by the Owner) of learning of any cause of delay or disruption to the progress of the Works, the Civil Contractor shall submit a notice providing full details relevant to such cause, except to the extent the Civil Contractor cannot submit all relevant details within such period because the cause of delay or disruption continued for a period exceeding seven (7) days, the Civil Contractor shall submit interim details of intervals of not more than seven (7) days (from the first day of such delay or disruption) and full and final supporting details together with full supporting documentation in support of its application within fourteen (14) days of the date of cessation of such delay or disruption.*

Further in all cases where events described in Section 7.3.1 have occurred, the Civil Contractor shall advise the Owner of:

(a) the extent of the actual and contemplated delay and its anticipated effect upon the relevant Milestone Date and or Guaranteed Date of Completion;

(b) the Civil Contractor's plans to take steps to overcome or minimise the actual or anticipated delay and the increased costs, if any, associated therewith: and

(c) the Civil Contractor's plans to adopt any methods suggested by the Owner to overcome or minimise the delay and

the increased costs, if any, associated therewith, and the Civil Contractor shall use all reasonable endeavours to take such steps and or adopt such methods.

7.3.3 *The Civil Contractor shall not be entitled to any extension of time:*

(i) *unless the Civil Contractor shall have used and continues to use reasonable endeavours to prevent, avoid, overcome and minimise any such delay and to proceed with the Works, and*

(ii) *in respect of any delay to the extent that such delay is attributable to any act, omission, negligence, default or breach of the Civil Contractor or its Subcontractors or any tier of subcontractor of such Subcontractor or la any matters or events which are within the control of the Civil Contractor or any Subcontractor or any tier of subcontractor of such Subcontractor:*

7.3.4 *Where the Parties have agreed pursuant to Article 12 the length of the extension of time to be granted in respect of a Variation or other event treated as Variation under this Agreement, such agreement shall be final and binding.*

7.3.5 *The Owner shall proceed to agree or determine either prospectively or retrospectively such extension of the time for completion as may be due and shall notify the Civil Contractor accordingly. When determining each extension of time, the Owner shall be entitled to take into account all the circumstances known to the Owner at*

that time, including the effect and impact of any prior extensions. the effect of any reduction in the quantity of any item of the Works and the Civil Contractor's compliance with the requirements of this Section 7.3. If the Parties fail to agree upon the period of extension to the relevant Milestone Date and/or Guaranteed Date of Completion, as applicable, the matter shall be determined in accordance with Section 21.5,"

7.3.6 Any addition to the Contract Price granted by the Owner under Section 4.2 small not of itself entitle the Civil Contractor to an extension of time pursuant to this Section 7.3.

7.3.7 Without prejudice to the other provisions of this Section 7.3, the Owner shall. within thirty (30) days of receipt of the supporting documents, respond to the Civil Contractor's request for extension of time, and the Parties shall mutually agree to whether the Civil Contractor is entitled to any extension to the relevant Milestone Date and/or Guaranteed Date of Completion.

7.4 Delay Liquidated Damages

7.4.1 Liquidated Damages

7.4.1.1 In case the Reliability Run of any Unit(s) is not successfully completed on or before the Milestone Date(s) specified therefor. subject to such extensions of time as may be allowed in this Agreement, the Civil Contractor shall pay to the Owner by way of Delay Liquidated Damages and not by way of penalty, zero decimal point one seven percent (0.17%) of the Contract Price per week of delay or part thereof for each Unit. provided that the total Delay Liquidated Damages payable by the

Civil Contractor shall not exceed ten percent (10%) of the Contract Price.

7.4.1.2 All sums payable by the Civil Contractor to the Owner pursuant to this Section 7.4 shall be paid as liquidated damages and not as a penalty The terms, conditions and amounts fixed pursuant to this Section 7.4.1 for liquidated damages are reasonable, considering the reduction in value of the Power Station to the Owner and the actual costs thar the Owner will incur in the event of the Civil Contractor's failure to scheme each Milestone by the Milestone Date specified therefor. The amount of these liquidated damages are agreed upon and fixed hereunder by the Parties because of the difficulty of ascertaining on the date hereof the exact amount of such reduction in value or costs that will be actually incurred by the Owner in such event, and the Parties hereby agree that the liquidated damages amounts specified herein are a genuine pre estimate as of the date hereof of damages likely to be incurred and shall be applicable regardless of the amount of such reduction in value or costs actually incurred by the Owner and, subject to the provisions of Article 9 and the Owner's right to terminate this Agreement under Section 16.2 shall be in lieu of all remedies and damages for such late completion or Take Over.

7.4.2 If the Civil Contractor is entitled pursuant to Section 7.3 to an extension to any Milestone Date for any Milestones in respect of any delay which will be or has been suffered by the Civil Contractor during any Period of Civil Contractor's Delay by reason of any one or

more of the matters set out in Section 7.3.1, and/or the Owner issues a Variation Order pursuant to Article 12 for the performance of work by the Civil Contractor during any Period of Civil Contractor's Delay pursuant to which any such Milestone Date is extended, the Owner shall be entitled to liquidated damages in accordance with Section 7.4.1 in respect of any delay:

(i) prior to extension as aforesaid and the Delay Commencement Date: and

(ii) after the Milestone Date, as extended as aforesaid.

7.4.3 [NOT USED]

7.4.4 Liquidated damages arising under this Section 7.4 shall, subject to Section 4.8, be paid by the Civil Contractor fortnightly in arrears by wire transfer or deposit of immediately available funds to such account as the Owner may direct, with the first such payment to be made no later than fourteen (14) days from the date of raising invoice(s) in respect of the same by the Owner and the last such payment to occur on the earlier of successful completion of the Performance Guarantee Test of the Power Station or termination of this Agreement by the Owner.

7.4.5 The damages recoverable pursuant to this Section 7.4 shall, subject to Sections 16.2 and 6.6, be the Owner's sole remedy în relation to such delay.

