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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 15.05.2026

Judgment delivered on: 14.08.2026

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FAO(OS) (COMM) 132/2024 CM APPL. 37358 /2024

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FAO(OS) (COMM) 136/2024 CM APPL. 37716/2024

SSANGYONG ENGINEERING AND CONSTRUCTION CO. LTD.

.....Appellant

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Respondent

Advocates who appeared in this case

For the Appellant : Mr. Navin Kumar, Ms. Surbhi Agarwal, Ms. Rashmeet Kaur, Ms. Aarti Mahto, Advs.

For the Respondents : Mr. Ankur Mittal and Mr. Arpit Sharma, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMEET PRITAM SINGH ARORA, J.

1. FAO(OS) (COMM) 132/2024 has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 [‘Act of 1996’] read with Section 13 of the Commercial Courts Act, 2015 assailing the judgment dated



08.04.2024 passed by the learned Single Judge [the ‘impugned judgment’] in exercise of its jurisdiction under Section 34 of the Act of 1996 in OMP(COMM) No. 340/2021, whereby the Arbitral Award dated 26.06.2021 [‘impugned Award’] has been set aside at the instance of the Respondent, and the disputes [including claims and counter-claim] have been remanded back to the Arbitral Tribunal for fresh adjudication.

2. FAO(OS) (COMM) 136/2024 has been filed assailing the judgment dated 08.04.2024 passed in Section 34 petition being OMP (COMM) No. 256/2021 filed by the Appellant, on the plea that learned Single Judge failed to adjudicate the Appellant’s challenge to the impugned Award rejecting the Appellant’s claim for pre-award and pendente lite period for interest at 10% per annum on the awarded amount, compounded monthly.

FACTUAL MATRIX

3. On 30.12.2005, the Appellant was awarded a contract by the Respondent for the construction of a highway on the Jhansi-Lakhanadon Section in the State of Madhya Pradesh for about 54 Km. between Km 211 to Km 255 of NH-26 (Contract Package-ADB-II/C-6) [the ‘contract’ or ‘contract package C-6’] at a Contract Price of Rs. 163,87,02,003/-.

4. It is stated that the contract in question, being a FIDIC¹ standard form contract, stipulated that execution of the contract would be supervised by an independent third party, i.e., the Engineer.

5. Accordingly, as per Clause 2.1 of General Conditions of the Contract

¹ International Federation of Consulting Engineers



['GCC'], the Respondent/Employer had appointed M/s. Roughton International to act as 'the Engineer'.

6. As per Clause 2.6 of GCC, it was provided that the Engineer shall have the authority to inter alia give his decision, opinion or consent, determine value, or otherwise take action which may affect the rights and obligations of the Respondent/Employer or the Appellant/Contractor. Such power was to be exercised by the Engineer impartially, having regard to all circumstances.

7. It was specifically agreed in terms of the said Clause 2.6 of GCC that "any such decision (sic. of the Engineer), opinion, consent, expression of satisfaction, or approval, determination of value or action may be opened up, reviewed or revised as provided in Clause 67 of COPA (i.e. the Dispute Resolution Mechanism under the Contract)".

8. It is stated that upon substantial completion of work, the project was to be taken over by the Engineer by issuing a Taking Over Certificate ['TOC'] in terms of Clause 49 of GCC, which was also the point of commencement of the Defects Liability Period ['DLP'] for a period of 365 days.

9. It is stated that the Appellant executed the contract under the instructions of the Engineer. It is stated that as per Sub-Clause 60.1 of the Conditions of Particular Applications ['COPA'] the Appellant submitted monthly statements to the Engineer for each month in respect of the work executed up to the end of the previous month. It is stated that the monthly statements were submitted in the form of an Interim Payment Application



['IPA']. It is stated that, pursuant to Sub-Clause 60.2 of COPA, the Engineer, upon verification of the work executed, determined the amount due to the Appellant under the IPA and issued to the Respondent and the Appellant the corresponding IPC for payment against the IPA. It is stated that the Appellant raised several IPAs during the execution of the contract, and that a total of 72 IPCs were issued by the Engineer, which have been duly paid by the Respondent to the Appellant.

10. It is stated that the project was completed on 30.10.2012, as certified by the TOC dated 06.04.2013. The certificate recorded that the work was determined as complete as on 12.03.2013. The DLP was completed on 12.03.2014 as certified by the Defects Liability Certificate ['DLC'] dated 04.04.2014. It is stated that issuance of the DLC constitutes approval of all works executed under the contract as agreed by the parties under Clause 61.1 of GCC.

11. Upon completion of the project and the DLP, the Appellant raised its Draft Final Statement [Draft Final Bill] as per Sub-Clause 60.11 of COPA on 24.06.2014, for a net value of Rs. 160,71,89,930/- payable in INR and \$ 5,845,604.72 payable in USD for the evaluation and certification of the Engineer in terms of Sub-Clause 60.13 of COPA.

Thereafter, the Engineer reviewed the Draft Final Statement.

The Engineer certified the Final Statement, pursuant to its jurisdiction under Sub-Clause 60.11 of COPA. The Engineer issued the Final Payment Certificate ['FPC'] dated 31.08.2014, in terms of Sub-Clause 60.13 of COPA against the Contractor's Draft Final Statement for payment for a net value of Rs. 14,24,50,311/-, wherein payment in INR was of Rs.



122,802,146/- and payment in USD was \$ 446,650.86.

12. The Arbitral Tribunal, at paragraph no. 26 of the impugned Award, while considering the nature of the Certificate dated 31.08.2014, recorded that the Appellant had not furnished the written discharge contemplated under Sub-Clause 60.12 of COPA and accordingly concluded that the said Certificate constituted the Final Statement under Sub-Clause 60.11 of COPA and not an FPC under Sub-Clause 60.13 of COPA. The findings of the Arbitral Tribunal are not challenged by the Appellant. The Appellant agrees that the Certificate dated 31.08.2014 is a Final Statement [Final Bill] and not an FPC.

The Arbitral Tribunal, by its Award dated 26.06.2021, awarded the Appellant Rs. 6,65,57,179/- and USD 251,858/- towards the balance amount under the Final Statement, together with future interest at 2% per annum.

However, it declined to adjudicate the Respondent's challenge to the correctness of the said Final Statement on the premise that it had not been challenged under Sub-Clause 67 of COPA read with Clause 2.6 of GCC. The Arbitral Tribunal also rejected the Respondent's counter-claim of Rs. 2,76,12,569/- as barred by limitation. The Appellant's claim for delayed-payment interest under Sub-Clause 60.8 of COPA was also rejected, which has been separately challenged by the Appellant in OMP (COMM) No. 256/2021.

13. Thereafter, the Respondent challenged the impugned Award by way of OMP (COMM) No. 340/2021, inter alia on the ground of violation of principles of natural justice, contending that the case of the Respondent had not been considered and that the said Award ignored that no term of the



contract provides for payment against a Final Statement.