7.4.6 The aggregate maximum liability of the Civil Contractor for Delay Liquidated Damages shall be equal to ten percent (10%) of the Contract Price.

10.7 Further Tests

10.7.1If the making good under this Article 10 when complete, might affect the performance of any part of the Power Station, the Owner may reasonably require that any of the tests which are to be performed under this Agreement be repeated; provided that if the Civil Contractor provides evidence satisfactory to the Owner that any such remedying of defects shall not affect the previous test results, the owner may direct that such tests would not require to be repeated.

10.7.2The request shall be made by notice within thirty (30) days after completion of such making good and the relevant tests shall be repeated in accordance with Article 6.

10.7.3In the event of any failure to pass such tests, the provisions of Sections 6.1.10, 6.1.12, 6.6 and Articles 8 and 16 shall apply."

(underlining is ours)

99. The Respondent was contractually required to conduct three tests on each Unit in the following order; (i) RRT; (ii) UCT; and (iii) PGT. Milestone payments under the Agreements were linked to the "successful completion" of the RRT and PGT. 5% of the contract price was payable on the successful completion of the RRT and another 5% was payable on the successful completion of the PGT. The successful completion of the PGT was based on the achievement of certain parameters as provided for in the Agreements and Technical Specifications. Despite the Tribunal having rendered a categorical finding that the UCT for Unit -I was not successfully completed, had gone

on to hold that the PGT for Unit -1 was successfully completed and thus the Respondent was entitled to the milestone payment payable towards PGT of Unit -1 in derogation of the contractual provisions which stipulate the manner in which the testing has to be done.

100. On the contrary, the Tribunal has held that the Appellant had acted in breach of the contractual obligations by refusing to recognise that the RRT had been successfully passed for Units I and 2 and by refusing to permit the UCT and PGT to be conducted, it held that the Respondent was entitled to damages for breach of the contract as it was prevented by the Appellant from performing these Tests and earning 5% of the Contract Price for the PGT of Units 2 and 3. These findings are again in the teeth of the contractual provisions that the tests must be carried out in a certain order and manner failing which the question of moving on to the subsequent test would not arise. The relevant passages dealing with the same are as hereunder;

> *"764. In relation to the UCT, the Tribunal notes the approach adopted by Mr Margolis which is said to take into account the evidence and agreements between the parties. There were three key parameters which were not met and which are the subject of the counterclaim and R-173 defects. These were (I) the attemperation flow rate was exceeded; (2) the ID fans did not have sufficient capacity; and (3) the noise levels were too high. In these circumstances the Tribunal rejects the Claimant's submission that Mr Margolis' approach "better reflects the basis on*

which UCT was to be conducted, how it was to be conducted and the interpretation of those results.'

765. However the Respondent had by the time the results of the UCT and PGT test on Unit 1 were known, adopted a blanket approach which would have prevented the Claimant from repeating the UCT and PGT. This approach stems from Mr Sheshan's email dated 10 September 2014. This approach is not consistent with the contractual obligations between the parties. The Respondent acted in breach of the contractual obligations by refusing to recognise RRT had been successfully passed on Units 1 and 2 and by refusing to permit the UCT and PGT to be conducted until all work within the Claimant's scope of works had been completed in all respects.

Findings

766. The Tribunal finds that the Claimant is entitled to 5% of the Contract Price payable on completion of PGT in relation to Unit 1 and that the Claimant is entitled to damages for breach of contract because the Claimant was prevented by GKEL's wrongful act of hindrance and prevention from performing the tests and earning the 5% of the Contract Price that would have been payable for the UCT in relation to Units 1, 2 and 3, and the PGT for Units 2 and 3 on satisfying these milestones."

101. In holding so, the Tribunal has awarded to the present Respondent sums to the tune of Rs. 255 Crores (approx.). It is opportune at this stage to take note of Section 6.1.5.1 of Amended CWEETC Agreement, which mandates that the RRT is required to be successfully completed before the commencement of the UCT. Further, as per Section 6.1.7.1(a),

both RRT and UCT are required to be successfully completed before the conduct of the PGT. Thus, it is evident that successful completion of both RRT and UCT is a precondition to the successful completion of the PGT. A failure to successfully complete the RRT and UCT would mean that the preconditions to perform the PGT had, in fact, not been achieved and thus the question of conducting the same would not arise.

102. It was the Appellant's case that UCT for Unit 1 had failed, for the reason amongst others, that the attemperator flow rate had exceeded the design value i.e. there being a defect in the design of the Boiler. This system and the Boiler design was common to all the Units. In fact, the Appellant had made a counter claim for the cost of rectification of this defect in all 3 units, (which was considered in Issue no. 16 of the Arbitral Award) which would have required a substantial change in the design of the boiler.

103. The relevant paragraphs from the Arbitral Award dealing with the issue state;

> *"1084. The Claimant submitted Mr Aspinall's investigations were limited and not probative of the existence of any defect in the design as he had only looked at Unit 2 boiler operation. His reports did not detail any of his observations of Unit 2 and he had not looked at Unit 3 at all. However, this submission overlooks the same evidence elsewhere. There is a comment in the opening paragraph of the*

first Harbin report headed a "Description of Problem" (i.e., the high desuperheating water flow during the UCT of Unit 1) which also states; "the same problem also got involved in the operation of the No 2 and No 3 boilers.

1093. The Tribunal has carefully considered this evidence in light of all the evidence put forward by the parties. The Tribunal finds that with the exception of the "over-fire air" and other low cost rectification works which have been recommended by Mr Aspinall and which the Tribunal finds are necessary, whether any other remedial works are necessary has not been established. The over-fire works and other low cost measures will probably mitigate the problem.

1094. The Tribunal finds that the Claimant's design was in breach of the EPC Technical Specifications as a result of the failure to achieve the stable operationattemperation flow rate of below 25 TPH at 100% BMCR."

104. The Tribunal, curiously, has returned a finding that there was defect in the design of the boiler and it was in breach of the EPC Technical Specifications. The Tribunal also held that the manufacturers of the boiler itself had stated that the same defect was prevalent in boilers of all the 3 units.

105. The Tribunal has also rendered a finding that the attemperator was defective and that it was the Respondent's responsibility under, *inter alia*, Sections 6.1.4.3, 6.1.4.6 (iii) and 6.1.10.1 of the Amended CWEETC Agreement to repair and rectify it, at its own risk and cost, and further, under Section 6.1.4.1, to have all systems functioning before undertaking or re-taking the tests.

106. The Respondent was, thus, contractually constrained to demand a re-test unless it first rectified the defect of the attemperation flow rate and completed all systems which were required for the smooth operation of the plant as required under Section 6.1.4.1. Therefore, the question of the Appellant preventing the Respondent from carrying out the re-test of the UCT, by not allowing a UCT unless a rectification was done and all systems were operational as required by the Contract for performing the Acceptance Tests, did not arise. Unless, the UCT was successful, the question of preventing the PGT does not arise.

107. In view of the above, having held that the UCT for Unit — 1 was unsuccessful the Tribunal could not have proceeded to hold the PGT to be successful as held in the following paragraphs:

> *"764.In relation to the UCT, the Tribunal notes the approach adopted by Mr Margolis which is said to take into account the evidence and agreements between the parties. There were three key parameters which were not met and which are the subject of the counterclaim and R-173 defects. These were (I) the attemperation flow rate was exceeded; (2) the ID fans did not have sufficient capacity; and (3) the noise levels were too high. In these circumstances the Tribunal rejects the Claimant's submission that Mr Margolis' approach "better reflects the basis on which UCT was to be conducted, how it was to be conducted and the interpretation of those results.*

> *766.The Tribunal finds that the Claimant is entitled to 5% of the Contract Price payable on completion of PGT in relation to Unit 1 and that the Claimant is entitled to damages for breach of contract because the Claimant was prevented by GKEL's wrongful act of hindrance and prevention from performing the tests and earning the 5% of the Contract Price that would have been payable for the UCT in relation to Units 1, 2 and 3, and the PGT for Units 2 and 3 on satisfying these milestones."*

108. Similarly, with respect to the Units — 2 and 3 also the problem of, *inter alia*, the attemperator flow rate was also existing and thus there could be no question of prevention of the test, as they were bound to fail. Further, the Appellant had categorically informed the Respondent *vide* its letter dated 28.11.2014, in consonance with *inter alia*, the provisions of Section 6.1.4.1 of the amended CWEETC Agreement, that there were several systems such as the fire fighting system, the condenser tube cleaning system, CEMS, the ash disposal system, coal waste water treatment, all of which were still required to be made operational so as to be eligible to undertake the Acceptance Tests.

109. In view of the above, the Tribunal's repeated findings, that requiring all works in all Units and-the BOP to be completed before UCT and POT is in stark contrast to the provisions of the Amended CWEETC Agreement and in contradiction to the

express terms of the Agreements. The relevant paragraphs of the arbitral award are reproduced herein:

> *"757. The contractual requirements for undertaking UCT are successful completion of the RRT, submission of the test procedure for approval and 30 days' notice. A Unit is ready for PGT when the RRT and UCT tests have been successfully completed. Contrary to the requirements in Section 6 of the Amended CWEETC Agreement, Mr Sheshan's view was that he saw no problem with requiring everything to be completed before allowing UCT and PGT to take place. Mr Karanam's evidence was equally clear, he required "all the things to be completed. "Requiring all works in all Units and the BOP to be completed before UCT and PGT is contrary to the provisions of the Amended CWEETC Agreement and furthermore was inconsistent with the Respondent's own position in August 2013 and in July 2014."*

110. The Tribunal by holding so has modified the express terms of the Agreements and overshot its jurisdiction. The Tribunal has, in fact, ignored its own finding:

> *"1061. The attemperation flaw rate is one of the Guaranteed Performance Parameters jar the PGT the EPC Technical Specifications in terms referring to 100% MICR ..."*

111. Thus, once it was held that the UCT was not successful, as a corollary thereto, it could never be said that the PGT was successful. The Tribunal in holding in favour of the Respondent failed to consider that the Milestone payment of 5% is payable on not merely conducting the PGT but on the

'successful completion' of the same. Consequentially, once the Tribunal had rendered a finding that the Respondent had failed to achieve the parameter for the attemperation flow rate, any number of attempts at the UCT / PGT would naturally have been unsuccessful.

112. A bare perusal of the RRT Test Report *(provided to us at Annex-94, Pg.7328)* and the Post RRT Joint Protocol *(provided to us at Ann-95, Pg.7428)* shows that there were a number of critical defects observed during the reliability runs of both Unit 1 and Unit 2. One of them being the fact that the Ash Handling System was not functioning properly as the ash conveying system was being run with 5 air compressors (for Unit 1) and 4 air compressors (for Unit 2) instead of the design requirement of 3 compressors(Issue No. 19). Moreover, when the Tribunal held that the ash handling system was fundamentally under designed and could not cope with the amount of ash being produced, even if the coal was within the range of coal and still proceeded to award a sum of Rs.40 Crores (approx.) as damages for the same. The relevant paragraphs of the Arbitral Award are reproduced hereinbelow:

> *"16.2 Was the Demonstration Parameter for attemperation flow being below 25TPH at BMCR achieved during the UCT attempt of Unit 1?*
> *…..1071. No, the rate was exceeded. As noted above, during the UCT for Unit 1 on 26 August 2014, the total flow rate was recorded as "Total flow = 46.12 +*

46.12.+ 1.9 = 94.14 TPH" and it was observed that "SH attemperation flow is more than design value."

Findings

….1093. The Tribunal has carefully considered this evidence in light of all the evidence put forward by the parties. The Tribunal finds that with the exception of the "over-fire air" and other low cost rectification works which have been recommended by Mr Aspinall and which the Tribunal finds are necessary, whether any other remedial works are necessary has not been established. The over-fire works and other low cost measures will probably mitigate the problem.