14. The learned Single Judge *vide* Impugned Judgment has set aside the impugned Award and remanded the matter back to the Arbitral Tribunal for fresh adjudication on the following three findings: -

- i. Absolute non-consideration and non-adjudication of the objections of the Respondent to the Final Statement dated 31.08.2014, which amounts to non-adherence to the principles of natural justice. Also, the non-consideration of the pleas of the Respondent vis-à-vis the errors in the contents of the Final Statement dated 31.08.2014 is a breach of public policy.
- ii. Since the Final Statement dated 31.08.2014 was not a FPC as contemplated under Sub-Clause 60.13 of COPA, the relief granted by the Arbitral Tribunal in favour of the Appellant, directing the Respondent to make payment as per the Final Statement dated 31.08.2014, was not permissible as per the contract.
- iii. Lastly, contradiction in the impugned Award with a separate award dated 01.12.2019 with respect to a separate contract package C-5, wherein the Arbitral Tribunal held the character of the similar FPC therein to be an Interim Payment Certificate [i.e., as per Sub-Clause 60.9 of COPA] and concluded that such a certificate has not attained finality. The learned Single Judge also noted that the counter-claim in the other arbitration had been held to be within limitation and not time-barred. The learned Single Judge was of the view that the findings in the impugned Award arising out of contract package C-6



were contrary to those in the arbitral award dated [‘award dated 01.12.2019’] arising out of contract package C-5, even though they arose from identical clauses in the contract.

14.1. The learned Single Judge observed that the composition of the Arbitral Tribunal presiding over the disputes in contract package C-6 and contract package C-5 was the same.

14.2. This finding of the learned Single Judge that the composition of the Arbitral Tribunal was identical has been disputed by the Appellant as a matter of fact.

We therefore note that the composition of the Arbitral Tribunal which passed the impugned Award dated 26.06.2021 in contract package C-6 comprised of (i) Shri Prabhat Krishna, Presiding Arbitrator, (ii) Shri A.K. Yadav, and (iii) Shri Ashok Khurana. Whereas, the composition of the Arbitral Tribunal, which passed the award dated 01.12.2019 in contract package C-5 comprised (i) Shri B.V. Tripathi, Presiding Arbitrator, (ii) Shri Ashok Khurana and (iii) Shri A.K. Yadav. Thus, the composition of the Tribunal was not identical, though at least two members were common. However, Shri Ashok Khurana has recorded his dissent in the award dated 01.12.2019, passed in contract package C-5. This issue will be considered later.

15. In these facts, the Appellant has instituted the present appeals.

SUBMISSIONS BY THE APPELLANT

16. Mr. Navin Kumar, learned counsel for the Appellant contended that



the Appellant was entitled to receive the entire payment certified on 31.08.2014 within a period of 84 days as per Sub-Clause 60.8 of COPA.

He stated that the Respondent, in fact, released part-payments to the Appellant on 03.09.2014, 08.09.2014 and 24.09.2014. The details of the payments are: -

“25. It is submitted that as per Sub-Clause 60.8 of COPA, the Respondent was required to release the payments of the Claimant as certified by the Engineer in the aforesaid Final Payment Certificate dated 31.08.2014 within a period of 84 days, however, the Respondent released only a sum of Rs.3,66,92,653/- on 03.09.2014 and Rs.1,68,63,12,82/- on 24.09.2014 against INR portion and USD 1,62,607.48/- on 08.09.2014 and USD 32,183.95/- on 24.09.2014 against Foreign portion.”

16.1. He stated that in the Statement of Claim² [‘SoC’] filed before the Arbitral Tribunal, the Respondent defaulted in making the balance payments and *vide* letter dated 15.10.2014 directed the Engineer to undertake compliance with the Certificate dated 31.08.2014 which was non-contractual and arbitrary. He stated that the Appellant opposed the aforesaid action of the Respondent *vide* its representation dated 01.02.2015, and it called upon the Respondent to release the due amount of the Final Statement [Final Bill] certified by the Engineer on 31.08.2014. It is stated that the Respondent failed to make payment for over two years and therefore the Appellant, *vide* letter dated 26.04.2016, issued a reminder for release of the outstanding payment towards the Final Statement [Final Bill]. He referred to the Respondent’s response dated 09.05.2016, wherein the Respondent declined to release the payment until the compliances notified by it had been duly fulfilled by the Engineer as well as the Appellant.

² Dated 07.10.2017



16.2. He stated that in the SoC, the Appellant raised a grievance to the letter dated 18.08.2016 received from the Office of the Engineer unilaterally incorporating the corrections in the Statement of Completion and Final Statement [Final Bill] inter alia making the net payable amount negative and recommending recovery payment from the Appellant. In the SoC, the Appellant termed the said action of the Engineer as arbitrary and unjustified. It is contended that the said action of the Engineer was in violation of the contract. He relied upon the Appellant's letter dated 23.09.2016 and 06.10.2016 objecting to the action of the Engineer in seeking to unilaterally amend the Final Statement [Final Bill] dated 31.08.2014, at the behest of the Respondent. He took a categorical stand that the amendments made by the Engineer to the Final Statement [Final Bill] were not acceptable to the Appellant.

16.3. He contended that since the disputes inter se parties remained unresolved, on account of the Respondent's non-payment of the balance amount in terms of the Final Statement [Final Bill] dated 31.08.2014, the Appellant invoked Arbitration under Clause 67 of COPA *vide* its letter dated 07.11.2016 towards its claim for payments under the Final Statement [Final Bill] dated 31.08.2014.

16.4. He contended that the learned Single Judge, while setting aside the impugned Award, exceeded the limited scope of interference permissible under Section 34 of the Act of 1996. He submitted that such an exercise was impermissible, particularly in the case of an International Commercial Arbitration.



16.5. He further contended that the learned Single Judge failed to consider the Appellant's principal submission concerning the effect of Clause 2.6 of GCC and Clause 67 of COPA. It was submitted that the Arbitral Tribunal had, upon consideration of the contractual provisions, correspondence and conduct of the parties, held that the Final Statement certified by the Engineer on 31.08.2014 had attained finality and binding effect, as the Respondent had failed to avail the contractual mechanism for challenging the said certification within the prescribed period. He submitted that the finding of the learned Single Judge that Sub-Clause 60.11 of COPA did not contemplate payment of the Final Statement amounted to substitution of the Court's interpretation for that of the Arbitral Tribunal.

16.6. He also assailed the finding that the pendency of disputes between the parties disentitled the Appellant from receiving payment under the Final Statement. He submitted that the Arbitral Tribunal had returned a finding of fact that the disputes subsequently sought to be raised by the Respondent pertained to the Final Statement which had already attained finality, and therefore, the learned Single Judge, impermissibly re-examined the nature of the disputes and the contractual provisions and treated the Tribunal's interpretation as a 'mistake of law', though no such ground could justify interference in the present proceedings.

16.7. He further contended that there was no violation of natural justice or failure to adjudicate the Respondent's objections and counter-claims. He submitted that the Arbitral Tribunal had considered the Respondent's case and had first determined the issue of limitation, holding that the counter-claims were barred by time, and having reached such a finding, the Arbitral



Tribunal was not required to undertake an elaborate examination of the merits of claims which were otherwise not maintainable.

16.8. He submitted that the learned Single Judge had also adopted an impermissibly broad understanding of ‘public policy’ under Section 34 of the Act of 1996 and had used the said ground to undertake a review of the Award. It was contended that the Arbitral Tribunal had in fact adjudicated the disputes and had rejected the Respondent’s counter-claims, inter alia, on the grounds that there was no contractual basis for reopening the Final Statement and that the Respondent had failed to challenge the Certificate within the prescribed period; consequently, the finding that the impugned Award suffered from a breach of public policy was unsustainable.

16.9. He further submitted that the finding, that the impugned Award suffered from ‘illegality’ was equally untenable. He contended that the ground of patent illegality was not available in respect of an International Commercial Arbitration and, in any event, could not be invoked to re-appreciate evidence or revisit the interpretation adopted by the Arbitral Tribunal.