1094. The Tribunal finds that the Claimant's design was in breach of the EPC Technical Specifications as a result of the failure to achieve the stable operation attemperation flow rate of below 25 TPH at 100% BMCR.

1281. The Tribunal assesses the rectification costs limited to INR 395,300,000 on the basis that the vacuum system is not to be included as it would otherwise be a claim for betterment of the contracted system.

(44) Defect 44 - Failure of Turbine Driven Boiler Feed Pump (TDBFP) rotor cartridge (Part 1, Tab 3, Item 46)

1725. In or around July 2016, the rotor cartridge of the Turbine Driven Boiler Feed Pump 3tiA seized. As a result the feed water flow could not be established and the rotor cartridge was unable to achieve the necessary process parameters for the feedwater flow.

Respondent's position

1726. This is a Latent Defect that arose before the expiry of the Latent Defects Period on 1 June 2016."

(underlining is ours)

113. The Tribunal having awarded damages for the defective ash handling system (Issue no.19), HFO system (Issue no.18), as well as the High Pressure Feed Water Heaters (Issue No. 17)., which were also, mentioned as defects in the post RRT protocol, the Tribunal could not have possibly found that the Appellant had agreed that the RRT was successfully completed. The same is counter intuitive, contrary to the records and grossly arbitrary. It is thus clear that Issue Nos.9,10, 7,16,17,18 and 19 are intrinsically tied up with and directly related to the inherent flaws in the testing processes i.e. UCT, RRT and PGT.

D. WHETHER THE LD. SINGLE JUDGE WAS CORRECT IN DISMISSING THE SECTION 34 PETITION AT THE STAGE OF ADMISSION WITHOUT CONSIDERING ALL THE ARGUMENTS MADE BY THE PARTIES?

114. The Learned Senior Counsel for the Respondent very zealously put forward his submissions pertaining to this issue. The Appellant claims that the Learned Single Judge ought not to have dismissed the petition under Section 34 at the stage of admissions without considering all the arguments made by them.

115. *Per contra,* the Respondent's contended that under Section 34 of the A & C Act, a Court exercises limited jurisdiction and any challenge to an award must meet the minimal thresholds set out in the said Section for it to be admitted. The hearing, on

admission and stay, before the Learned Single Judge has apparently gone on for 9 days followed by the parties submitting post hearing submissions as well. Therefore, it is the Respondent's earnest contention that the Single Judge did not err in dismissing the petition under Section 34 at the stage of admission and has done so after applying his mind to the merits of the Appellant's submissions.

116. It is pertinent to mention herein that the Learned Single Judge had considered only three broad issues at the stage of admission and hearing of the interim stay application before passing his final judgment (impugned herein). Firstly, whether the Tribunal has made out a case for the Respondent which was not pleaded by it; secondly, if the Tribunal has modified the contract between the parties by holding that the parties had waived the requirement to issue contractual notices and thirdly, whether this waiver was applied equally to both parties.

117. However, the Learned Single Judge was of the final opinion in the following words:

> *"24.1 As discussed earlier, in the instant case, the Tribunal has not re-written the contract. When an issue with regard to waiver/estoppel of issuance of notices in violation of the amended CWEETC Agreement was raised by the Petitioner, the Tribunal was obliged to answer the same on the basis of the materials available on record. Accordingly, on discussion of the materials on*

record, the Tribunal came to a conclusion that the parties have agreed to waive issuance of notices as per contractual provision. The Tribunal, while answering the issue, has rejected the plea of waiver of contractual notices by the SEPCO relying upon the events of March, 2010 only. Basing upon the materials on record, the Tribunal came to a conclusion that by their conduct in March, 2012 the parties have consciously and diligently decided to waive issuance of contractual notices. Although the material available may not be sufficient to come to the impugned conclusion, as alleged by the Petitioner, but that cannot be a ground of interference in view of the case law discussed earlier. Further, the finding of the Tribunal does not shock the conscience of the Court, which would warrant interference with the impugned award under Section 34 of the Arbitration Act, on the plea of breach of fundamental principles of justice. Thus, it cannot be said that finding of the Tribunal is contrary to the public policy of India."

118. The Learned Single Judge while discussing the main issue of Notice – Waiver/Estoppel has held as follows:

"19. In the instant case, the arbitral Tribunal relying upon the email of Mr.Rao (GKEL's representative) came to hold that through such email Mr.Rao was asking SEPCO not to issue formal notice to it in any matter in future. Thus, it cannot be denied that finding with regard to waiver of notice is perverse and based on no evidence. As held in Associate Builders (supra), an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. This Court on re-appreciation of evidence cannot comment upon

> *the quantity and quality of evidence relied upon by the Tribunal to come to a definite finding, unless it shocks the conscience of the Court. On perusal of the relevant paragraphs of the impugned award referred to by learned counsel for the parties, it is manifest that the Tribunal has dealt with the rival contentions of the parties while recording finding of waiver of notices. It would not be out of place to mention here that the claim of SEPCO with regard to waiver of notices in certain aspects have also been rejected by the Tribunal holding that waiver of notices in such matters is not permissible in law."*
>
> *(underlining is ours)*

119. We are unable to accept that, despite noting that the finding regarding waiver of notice is based on no evidence and incorrect, the Single Judge has been reluctant to interfere with the Arbitral Award while being conscious and aware of the fact that this one issue was by itself a bedrock for a major portion of the parties claims and disputes and, therefore, went to the root of the matter. Moreover, the Learned Single Judge did not even delve into the issue of prolongation costs caused by the suspension and cancellation of Unit 4 despite the same being brought to its notice.