16.10. He also challenged the reliance placed by the learned Single Judge upon an alleged contrary view taken by the same Arbitral Tribunal in another arbitration [contract package C-5]. He submitted that the composition and factual matrix of the two proceedings were not identical and that the present Award had to be examined on the basis of the pleadings, evidence and contractual framework applicable to the present dispute; comparison with a separate arbitral proceeding could not furnish a



permissible ground for setting aside the impugned Award under Section 34 of the Act of 1996.

16.11. He submitted that the learned Single Judge further erred in holding that the Arbitral Tribunal's interpretation of the contract was contrary to the fundamental policy of Indian law. He reiterated that construction of the contractual provisions was within the domain of the Arbitral Tribunal and that a different interpretation preferred by the Court could not, by itself, render the impugned Award contrary to the fundamental policy of Indian law.

SUBMISSIONS BY THE RESPONDENT

17. Mr. Ankur Mittal, learned counsel for the Respondent contended that the learned Single Judge rightly held that the Arbitral Tribunal violated the principles of natural justice by failing to adjudicate the discrepancies raised by the Respondent regarding the Certificate dated 31.08.2014.

17.1. He submitted that under Clause 60 of COPA, payments were based on monthly statements supported by measurements recorded by the Engineer; the Engineer had approved and Respondent had paid all the IPCs over 7-8 years; however, in the Final Bill dated 24.06.2014, the Appellant substantially revised the quantities based on as-built drawings, even though the works had already been measured, certified and paid earlier.

17.2. He submitted that the Respondent sought clarification regarding the increased quantities certified in the Final Bill; the Appellant responded only on 01.02.2015 and admitted that the requirements for issuance of a final



certificate, including written discharge, had not been fulfilled. He submitted that the dispute subsequently continued and arbitration was invoked by the Appellant.

17.3. He contended that since the Appellant had already invoked arbitration, Respondent was entitled to raise its objections and defences concerning the correctness of the 31.08.2014 certificate in its Statement of Defence [‘SoD’] and counter-claim; it was not necessary for the Respondent to independently invoke arbitration. Reliance was placed on **State of Goa v. Praveen Enterprises**³ and **National Highway Authority of India v. Transstroy (India) Ltd.**⁴.

17.4. He contended that the Arbitral Tribunal failed to consider the detailed calculations and material placed on record demonstrating numerous discrepancies in the Certificate dated 31.08.2014; despite conducting approximately 50 hearings, the Arbitral Tribunal did not adjudicate the correctness of the certificate, which went to the root of the dispute.

17.5. He submitted that Clause 2.6 of GCC permitted the Engineer’s decision/opinion to be opened, reviewed or revised under Clause 67 of COPA. He submitted that this power was available irrespective of which party invoked arbitration and could apply to both claims and defences.

17.6. He submitted that the Respondent had specifically challenged the quantities and variation-order items and contended that the Appellant’s claims were theoretical calculations based on as-built drawings rather than

³ (2012) 12 SCC 581

⁴ (2022) 15 SCC 91



actual site measurements. He submitted that the Respondent placed extensive pleadings and documents, running into approximately 4,000 pages, before the Arbitral Tribunal, but these were allegedly ignored. He submitted that the Arbitral Tribunal effectively abandoned its duty to adjudicate by recording that there was no dispute concerning the amounts certified on the Certificate dated 31.08.2014.

17.7. He argued that the Arbitral Tribunal itself recognised that measurements were required to be taken at site and recorded in measurement books; however, the Certificate dated 31.08.2014 was admittedly based on as-built drawings rather than actual measurements. He submitted that the Arbitral Tribunal therefore failed to adjudicate Respondent's fundamental objection that the certificate did not correspond with the measurements recorded during execution.

17.8. He submitted that the Arbitral Tribunal failed to decide whether the Certificate dated 31.08.2014 was an IPC or an FPC, as the contract did not contemplate payment of a 'Final Statement'; payment was contemplated only through an IPC or FPC under Sub-Clause 60.8 of COPA.

17.9. He submitted that Sub-Clause 60.11 of COPA expressly contemplated that where the Engineer disagreed with or could not verify any part of the draft final statement, a dispute would arise and only the undisputed portion would be certified. Since disputes admittedly existed, the Arbitral Tribunal ought to have examined the issue rather than treating the certificate as conclusive.

17.10. He contended that since the certificate was an IPC and not an FPC,



Sub-Clause 60.9 of COPA permitted the Engineer to revise or modify it. The certificate was in fact revised on 13.07.2017 and 31.12.2017. He therefore contended that the Arbitral Tribunal disregarded the express contractual terms in treating the earlier certificate as final.

17.11.He further submitted that the Arbitral Tribunal gave findings inconsistent with another arbitration [contract package C-5] concerning similar facts, where a common arbitrator Mr. A.K. Yadav, had held that the relevant payment certificate was an IPC and not an FPC; he argued that consistency in interpretation of the same contractual provisions should be maintained.

17.12.He contended that Respondent's counter-claim arose from mistakes in the Engineer's and Appellant's calculations, which could only be discovered after detailed examination of the measurement books covering the period from 2006 to 2014; therefore, limitation could not have commenced merely from the date of the disputed Certificate dated 31.08.2014.

The revised certificate was issued in 2017, and the counter-claim was filed on 08.12.2017; he argued that even if limitation were computed from the date the discrepancies were brought to the Appellant's notice or discovered, the counter-claim was within time.

17.13.He submitted that once the Appellant had invoked arbitration, Respondent was entitled to raise counter-claims in the same proceedings; a separate invocation would only result in multiplicity of proceedings⁵.

⁵ State of Goa v. Praveen Enterprises (supra) [Paragraph Nos. 25-33, and 41].



FINDINGS AND ANALYSIS

18. This Court has heard the learned counsel for the parties and perused the record.

I. NON-ADJUDICATION OF THE DISPUTE SUBMITTED TO THE ARBITRAL TRIBUNAL AND RESPONDENT'S DEFENCE

19. The impugned Award records that the Arbitral Tribunal conducted its first hearing on 09.08.2017.

20. The Appellant filed its SoC on 07.10.2017 and raised a claim towards the balance unpaid amount of Rs. 8,84,22,371/- payable in INR and \$3,391,185 payable in USD along with interest at the rate of 10% from 07.10.2017 till the actual date of payment as per the Certificate dated 31.08.2014. Pertinently, in the SoC, the Appellant narrated the facts which had transpired between the parties from 31.08.2014 till 07.11.2016 pertaining to the issuance of the Certificate dated 31.08.2014 by the Engineer and its unilateral modification by the Engineer at the request of the Respondent, giving rise to the disputes between the parties *qua* the payments under the said Certificate, more specifically paragraph nos. 27 to 38 of the SoC.

21. A perusal of the SoC clearly shows that all the issues, claims and differences arising inter se parties out of the Certificate dated 31.08.2014 were made the subject matter of the arbitration proceedings by the Appellant. In this regard, paragraph no. 38 of the SoC is relevant and is reproduced hereunder: -



“38.

.....

Therefore, **all issues, claims, differences arising out of the Claimant's Final Bill as certified by the Engineer** are a **subject matter** of the present arbitration proceedings and the same are required to be adjudicated upon by this Hon'ble Tribunal.”

[Emphasis Supplied]

22. The Respondent filed its SoD and counter-claim dated 08.12.2017, with the following reliefs:

- “(a) Reject the claim of the Claimant as not sustainable in the facts and circumstances of the case.
- (b) Allow the Counter Claim of Respondent of Rs. 2,79,52,299 /-.
- (c) Grant pre-arbitration, pendent lite and future interest at the rate of 24%
- (d) Cost of the Arbitration proceedings.”

23. The relevant paragraphs of the SoD and counter-claim read as under: -

“1. The Present Arbitration proceedings is filed by Claimant seeking payment of Final Statement of the Claimant dated 24.06.2014 and as recommended by Engineer vide its payment certification dated 31.08.2014, but the Claimant has conveniently neglected the later developments including the Revised Certification made by the Engineer on 18.08.2016. It is important to note that the Engineer revised his earlier certification, since it was found that there were some errors, in unsustainable claims made by the Claimant regarding BOQ and certain rates of the materials etc.,

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20. The Claimant ought to have raised the Final Statement on or before 12.05.2013 since the Defect Liability Certificate was issued on 04.04.2014, but the Claimant delayed the same. Moreover, Final Statement should contain all breakup of the details and supporting documents so that the verification of quantity and other contractual requirements can be checked by the Engineer as well as by the employer. It is very important because the Respondent before realizing the Final Payment has to check each and every claim- of the Claimant to avoid any over payment of the public money. It is humbly submitted that the payment for quantities or items of BOQ are payable as per actual execution of work that site and not as per the quantities of items provided in BOQ of the contract. Hence, it is clear that as per Good Industry



Practice, Final Statement of quantity should have been as per actual execution of quantities by Claimant, but the Claimant insisted to clear the Final Statement as per provisions of quantities taken in the contract. It is pertinent to mention here that actual execution of work at various places was not executed exactly as per the 'Approved Drawings' and even not as per 'As Built Drawings'. It is further submitted that for verification of Final Quantities in Final Statement, the Respondent sent various notices to Engineer as well as to the claimant vide letters dated 09.05.2016 and 17.10.2016, but the Claimant did not respond to the said letters of the Respondent. The Respondent requested the Claimant vide its letters dated 9.05.2016 and 17.10.2016 seeking information for the purpose of verification of executed Quantity but the Claimant did not provide any details. The true copy of letters dated 9.05.2016 and 17.10.2016 are marked and annexed as Annexure R-2(colly).

21. The final Statement dated 24.06.2014 submitted by the Claimant to the Engineer did not disclose actual quantum of BOQ used in the project site and it did not disclose the required details for the purpose of verification of the same.

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23. Simply submitting that the Final Statement based on contract quantities does not entitle the contractor to receive those amounts prior to verification. The Respondent again requested the Claimant vide its letters dated 9.05.2016 and 17.10.2016 seeking information for the purpose of verification of executed Quantities but the Claimant did not provide any detail. The true copy of letters dated 9.05.2016 and 17.10.2016 are marked as annexures in the above- mentioned para.

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25. It is submitted that while Respondent was verifying the Final Statement it released 50% Interim amount of Gross payment as an Advance i.e. Rs.1,68,63,282/- and USD 162,607.48 in the interest of progress of work.

.....

32. The Claimant without producing the information required by the Respondent as well as the Engineer, it kept on pressurizing the Respondent to release the payment as per the final Statement. One such letter dated 26.04.2016 was sent by Claimant but, the Respondent could not finalize the verification since the required information was not provided by Claimant.

.....

34. It is incorrect to state that the Respondent somehow wanted to



withhold the legitimate claim of the Claimant which became payable in terms of contract. Infact, the Claimant was in a hurry to get the amount from Respondent, in excess of the Quantities actually executed & on the basis of very high Rates than the standard rates. This can be understood from the conduct of the claimant refusing to produce the relevant documents including MB's Measurement Sheets and Test Certificate etc.

.....

39. It is incorrect to state that by virtue of the provisions contained in the contract between the parties; the Respondent is liable to pay a sum of Rs.6,56,57,179/- payable in INR and \$ 2,51,858.57 in USD towards unpaid Final Statement amount payable to the Claimant as certified by the Engineer for the works executed by the Claimant. As per modified final statement (Annexure R-3) submitted by engineer earlier, respondent is liable to pay net balance sum of INR- 25,06,599/- & USD 9,711/- only on account of final statement of project.

In fact, the Claimant is liable to pay a sum of Rs. 2,79,52,299/- to respondent as detailed below-

- (i) Claimant has to make a payment of Rs.2,50,00,000/- to the Respondent on account of base index taken by the claimant for foreign inputs as October 2005 in place of September 2005 (28. days prior to bid submission) annexed as Annexure R-4.
- (ii) Claimant has to make a payment of Rs. 29,52,299/- to the Respondent on account of non- compliance of observations of Vigilance division of NHAI annexed as Annexure R-5.

[Emphasis Supplied]

24. A perusal of the SoD and counter-claim shows that the Respondent specifically disputed its liability to pay the balance amounts claimed by the Appellant under the Certificate dated 31.08.2014. It challenged the Certificate dated 31.08.2014, claiming that excess amounts were paid to the Appellant during the contract and relied upon the Engineer's revised Certificate dated 13.07.2017. In addition to the aforesaid challenge to the Certificate dated 31.08.2014, the Respondent also raised a counter-claim for recovery of Rs. 2,79,52,299/-, from the Appellant.

25. The Respondent thereafter filed an amended counter-claim on



13.07.2018 based on another revised Final Bill dated 31.12.2017, claiming recovery of a *lesser* amount of Rs. 2,76,12,569/- from the Appellant.

26. The Arbitral Tribunal, while allowing the claims of the Appellant, has recorded its findings at paragraph no. 26.0 of the impugned Award. The findings of the Arbitral Tribunal can be summarised as under: -

- i. The value of work determined and certified by the Engineer through IPCs is based on actual executed quantities and the payments were not released on the basis of estimated quantities included in the Bill of Quantities ['BOQ'] as contended by the Respondent in its amended SoD⁶.
- ii. The certification done by the Engineer in its monthly IPCs for all the items of work executed by the Claimant is in accordance with the drawing approved by the Engineer and is quantified on the basis of the actual measurements of the various components of work carried out at the site. Therefore, it represents a milestone-based certification, and so the quantification done is firm on the date of the issue of the IPC. The submission of the Respondent that the Engineer was issuing IPC on a tentative basis was rejected⁷.
- iii. The monthly certification done by the Engineer in its monthly IPCs, the quantities of all the items of work executed by the Claimant and their valuation, as the work proceeded, was available both with the Engineer and the Respondent, and the Respondent continued to

⁶ Paragraph 26 (viii) at internal page 42 of the award

⁷ Paragraph 26 (x) at internal page 43 of the award



release the money based on these certifications. Therefore, the Respondent could have carried out verification of the quantities independently, with the assistance of the Engineer or the Claimant or both, at the stages when IPCs were issued by the Engineer or even thereafter till they reached a finality through the acceptance of Final Statement, by both the Engineer and the Claimant⁸.

- iv. Sub-Clause 60.9 of COPA authorises the Engineer to make by an IPC any correction or modification in any previous IPC. Engineer also has the authority to omit or reduce the value of such work in any IPC, if any work is not being carried out to its satisfaction. Thus, the Engineer is empowered to make any correction or modification in any IPC as per Sub-Clause 60.9 of COPA. The Arbitral Tribunal took note that during the execution of the contract, 72 IPCs have been issued by the Engineer and the Engineer did not carry out any corrections or modifications in any of the IPCs. The Arbitral Tribunal concluded that Sub-Clause 60.9 of COPA is limited to IPCs alone⁹.
- v. The Arbitral Tribunal categorically held that the submission of the Respondent that the Engineer could also make corrections or modifications in the Final Statement agreed between the Engineer and Claimant under Sub-Clause 60.11 of COPA is not correct¹⁰.
- vi. The Arbitral Tribunal held that there was no dispute between the Engineer and the Claimant on the Draft Final Statement, and so the

⁸ Paragraph 26 (xiii) at internal page 44 of the award

⁹ Paragraph 26 (xiv) and (xv) at internal pages 44 and 45 of the award

¹⁰ Paragraph 26 (xv) at internal page 45 of the award



Final Statement agreed to between the Engineer and the Claimant became final¹¹.