120. The statutory right to appeal against an arbitral award as provided for in Section 34 of the A&C Act is a statutory appeal. There are usually only three outcomes that come out of these appeals, which are:

i. Dismissed after consideration of the matter on merits. (Award is upheld)

ii. Allowed after consideration of the matter on merits. (Award is set aside)

iii. Dismissed on the ground of delay or error in jurisdiction, etc. at a preliminary stage without consideration on merits.

121. The first and second outcomes being simple, we are faced here with a curious mixture of the first and third outcome. When a petition under Section 34 is dismissed at a preliminary stage, i.e. at the stage of admission, the grounds are usually limited to delay or jurisdiction. In the present case, the Single Judge has partially considered the case on merits but dismissed the matter at a preliminary stage. The same is an unusual departure from the practice and norm of hearing a petition under Section 34. In any case, whether or not the Learned Single Judge erred in his approach, is not germane to the issues at hand as the parties *vide* order dated 15.5.2023 of the Supreme Court of India in SLP(C) No.12194 of 2023 have been urged to place all their contentions before this Court in the present appeal Section 37 of the A&C Act and therefore, this Court is presently in any case, making an earnest endeavour to discuss and deliberate upon all such contentions.

i. WHETHER THE LD. SINGLE JUDGE WAS CORRECT IN DISMISSING THE APPELLANT'S CONTENTIONS PERTAINING TO BIAS BEING SHOWCASED BY THE ARBITRAL TRIBUNAL.

122. While the Learned Single Judge has curiously not considered all the contentions of the Appellant, it has rendered a finding on whether the Appellant could raise the issue of bias being showcased by the Arbitral Tribunal. The Appellant has premised this contention as an extension of the equality of treatment specified under Section 18 of the A&C Act. The Appellant has pointed out a number of instances to show how the parties have been treated unequally during the course of arbitral proceedings. It has also taken us painstakingly through various portions of the award to show how certain principles of law have been applied unequally with respect to the parties therein. Although, such a contention at first glance seems to be attractive but a closer scrutiny would, in fact, points in another direction. The concept of "bias" and "unequality" as postulated under Section 18 of the A&C Act are separate and distinct concepts juristically.

123. The Arbitration Act is a complete code in itself and provides for a challenge being made on the ground of bias. Section 12(3) of the A&C Act which provides that:

> *"12 (3) An arbitrator may be challenged only if—*
> *(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or*

(b) he does not possess the qualifications agreed to by the parties."

And Section 13 of the A&C Act further provides that:

> *"13.Challenge procedure.—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.*
> *(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section(3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.*
> *(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.*
> *(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.*
> *(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.*
> *(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."*

124. Section 13 of the A&C Act requires that in the first instance, the challenge pertaining to the Arbitral Tribunal's independence or

impartiality is to be made to the Arbitral Tribunal itself. If the said challenge is not successful, it can be made a ground for setting aside of the award under Section 34 of the A&C Act (Section 13(5) of the A&C Act provides for the same). In fact, the said challenge can be raised at any stage of the arbitral proceeding when such a circumstance occurs subject to the limitation of 15 days provided under Section 13(2) of the A&C Act.

125. In the present case, the challenge is based solely on the conclusions and findings of the Tribunal in its Award. The Award is dated 7.9.2020. It was corrected on 17.11.2020. It was followed by a further Award on Interest and Costs dated 24.6.2021, followed by corrections and a final award dated 1.9.2021. The Appellant thus knew the grounds of its challenge on 7.9.2020 and was legally obliged to make its challenge on the grounds of bias within 15 days thereof. Instead, the Appellant participated in the corrections of Award exercise and participated in the further Award on Interests and Costs without any objection/protest. It made its bias challenge on 15.2.2021 when it filed its petition under Section 34 of the A & C Act. The Appellant has not explained the delay or reasons for non-adherence to the procedure and time window prescribed under Section 13(2) of the A&C Act.

126. The Respondent has further brought to our notice the test for apparent bias laid down by the House of Lords in ***Porter v.***

Magill[28] which was endorsed by the Supreme Court in ***N.K. Bajpai v. Union of India***[29].

127. Nonetheless, we are but in agreement with the Learned Single Judge that the allegation of 'bias' is a serious allegation against the Tribunal and the same has to be viewed with circumspection. The Appellant cannot raise the issue of 'bias' at a belated stage before this Court in a petition under Section 34, in gross contravention of the mechanism provided in the A&C Act. No objection with regards to 'bias' was raised by the Appellant under Section 12(3) and Section 13 of the A&C Act and thus, the same cannot be entertained now.

E. IN LIGHT OF THE ABOVE WHETHER THE ORDERS OF THE LD. SINGLE JUDGE AND THE LD. ARBITRAL TRIBUNAL HAVE "SHOCKED THE CONSCIENCE OF THIS COURT", OR "ARE CONTRARY TO THE BASIC NOTIONS OF JUSTICE", OR "ARE IN EXPRESS VIOLATION OF SECTION 28(3) OF THE A&C ACT, WHICH NECESSITATES INTERFERENCE BY THIS COURT UNDER SECTION 37 OF THE A&C ACT?

128. At the outset, it is relevant to observe that the law as to the scope of interference under Sections 34 and 37 of the A&C Act is now well settled. It is no longer *res integra* that the scope of interference by the Courts in arbitration proceedings and arbitral awards is narrow, more so, in an International

[28](2002) 1 All ER 465
[29](2015) 1 SCC 653

Commercial Arbitration seated within or outside India, especially after the amendment to the A&C Act in 2015. The Courts should be slow and circumspect in interfering with any award which is passed by an arbitral tribunal which has been appointed pursuant to an agreement between the parties to the dispute. Section 34 of the A&C Act outlines within it, only certain finite instances when the Courts can interfere with an award passed by arbitral tribunals and set it aside. An arbitral award can be set aside under Section 34 of the A&C Act only on the grounds as set out under Section 34(2) or 34(2A) of the A&C Act. Further, interference under Section 37 of the A&C Act cannot travel beyond the prescriptions as set out under Section 34 of the A&C Act.