- vii. The Arbitral Tribunal observed that the Claimant had admittedly failed to issue any written discharge as required under Sub-Clause 60.12 of COPA. The Tribunal held that in the absence of the written discharge, the Engineer was not entitled to issue a FPC under Sub-Clause 60.13 of COPA. The Tribunal held that the Engineer had erred in issuing the FPC¹².
- viii. The Arbitral Tribunal held that the Certificate dated 31.08.2014 is not as per the format of the FPC stipulated in Sub-Clause 10.13 of COPA¹³.
- ix. The Arbitral Tribunal¹⁴ has observed that as on 24.06.2014 [when the Appellant submitted the Draft Final Statement] and 31.08.2014 [when the Appellant submitted the Final Statement], a number of disputes were pending between the Appellant and the Respondent. It therefore concluded that the Certificate dated 31.08.2014 issued by the Engineer is actually NOT the FPC envisaged under Sub-Clause 60.13 of COPA, but was in reality the Final Statement agreed between the Engineer and the Claimant in terms of Sub-Clause 60.11 of COPA. The Arbitral Tribunal held that, therefore, the Engineer had termed the document dated 31.08.2014 incorrectly as the FPC. The Arbitral Tribunal held that this document, which is signed by both the

¹¹ Paragraph 26 (xxiii) at internal page 49-50 of the award

¹² Paragraph 26 (xxxi) at internal page 52-53 of the award

¹³ Paragraph 26 (xxxii) at internal page 53 of the award

¹⁴ Paragraph 26 (xxii) at internal page 48 of the award.



Engineer and the Claimant, was Part(a) of the Final Statement agreed between the Claimant and Engineer under Sub-Clause 60.11 of COPA, and accordingly it attained finality on 31.08.2014¹⁵.

- x. The Arbitral Tribunal at paragraph no. 26(xxvii) of the impugned Award observed that the Respondent has not mentioned the clauses of the contract which entitle the Respondent or the Engineer to reopen the Final Statement agreed between the Engineer and the Claimant and also get it finalised unilaterally by the Engineer without seeking the consent of the Claimant.

However, the Arbitrator only made an observation and did not determine the issue as regards the jurisdiction [or lack thereof] of the Engineer to carry out the modifications to the Final Statement.

- xi. The Arbitral Tribunal held¹⁶ that the Final Statement has not been challenged by any party under Clause 67 of COPA as per requirements laid down under Clause 2.6 of GCC, and thus, it has become absolute and has to be implemented. This is the conclusion of the Arbitral Tribunal which forms the basis of awarding the principal amount claimed by the Appellant in its SoC on the basis of the Certificate dated 31.08.2014.

27. To summarise, the Arbitral Tribunal by its impugned Award decided the claims raised in the SoC of the Appellant, separately from the counter-claim of the Respondent. The Arbitral Tribunal allowed the claims of the Appellant for the principal amount and future interest thereon, as per the

¹⁵ Paragraph 26 (xxxiii) at internal page 53-54 of the award

¹⁶ Paragraph 26 (xxxiv) at internal page 54 of the award



Certificate dated 31.08.2014 issued by the Engineer; however, it rejected the claim for interest for the period from 31.08.2014 to 07.10.2017 [i.e. the date of filing of SoC], as well as rejected the claim for interest for the pendente lite period from 08.10.2017 till 26.06.2021 [i.e. the date of passing of the award].

The Arbitral Tribunal held that said Certificate dated 31.08.2014 is actually the Final Statement as contemplated under Sub-Clause 60.11 of COPA. The Arbitral Tribunal concluded that the said Final Statement was agreed between the Claimant and the Engineer, and it has attained finality on 31.08.2014, since it has ‘not been challenged’ by any party under Clause 67 of COPA as per the requirement laid down under Clause 2.6 of GCC. The relevant paragraph no. 26(xxxiv) of the impugned Award reads as under: -

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

[Emphasis Supplied]

28. In our considered opinion, the finding of the Arbitral Tribunal at paragraph no. 26 (xxxiv) of the impugned Award that the Final Statement has ‘not been challenged’ by any party, appears to be on the premise that there is ‘no’ formal claim or challenge to the Certificate dated 31.08.2014, by the Respondent. It appears that the Arbitral Tribunal was of the view that a formal claim is required under Clause 2.6 of GCC read with Clause 67 of COPA.

29. The learned Single Judge has held that the said finding of the Arbitral Tribunal that the Certificate dated 31.08.2014 ‘has not been challenged’, is



contrary to the record as it fails to take into consideration the specific pleas raised by the Respondent in the SoD, challenging the veracity of the Certificate dated 31.08.2014. The learned Single Judge held that, in fact, the Arbitral Tribunal has failed to adjudicate on the elaborate pleas raised by the Respondent challenging the Certificate dated 31.08.2014. It has therefore concluded that the failure of the Arbitral Tribunal to adjudicate the pleas of the Respondent challenging the veracity of the Certificate dated 31.08.2014 had resulted in non-adherence to the principles of natural justice and amounts to a violation of public policy. The learned Single Judge has therefore opined that the challenge to the impugned Award is made out under Section 34 of the Act of 1996.

A. The issue of correctness (or otherwise) of the Certificate dated 31.08.2014 was, indeed, a dispute referred to the Arbitral Tribunal

30. Having perused the SoC and the SoD, there is no doubt in our mind that the cause of action for the Appellant to invoke the arbitration clause was the dispute which had arisen between the parties with respect to the correctness [or otherwise] of the Certificate dated 31.08.2014.

31. The pleadings of the SoC reveal that Appellant was aggrieved that the Respondent was not releasing balance payments due under the Certificate dated 31.08.2014. The Appellant was aggrieved by the Respondent's objections to the Certificate dated 31.08.2014, and this led to exchange of several letters between the parties, eroding the binding nature of the said Certificate. The Appellant was aggrieved that the Engineer, *vide* communication dated 18.08.2016, had unilaterally revised the Certificate dated 31.08.2014, and recorded negative payment as well as recommended



recoveries from the Appellant. It was in the backdrop of these unresolved disputes that the Appellant invoked arbitration *vide* notice dated 07.11.2016, and, as expressly stated in paragraph no. 38 of its SoC, submitted for adjudication of all issues, claims and differences arising out of the Certificate dated 31.08.2014. In this regard, paragraph no. 38 of the SoC is relevant and is reproduced hereunder: -

“38.

.....

Therefore, **all issues, claims, differences arising out of the Claimant's Final Bill as certified by the Engineer** are a **subject matter** of the present arbitration proceedings and the same are required to be adjudicated upon by this Hon'ble Tribunal.”

[Emphasis Supplied]

32. In the SoD, the Respondent specifically disputed the correctness of the computation of value of work done in the Certificate dated 31.08.2014. It denied its liability to make payment of any balance amount as per the said Certificate. In addition, it raised a counter-claim for recovery of excess payments made to the Appellant. The Respondent relied upon the modified Final Bill issued by the Engineer which, as per the Respondent, superseded the Certificate dated 31.08.2014. Illustratively, the opening para of the SoD, which acknowledges the dispute *qua* the veracity of the Certificate dated 31.08.2014, reads as under: -

“1. The Present Arbitration proceedings is filed by Claimant seeking payment of Final Statement of the Claimant dated 24.06.2014 and as recommended by Engineer *vide* its payment certification dated 31.08.2014, but the Claimant has conveniently neglected the later developments including the Revised Certification made by the Engineer on 18.08.2016. It is important to note that the Engineer revised his earlier certification, since it was found that there were some errors, in unsustainable claims made by the Claimant regarding BOQ and certain rates of the materials etc.”