129. Section 34 of the A&C Act is quoted hereinbelow for easy reference:

> *"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 1[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 <u>was otherwise unable to present his case</u>; 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, <u>or</u>

<u>(ii) the arbitral award is in conflict with the public policy of India.</u>

<u>[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,—</u>

(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

<u>(ii) it is in contravention with the fundamental policy of Indian law; or</u>

(iv) 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.]

…."

(Emphasis is ours)

130. In ***MMTC Ltd. v. Vedanta Ltd.*** (supra), the Supreme Court has observed that as far as interference with an order made under Section 34 is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the said provision. As far as Section 34 is concerned, the position is well-settled that the Court does not sit in appeal over the arbitral award and can interfere on merits only under limited grounds. It thus, needs no reiteration that interference under Section 37 of said Act does not entail a review of the merits of the dispute, and is limited to situations where the findings of the Arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be tinkered with lightly, if the view

taken by the Arbitrator is a possible view based on facts. The relevant paragraphs of ***MMTC Ltd. v. Vedanta Ltd.*** (supra) are reproduced hereinbelow for the sake of convenience:

> *"10. Before proceeding further, we find it necessary to briefly revisit the existing position of law with respect to the scope of interference with an arbitral award in India, though we do not wish to burden this judgment by discussing the principles regarding the same in detail. Such interference may be undertaken in terms of Section 34 or Section 37 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act"). While the former deals with challenges to an arbitral award itself, the latter, inter alia, deals with appeals against an order made under Section 34 setting aside or refusing to set aside an arbitral award.*
>
> *11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. WednesburyCorpn., (1948) 1 KB 223*

(CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] ; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445] ; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been

confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

Reference may also be made to ***Hindustan Zinc Ltd. v. Friends Coal Carbonisation***[30]; ***National Highway Authority of India v. Progressive-MVR (JV)***[31]; and ***McDermott International Inc. v. Burn Standard Co. Ltd.***[32]in this regard.

131. Furthermore, in the oft quoted and relied upon case of ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI*** (supra) the Supreme Court has held that:

"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

[30](2006) 4 SCC 445
[31](2018) 14 SCC 688
[32](2021) 11 SCC 181

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 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].

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground."

132. Therefore, keeping in mind the position of law as it stands today, the grounds available to a party to challenge an arbitral award are broadly:

i. **Contravention of the fundamental policy of Indian Law** as laid down in Paras 18 and 27 of ***Associate Builders[Associate Builders v. DDA[33]]:*** A quick reference may be made to the relevant paragraphs as reproduced hereinbelow:

[33] (2015) 3 SCC 49

"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."*

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).

….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.

ii. **Contravention of the principles of natural justice** (as laid down in Para 30 of ***Associate Builders*)*:*** A quick reference may be made to the relevant paragraphs as reproduced hereinbelow:

"….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;"

iii. **Contravention of the most basic notions of justice and morality** (as laid down in Paras 36 to 39 of ***Associate Builders):*** A quick reference may be made to the relevant paragraphs as reproduced hereinbelow:

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

37. The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Contract Act, 1872 so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality":

> *"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.*

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code, 1860."

38. In GherulalParakh v. MahadeodasMaiya [1959 Supp (2) SCR 406 : AIR 1959 SC 781] , this Court explained the concept of "morality" thus: (SCR pp. 445-46 : AIR pp. 797-98)

"Re. Point 3 — Immorality: The argument under this head is rather broadly stated by the learned counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu law considers to be immoral in that context may appropriately be applied to a case under Section 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu law into the domain of contracts. Section 23 of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English law than to the Hindu law texts dealing with a different matter. Anson in his Law of Contracts states at p. 222 thus:

'The only aspect of immorality with which courts of law have dealt is sexual immorality….'

Halsbury in his Laws of England, 3rd Edn., Vol. 8, makes a similar statement, at p. 138:

'A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral

and illegal contracts. The immorality here alluded to is sexual immorality.'

In the Law of Contract by Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:

'Although Lord Mansfield laid it down that a contract contra bonos mores is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible.'

In the book on the Indian Contract Act by Pollock and Mulla it is stated at p. 157:

'The epithet "immoral" points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment.'

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by courts. The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances: settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

The word 'immoral' is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good

conscience is immoral. Its varying content depends upon time, place and the stage of civilisation of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of Section 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative textbook writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, 'the court regards it as immoral', brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognised and settled by courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold."

39. This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific

performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience."

133. Again in ***Madhya Pradesh Power Generation Company Ltd. v. Ansaldo EnergiaSpA,***[34] it is held as under:

"25. The limit of exercise of power by courts under Section 34 of the Act has been comprehensively dealt with by R.F. Nariman, J. in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Lack of judicial approach, violation of principles of natural justice, perversity and patent illegality have been identified as grounds for interference with an award of the arbitrator. The restrictions placed on the exercise of power of a court under Section 34 of the Act have been analysed and enumerated in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] which are as follows:

(a) The court under Section 34(2) of the Act, does not act as a court of appeal while applying the ground of "public policy" to an arbitral award and consequently errors of fact cannot be corrected.

(b) A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the sole judge of the quantity and quality of the evidence.

[34] (2016) 6 SCC 661

(c) Insufficiency of evidence cannot be a ground for interference by the court. Re-examination of the facts to find out whether a different decision can be arrived at is impermissible under Section 34(2) of the Act.

(d) An award can be set aside only if it shocks the conscience of the court.

(e) Illegality must go to the root of the matter and cannot be of a trivial nature for interference by a court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the court. Error of construction is within the jurisdiction of the arbitrator. Hence, no interference is warranted.

(f) If there are two possible interpretations of the terms of the contract, the arbitrator's interpretation has to be accepted and the court under Section 34 cannot substitute its opinion over the arbitrator's view."

134. If we may, for a moment, focus on the term used in Explanation 2 of Section 34 (2)(b) then Merriam Webster Dictionary defines "review" simply as "to look at a thing again". It is trite in law that the Court under Section 34 or Section 37 of the A&C Act does not sit in appeal over the merits of the case. The Supreme Court in ***P.R. Shah Shares & Stock Broker (P) Ltd. v. B.H.H. Securities (P) Ltd***.[35] has held that a Court does not sit in appeal over the award of an Arbitrator by re-assessing or re-appreciating the evidence. An award can be challenged only on the grounds mentioned in Section 34(2) of

[35] (2012) 1 SCC 594

the Act and in absence of any such ground, it is not possible to re-examine the facts to find out whether a different decision can be arrived at. This view was reiterated by the Apex Court in ***Swan Gold Mining Ltd. v. Hindustan Copper Ltd.***[36]. Therefore, the standard of "review" of an Arbitral Award under Section 34 and Section 37 of the A&C Act is quite different as compared to the onerous task of adjudicating the dispute afresh. In the latter, the Arbitrator is tasked with a complete and exhaustive perusal of the evidence produced on record. However, at the stage of adjudicating a challenge to the award, this Court cannot look at the merits of the dispute "again". Having been said, the Court while endeavouring to test if an award does not pass the muster of being *"in conflict with the fundamental policy of Indian law"* or being *"in conflict with the most basic notions of justice"* will necessarily have to undertake an assessment of the manner of the decision making of the award. Although the end-result or the interpretation of a contractual provision or a fact finding by the Arbitrator cannot be tinkered with the reasoning behind it must necessarily pass muster. The limitations placed on this Court's powers under Section 34 or 37 of the A&C Act cannot be countenanced to mean that a court seized with an application under Section 34 or Section 37 of the A&C Act is denuded from reviewing the

[36] (2015) 1 SCC 739

"reasonableness/unreasonableness" of decision making of either the Tribunal or the Court below, as the case may be.

135. In conducting this exercise, the Court must ensure that their actions are within the contours of the provisions, no matter howsoever constricted, they might have become over the years by way of judicial pronouncements or legislative interventions. Today, the test is that, to warrant interference with arbitral award the same must "shock the conscience of the court", interestingly a phrase which doesn't find mention in the A&C Act itself but it is an innovation made by the courts themselves.

136. It is true that the jurisdiction of this Court while considering the validity of an award is limited, as has also been stated by this Court in ***Ispat Engg. & Foundry Works***[37]. However, the Supreme Court in ***Bharat Coking Coal Ltd. v. Annapurna Construction***[38], where the Arbitrator has not taken into consideration and ignored the relevant clauses of the contract, goes on to hold that:

> *"40. However, as noticed hereinbefore, this case stands on a different footing, namely, that the arbitrator while passing the award in relation to some items failed and/or neglected to take into consideration the relevant clauses of the contract, nor did he take into consideration the relevant materials for the purpose of arriving at a correct fact.*

[37](2001) 6 SCC 347

[38](2003) 7 SCC 154

Such an order would amount to misdirection in law."

137. We are also mindful of the fact that the present legal position, as it stands today, states that this Court does not have the power to modify an award. In this regard, reference may be made to the judgment of the Supreme Court in ***NHAI v. M. Hakeem***[39], wherein the Apex Court has held:

> *"41. As has been pointed out by us hereinabove, McDermott [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] has been followed by this Court in KinnariMullick [KinnariMullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] . Also, in Dakshin Haryana BijliVitran Nigam Ltd. v. Navigant Technologies (P) Ltd. [Dakshin Haryana BijliVitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] , a recent judgment of this Court also followed McDermott [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] stating that there is no power to modify an arbitral award under Section 34 as follows : (Dakshin Haryana BijliVitran Nigam case [Dakshin Haryana BijliVitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] , SCC p. 676, para 44)*
>
> > *"44. In law, where the court sets aside the award passed by the majority members of the Tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding. Under Section 34 of the Arbitration Act, the court may either dismiss*

[39] (2021) 1 SCC 1

the objections filed, and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2-A) are made out. There is no power to modify an arbitral award."

…42. It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , [KinnariMullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , [Dakshin Haryana BijliVitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

…48. Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the LakshmanRekha and doing what, according to the justice of a case, ought to be done. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask

whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations world over."

138. The issue of Notice - Waiver / Estoppel goes to the root of the matter and is all pervasive and non-severable. It affects various claims such as those pertaining to Grid Synchronization (Issue no.6) (Para 505 of the Award), Fuel Oil (Issue no.7) Para 549 of the Award), Coal (Issue no.8) Para 610 of the Award), UCT-PGT (Issue no. 10) (Para 752 of the Award) and R-173 Defects (Issue No. 20). The findings in these issues has a consequential impact on the amount of prolongation costs awarded to the Respondent under Issue no. 11 and the issue of delay in liquidated damages recoverable by the Appellant from the Respondent, which has been considered by the Tribunal in Issue no. 15 of the Award. Thus, in view of the law settled by the Supreme Court in the case of ***NHAI v. M. Hakeem*** (supra), if the findings on this issue or any of the aforementioned issues are set aside, then the entire Award will have to be set aside.

139. In ***PSA Sical Terminals*** (supra), ***Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*** (supra), ***Satyanarayana Construction Co. v. Union of India*** (supra) and ***Indian Oil Corporation Limited v. Shree Ganesh Petroleum***

Rajgurunagar (supra), the common thread that emerges from the aforesaid decisions of the Supreme Court is that it has broadly identified two categories of cases which can be challenged under the mechanism provided under the A&C Act. They can be said to be cases where the Arbitrator exercises his power within jurisdiction or in excess thereof. An Arbitrator is perfectly entitled to "interpret" the terms of the contract and the same would be exclusively within its domain and he would be acting "within" his jurisdiction. However, when the Arbitrator based on whatever materials proceeds to "rewrite the terms of the contract", the same would be acting in excess of jurisdiction. In all the above cases, the Supreme Court has consistently held that rewriting of contract would come under the latter category, albeit an extremely narrow one, i.e. one which "shocks the conscience of the Court". The Apex Court has also consistently upheld the setting aside of all such instances which were brought before it especially where the arbitrator has acted in excess of jurisdiction and rewritten the terms of the contract.