[Emphasis Supplied]

33. In our considered opinion, the rival pleadings of the parties in the SoC and SoD expressly acknowledged that the correctness [or otherwise] of the Certificate dated 31.08.2014, issued by the Engineer, was directly a subject matter of the challenge in the arbitration proceedings. While the Appellant undertook the onus to prove the correctness of the Certificate dated 31.08.2014 for seeking the payments due to it, the Respondent as well undertook the onus to prove its objections to the Certificate dated 31.08.2014. This was the only issue raised by the Appellant in its SoC and Respondent in the SoD for the consideration of the Arbitral Tribunal. As a matter of fact, at the arbitral proceedings, the Respondent filed voluminous evidence to prove its objections to said Certificate. Thus, the correctness [or otherwise] of the Certificate dated 31.08.2014 was directly an issue arising for consideration before the Arbitral Tribunal.

However, the Arbitral Tribunal, in a remarkable turn of events, has at paragraph no. 26(xxxiv) of the impugned Award returned a finding that the said Certificate dated 31.08.2014 [or Final Statement as characterized by the Arbitral Tribunal] has not been challenged. We are unable to agree with the said conclusion of the Arbitral Tribunal. The correspondence preceding the invocation of Clause 67 of COPA and the commencement of the arbitration proceedings, read with the rival pleadings of the parties before the Arbitral Tribunal, leaves little doubt that the Certificate dated 31.08.2014 was the very subject matter of the dispute inter se parties as contemplated under Clause 2.6 of GCC.

34. As noted above, the Certificate dated 31.08.2014 was sought to be



corrected by the Engineer itself on 18.08.2016, and ultimately an amended Final Bill dated 31.12.2017 was also issued by the Engineer, which showed that, in fact, the Respondent had to effect recoveries from the Appellant. Whether the corrections and recoveries proposed by the Engineer on 18.08.2016 or 31.12.2017 were permissible or correct or incorrect were the issues which were directly arising for consideration and adjudication before the Arbitral Tribunal. However, the Arbitral Tribunal has abjectly failed to adjudicate on this issue on the basis of its finding at paragraph no. 26(xxxiv) of the impugned Award, which is entirely wrong in the facts of this case and cannot be sustained. Its failure to do so, while proceeding on the erroneous premise that the Certificate dated 31.08.2014 had not been challenged by the Respondent, amounts to a failure to adjudicate the disputes falling within the terms of the submission to arbitration.

35. It is a settled position of law that the existence of a dispute is a necessary pre-condition to the invocation of arbitration [Re: **Inder Singh Rekhi v. Delhi Development Authority**¹⁷]. Illustratively, had the Respondent not disputed the Appellant's entitlement for the balance payment under the Certificate dated 31.08.2014 and had merely defaulted in releasing the admitted amount, there would have been no dispute requiring adjudication by the Arbitral Tribunal. In such a scenario, since the dues stand admitted, the Appellant would have either filed a writ petition for release of the admitted dues or filed a suit for recovery. [Re: **Surya Constructions v. State of Uttar Pradesh and Others**¹⁸]

However, this is not the factual situation in this case, as the

¹⁷ (1988) 2 SCC 338 [Paragraph No. 4]

¹⁸ (2019) 16 SCC 794 [Paragraph No. 3]



Respondent has been consistently, since 15.10.2014, disputing the veracity of the Certificate dated 31.08.2014 and disputing the entitlement of the Appellant to seek payment thereunder. It was to resolve this precise dispute that the Appellant invoked arbitration *vide* notice dated 07.11.2016 on the express contention that the Respondent and the Engineer were wrongfully disputing the correctness of the Certificate dated 31.08.2014. The Arbitral Tribunal was thus bound to adjudicate upon the correctness of the Certificate dated 31.08.2014 before allowing the claims of the Appellant.

The Arbitral Tribunal at paragraph no. 26(xxxiv) of the impugned Award has wrongly concluded that the Certificate dated 31.08.2014 had not been challenged by any party, whereas the determination of the correctness of the said Certificate was actually the core issue in the SoC. The Respondent's defence, disputing the correctness of the said Certificate, challenged the very foundation of the Appellant's claim to balance payment under the Certificate dated 31.08.2014 and, therefore, the defence constituted a material issue requiring adjudication. The Arbitral Tribunal has, however, failed to adjudicate the Respondent's substantive defence to the Appellant's claim, on its erroneous finding at paragraph no. 26(xxxiv) of the impugned Award.

36. The distinction between an erroneous adjudication of an issue, by the Arbitral Tribunal, and a failure to adjudicate an issue submitted to arbitration is material. The failure to adjudicate the matters that have been submitted to the Arbitral Tribunal would make the impugned Award vulnerable to challenge under Section 34(2)(a)(iv) of the Act of 1996 if it results in prejudice to the parties to the dispute. In **Ssangyong Engineering**



& Construction Co. Ltd. v. National Highways Authority of India¹⁹, while considering Article 34(2)(a)(iii) of the UNCITRAL Model Law which corresponds to Section 34(2)(a)(iv) of the Act of 1996, the Supreme Court cited with affirmation the judgment of Court of Appeal of Singapore, in **CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK**²⁰, which held that the said provision of UNCITRAL Model Law applies not only where an arbitral tribunal improperly decides matters which had not been submitted to it, but also where it ‘failed to decide matters that had been submitted to it’, since in either situation the tribunal has exceeded or failed to exercise the authority conferred upon it by the parties. The Court of Appeal at Singapore clarified that failure to deal with every issue referred to the tribunal would not, by itself, warrant setting aside an award; the crucial consideration is whether such failure has resulted in real or actual prejudice to a party. The relevant portion of the judgment reads as under: -

“61. The Court of Appeal of Singapore, in *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, held as follows:

“25. The court's power to set aside an arbitral award is limited to setting aside based on the grounds provided under Article 34 of the Model Law and Section 24 of the IAA. As declared by this court in *Soh Beng Tee & Co. (Pte) Ltd. v. Fairmount Development (Pte) Ltd.* [*Soh Beng Tee & Co. (Pte) Ltd. v. Fairmount Development (Pte) Ltd.*²¹, SLR(R) para 59 (“*Soh Beng Tee*”), the current legal framework prescribes that the courts should not without good reason interfere in the arbitral process. This policy of minimal curial intervention by respecting finality in the arbitral process acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen.

26. However, it has also been said (correctly) that no State will permit a binding arbitral award to be given or enforced within its territory without

¹⁹ (2019) 15 SCC 131

²⁰ 2011 SGCA 33

²¹ (2007) 3 SLR (R) 86



being able to review the award, or, at least, without allowing the parties an opportunity to address the court if there has been a violation of due process or other irregularities in the arbitral proceedings [see Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions (Sweet & Maxwell, 3rd Edn., 2010) at para 7-001].

27. While the Singapore courts infrequently exercise their power to set aside arbitral awards, they will unhesitatingly do so if a statutorily prescribed ground for setting aside an arbitral award is clearly established. The relevant grounds in this regard can be classified into three broad categories [see generally Nigel Blackaby et al, Redfern and Hunter on International Arbitration (Oxford University Press, 5th Edn., 2009) (“Redfern and Hunter”) at paras 10.30-10.86]. First, an award may be challenged on jurisdictional grounds (i.e. the non-existence of a valid and binding arbitration clause, or other grounds that go to the adjudicability of the claim determined by the Arbitral Tribunal). Second, an award may be challenged on procedural grounds (e.g. failure to give proper notice of the appointment of an arbitrator), and, third, the award may be challenged on substantive grounds (e.g. breach of the public policy of the place of arbitration).”

*

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*

31. It is useful, at this juncture, to set out some of the legal principles underlying the application of Article 34(2)(a)(iii) of the Model Law. First, Article 34(2)(a)(iii) is not concerned with the situation where an Arbitral Tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the Arbitral Tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. In other words, Article 34(2)(a)(iii) addresses the situation where the Arbitral Tribunal exceeded (or failed to exercise) the authority that the parties granted to it (see Gary B. Born, International Commercial Arbitration (Wolters Kluwer, 2009) at Vol. 2, pp. 2606-07 and 2798-99). This ground for setting aside an arbitral award covers only an Arbitral Tribunal's substantive jurisdiction and does not extend to procedural matters [see Robert Merkin & Johanna Hjalmarsson, Singapore Arbitration Legislation Annotated (Informa, 2009) (“Singapore Arbitration Legislation”) at p. 117].

32. Second, it must be noted that a failure by an Arbitral Tribunal to deal with every issue referred to it will not ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute. In this regard, the following passage in Redfern and Hunter ([27] supra at para 10.40) correctly summarises the position:



The significance of the issues that were not dealt with has to be considered in relation to the award as a whole. For example, it is not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different. (emphasis added)

33. Third, it is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Article 34(2)(a)(iii) of the Model Law [see *Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd.* [Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd.²², (2010) 3 SLR 1], SLR paras 19-22]. In the House of Lords decision of *Lesotho Highlands Development Authority v. Impregilo SpA*²³, which concerned an application to set aside an arbitral award on the ground of the Arbitral Tribunal's "exceeding its powers" [see Section 68(2)(b) of the Arbitration Act, 1996 (c 23) (UK) ("the UK Arbitration Act")], Lord Steyn made clear (at [24]-[25]) the vital distinction between the erroneous exercise by an Arbitral Tribunal of an available power vested in it (which would amount to no more than a mere error of law) and the purported exercise by the Arbitral Tribunal of a power which it did not possess. Only in the latter situation, his Lordship stated, would an arbitral award be liable to be set aside under Section 68(2)(b) of the UK Arbitration Act on the ground that the Arbitral Tribunal had exceeded its powers. In a similar vein, Article 34(2)(a)(iii) of the Model Law applies where an Arbitral Tribunal exceeds its authority by deciding matters beyond its ambit of reference **or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute** (see above at [31])."

[Emphasis Supplied]

37. The obligation of the Arbitral Tribunal under the Act of 1996 to adjudicate upon the defence raised by the Respondent is enshrined in Section 18 and Section 34(2)(a)(iii) of the Act of 1996. The Supreme Court in ***Associate Builders v. Delhi Development Authority***²⁴ held that the said provisions enshrine the fundamental juristic principles of natural justice.

²² (2010) 3 SLR 1

²³ (2006) 1 AC 221; (2005) 3 WLR 129; 3 AII ER 789 (HL)

²⁴ (2015) 3 SCC 49 [Paragraph No. 30].



38. In our considered opinion, the jurisdiction of the Arbitral Tribunal under Clause 2.6 of GCC to review the Certificate dated 31.08.2014 for its correctness had been invoked by the Appellant itself in the SoC. The Respondent consented to this reference to arbitration and submitted its SoD disputing the correctness of the said Certificate and filing its objections to the said Certificate. The Arbitral Tribunal was therefore obliged to decide the issue of the correctness [or otherwise] of the Certificate dated 31.08.2014, on the basis of the pleadings in the SoC and SoD as well as the documents, even excluding the counter-claim. The absence of a formal claim by the Respondent challenging the Certificate dated 31.08.2014 cannot be a justification for not adjudicating this issue, as the challenge by the Respondent to the Certificate dated 31.08.2014 was unambiguous and clear in the notice dated 07.11.2016 issued by the Appellant invoking arbitration, and the pleadings. Assuming a formal claim was required, since all necessary pleadings and evidence were on record, the Arbitral Tribunal ought to have permitted the Respondent to amend the pleading to include such a formal claim. However, at the culmination of the arbitral proceedings which spanned over 50 hearings, where arguments were addressed by parties on the correctness [or otherwise] of the Certificate dated 31.08.2014, the Arbitral Tribunal could not have declined to adjudicate this issue on a thin premise of lack of a formal claim.

39. In our considered opinion, the Arbitral Tribunal's conscious omission to adjudicate upon the correctness [or otherwise] of the Certificate dated 31.08.2014 not only violated the principles of natural justice, as the Tribunal failed to adjudicate upon the defense of the Respondent, but the impugned



Award also violated Section 34(2)(a)(iv) of the Act of 1996 read with Article 34(2)(a)(iii) of the UNCITRAL Model Law as the Tribunal had abjectly failed to decide the dispute with respect to the correctness [or otherwise] of the Certificate dated 31.08.2014 referred to it by the parties.

40. The Respondent's challenge to the correctness of the Certificate dated 31.08.2014 questioned and disputed that the Appellant was entitled to the balance amount claimed on the basis of the said Certificate. By proceeding on the erroneous premise that the said Certificate had not been challenged, the Arbitral Tribunal failed to exercise the authority conferred upon it by the parties, in respect of a material dispute submitted to it, thereby causing prejudice to the Respondent. The impugned Award, to that extent, is therefore unsustainable under Section 34(2)(a)(iii) and Section 34(2)(a)(iv) of the Act of 1996. The non-adjudication of a material defence also violates the basic requirement of a fair adjudicatory process, and the impugned Award is in conflict with the public policy of India under Section 34(2)(b)(ii) Explanation (iii) of the Act of 1996.

B. The findings on limitation governing counter-claim filed by the Respondent failed to take into consideration correspondence exchanged between the parties

41. The Arbitral Tribunal in its first hearing on 09.08.2017 had granted time to the Respondent *vide* paragraph no. 18(b) of its order to file its SoD and counter-claim, latest by 11.12.2017.

42. The Respondent filed its SoD and counter-claim, initially, on 08.12.2017 challenging the correctness of the Certificate dated 31.08.2014 and seeking recovery for a sum of Rs. 2,79,52,299/- as per the modified Final Bill dated 13.07.2017 certified by the Engineer. The Respondent



amended its counter-claim on 13.07.2018 to make a claim for a *lesser* amount of Rs. 2,76,12,569/- as per the modified Final Bill dated 31.12.2017 as certified by the Engineer.

43. The Arbitral Tribunal held that the period for limitation to raise the counter-claim arose on 15.10.2014, when the Respondent for the first time acknowledged mistakes in the Certificate dated 31.08.2014. The Arbitral Tribunal held that the period of three years for filing the counter-claim expired on 15.10.2017 and therefore held that the counter-claim filed on 08.12.2017 was barred by limitation. The Arbitral Tribunal held that the date [i.e., 08.12.2017] of filing of the SoD and SoC was the date of reference to arbitration.