140. In the present case, the Tribunal's interpretation of the contractual provisions vis-a-vis Respondent's entitlement of delay related damages for prolongation and disruption costs in contravention of the express terms of the contract, and its ascertaining that the agreements excluded the common law right of termination, are in gross violation of the terms of the

contract entered into by the parties themselves. The Arbitral Tribunal has not only ignored the express terms of the contract to arrive at its findings; but it has also rewritten certain clauses thereby grossly exceeding the scope of its jurisdiction. The same does shock the conscience of this Court.

141. The ground of contravention of the fundamental policy of Indian Law(Ground 'i' hereinabove) entails that any arbitral award which flies in the face of what is fundamental to Indian law or any principle arising thereof, would be a valid ground for setting aside the arbitral award. As discussed hereinabove, it has been categorically laid down that disregarding orders passed by the superior courts in India would also be a contravention of the fundamental policy of Indian law. That being the case, as has been dealt with hereinabove, principles laid down in a catena of judgments of the Apex Court have been disregarded by the Tribunal while dealing with various issues as were framed by it. Therefore, this Court is constrained by the *imprimatur* of the Supreme Court to intervene, given the factual and legal backdrop.

142. Similarly, the ground of contravention of the principles of natural justice (Ground 'ii' hereinabove) postulates the principle that all parties must be treated equally and as a corollary thereof, any principle applied to one party must be extended equally to the other party as well. If there is no equality in the treatment of the parties, the arbitral award

becomes liable to be set aside. The Tribunal having come to a conclusion that the parties had mutually decided to "waive" the requirement of issuance of contractual notices could not have disallowed the counterclaims of the Appellant on the ground that no such notices had been given. This is nothing but violative of the equality principle enshrined under Section 18 of the A&C Act.

143. Lastly, the ground of contravention of the most basic notions of justice (Ground 'iii' hereinabove) implies that an award can be said to be against justice, when it shocks the conscience of the court and any such award which shocks the conscience of the court is liable to be set aside. Although, what will "shock the conscience of the court" will depend on the facts and circumstances of each case. What seems to be the common thread as discussed hereinabove is that it is impermissible for the Tribunal to rewrite the terms of the contract. In the present case, the Tribunal would have been perfectly justified and within jurisdiction to interpret the terms of the contract and could not have been faulted with. However, the Tribunal disregarding the fact that the parties were not ad idem on the issue of waiver of contractual notices and has proceeded to come to a conclusion that there, in fact, has been "waiver" of the same. In doing so, the Tribunal has acted in derogation of the express terms of the two clauses in particular, i.e. the "no

oral modification clause" and the "no waiver clause". In this manner, the Tribunal has committed a grave error of stepping into the shoes of the parties of the contract and it has rewritten the terms which strike at the root of the matter and it alters the very nature of the contract and the manner in which it was envisioned to be performed. We are, thus, of the considered opinion, albeit very cautiously, that the present case "shocks the conscience" of this Court and necessitates interference.

144. Therefore, keeping in mind the discussion above, the findings of the Tribunal pertaining to the issue of Notice-Waiver/Estoppel completely "shocks the conscience of this court" as also the Tribunal's findings pertaining to delay related damages for prolongation or disruption costs and the grant of 5% of contractual price upon completion of tests, and the same is therefore liable to be set aside. As explained above, the issue of Notice-Waiver/Estoppel is intertwined with various others and therefore, in light of the Supreme Court's judgment in ***NHAI v. M. Hakeem*** (supra) and more recently reiterated in ***Larsen Air Conditioning &Refrigration Company v. Union of India and Ors.***[40], the only recourse available to this Court is to set aside the entire Arbitral Award in the interest of justice.

[40] 2023 SCC OnLine SC 982

V. CONCLUSION:

145. The Arbitrator is a Judge chosen by the parties and his decision is final as long as it is founded in fairness and justice. "Q*uialiquidstatueritparteinauditaaltera, aequum licet dixerit, baud aequumfecerit*" that is, "justice should not only be done but should manifestly be seen to be done". A decision must 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. The award cannot be passed on the *ipse dixit* of the arbitrator.

146. When it comes to the fundamental public policy of India, argument based upon "most basic notions of justice", it is clear that this ground as laid down by the Supreme Court in ***SsangyongEngg. & Construction*** (supra); ***Associate Builders v. DDA*** (supra) and ***Madhya Pradesh Power Generation Company Ltd. v. AnsaldoEnergiaSpA*** (supra) can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infractions of the arbitrator or arbitral tribunal. This being the case, it is clear that in the present case, the arbitral tribunal has created a new contract for the parties by not only re-writing large portions of the same but also disregarding certain explicit embargos therein, which goes against the basic notions of justice and shocks the conscience of

this Court. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country. However, we repeat that this ground is available only in very exceptional circumstances, such as the facts and circumstances of the present case.

147. In light of the discussion above, keeping the settled principles of law in mind and for the reasons given above, this Court is of the considered view that the present Arbitration Appeal is allowed. Consequently, the judgment dated 17.06.2022 passed by the learned Single Judge of this Court is set aside. Accordingly, the arbitral award dated 07.09.2020 as corrected thereafter, passed by the Tribunal consisting Prof. Lawrence Boo BBM, Dr. Michael Pryles PBM, and Mr. Malcolm Homes QC is, accordingly, set aside in light of the discussion hereinabove.

148. ARBA (ICA) No.1 of 2023 is disposed of on the abovementioned terms. No order as to costs. Ordered accordingly.

(S. Talapatra)
Chief Justice

(Dr. S.K. Panigrahi)
Judge

Orissa High Court, Cuttack,
Dated the 27th September, 2023/