44. The Respondent has contended that the correspondence on the record shows that after the Respondent objected to the Certificate dated 31.08.2014, *vide* its letter dated 15.10.2014 by pointing out discrepancies and seeking clarifications, however, the Appellant responded to the said letter for the first time on 01.02.2015. It contends that various letters were issued by the Respondent between 2016-17 seeking information for verifying the Final Bill/Final Statement dated 31.08.2014 and requesting the Appellant for a written discharge as per Sub-Clause 60.12 of COPA. The Respondent relies upon Appellant's letters dated 16.05.2016, 23.09.2016 and 06.10.2016 objecting to the exercise undertaken by the Respondent in verifying the Certificate dated 31.08.2014. The Respondent also relied upon the letter dated 18.08.2016 and 19.09.2016 issued by the Engineer carrying out modifications to the Certificate dated 31.08.2014. The Respondent relied upon the revised final bill dated 13.07.2017 issued by the Engineer, which



was further modified on 31.12.2017 by the Engineer raising a final claim for recovery of Rs. 2,76,12,569/- from the Appellant, in favour of the Respondent.

44.1. The Respondent states that since, as per the Arbitral Tribunal, the Certificate dated 31.08.2014 was not an FPC and was allegedly a Final Statement, unaccompanied by a written discharge from the Appellant, it could not have held the counter-claim to be time-barred. The Respondent states that its limitation to file the counter-claim arose in 2017 when the revised Final Bill was issued by the Engineer. The Respondent states that therefore its claims were within limitation.

45. The Appellant has relied upon the findings of the Arbitral Tribunal to contend that the counter-claim is barred by limitation.

46. In our considered opinion, with the setting aside of the Award *qua* the claims of the Appellant in the SoC, this part of the Award also needs to be set aside, as the determination of the character of the Certificate dated 31.08.2014 by the Arbitral Tribunal, on a fresh consideration, will have a direct bearing on the date of commencement of limitation of the counter-claim. Whether the Certificate will be held to be a final payment certificate or an interim payment certificate or incorrect, are findings which will have a material bearing on the issue of limitation. Thus, the issue of counter-claims being barred or within limitation is intrinsically linked and would also have to be remanded back.

47. Also, we note that the Appellant in its letter dated 07.11.2016, while invoking arbitration, enlisted reference to 16 letters exchanged between the



Appellant, Respondent and the Engineer demonstrating dispute. The letter dated 26.09.2016 issued by the Respondent and enlisted at Sr. No. 4 of this letter shows that the Respondent issued a recovery demand of Rs. 7,88,687/- against the Appellant herein for the subject contract and specifically disputed any liability to make any further payment under the Certificate dated 31.08.2014. The Respondent referred to the Engineer's letter dated 18.08.2016 making corrections to the Certificate dated 31.08.2014. Similarly, the Engineer, by a letter dated 19.09.2016 [enlisted at Sr. No. 6], made a further recommendation to the final bill, which was also disputed by the Appellant *vide* response letter dated 23.09.2016. The Appellant referred the disputes between the parties enlisted in the 16 letters enlisted in the reference to arbitration. The recovery claim of the Respondent in its letter dated 26.09.2016 on the Appellant, therefore, stood referred to arbitration by the Appellant itself.

48. We, however, note that the Arbitral Tribunal while deciding the issue of limitation has not taken into consideration the effect of the Appellant's reference letter dated 07.11.2016 which refers the claim of recovery raised by the Respondent to arbitration on 07.11.2016. It is apparent that the counter-claim of the Respondent for recovery stood referred to arbitration by the Appellant itself. Thus, while computing limitation for the counter-claim, the Arbitral Tribunal would have to take into consideration the effect of the letter of reference dated 07.11.2016 [including letter dated 26.09.2016] as per the judgment of the Supreme Court in **State of Goa v. Praveen**



Enterprises (supra)²⁵.

49. We are refraining from deciding the issue of limitation in this judgment, as it would be a finding on merits. We deem it appropriate to leave the issue open to be decided by the Arbitral Tribunal after duly considering the facts discussed above. We may note that rejection of the counter-claims on a wrong finding of bar of limitation would render the impugned Award vulnerable under Section 34(2)(a)(iii) of the Act of 1996, as it would lead to wrongful non-adjudication of the counter-claims on merits.

II. IRRECONCILABLE CONTRADICTION IN TWO SEPARATE ARBITRAL AWARDS, IN TWO SEPARATE CONTRACTS (HAVING IDENTICAL TERMS AND CONDITIONS), EVEN THOUGH TWO MEMBERS OF THE TRIBUNAL ARE COMMON

50. The learned Single Judge set aside the impugned Award dated 26.06.2021 on a finding that in another arbitration proceeding between the same parties pertaining to contract package C-5, arising out of a contract containing identical terms and conditions, the award dated 01.12.2019 therein returned contradictory findings, on the identical facts of the contract. The learned Single Judge noted that two members of the Tribunal were common.

51. The impugned Award is dated 26.06.2021 and has been passed in contract package C-6.

52. The contradiction, as noted by the learned Single Judge, has arisen with a prior award dated 01.12.2019 passed in contract package C-5.

²⁵ Paragraph 20.



53. The terms and conditions of the contracts, in contract package C-5 and contract package C-6, are identical. The parties are identical. The facts and issues arising for consideration are near identical.

54. The impugned Award is subsequent to the award dated 01.12.2019; however, it contains no explanation from the common members of the Arbitral Tribunal as regards the basis for returning materially different findings on identical facts, in an identical contract.

55. We will now consider the effect, if any, of these contradictions on the legality of the impugned Award.

56. In contract package C-5, for disputes arising out of a contract containing identical terms and conditions, the document issued by the Engineer, i.e., FPC dated 19.08.2014 therein, has been held by the majority members of the Arbitral Tribunal as an IPC in the award dated 01.12.2019. The majority members of the Arbitral Tribunal held that since the draft final statement dated 12.02.2014 issued by the Contractor [i.e., the Appellant] was for Rs. 1,16,74,65,455/-, while the Engineer had certified only part amount of Rs. 9,70,97,582/- against the claimed amount, therefore, the certification issued by the Engineer on 19.08.2014 for the part amount of Rs. 9,70,97,582/- cannot be notified as an FPC under Sub-Clause 60.13 of COPA. The Arbitral Tribunal held that the certificate for the part amount of Rs. 9,70,97,582/- is only an IPC as per Sub-Clause 60.11 of COPA. The Arbitral Tribunal took note that since no written discharge had been issued by the contractor as per Sub-Clause 60.12 of COPA and therefore, in the absence of the written discharge as well as an agreed final statement



between the contractor and the Engineer as per Sub-Clause 60.11 of COPA, the Engineer could not have issued an FPC on 19.08.2014. The Arbitral Tribunal therein held that, therefore, the said IPC could be corrected or revised by the Engineer. The majority members thereafter proceeded to adjudicate on the objections raised by the Respondent to the correctness of the certificate dated 19.08.2014. The said arbitral award is in favour of the Respondent and has been challenged by the Appellant, and is pending adjudication.

The majority members of the Arbitral Tribunal which took this view consisted of Mr. B.V. Tripathi, the Presiding Arbitrator and Mr. A.K. Yadav.

The third member of the Tribunal, Mr. Ashok Khurana, recorded his dissent and held the Certificate dated 19.08.2014 issued by the Engineer to be an FPC as per Sub-Clause 60.13 of COPA.

57. We note that Mr. A.K. Yadav and Mr. Ashok Khurana are both members of the Arbitral Tribunal, which has passed the impugned Award dated 26.06.2021 and is the subject matter of this appeal.

58. In the impugned Award, which is the subject matter of the present appeal, the Arbitral Tribunal has unanimously held that the document bearing the nomenclature of an FPC dated 31.10.2014 by the Engineer *cannot* be held to be an FPC but it is a Final Statement under Sub-Clause 60.11 of COPA. The Arbitral Tribunal concluded that therefore the Engineer could not have corrected or revised it.

59. The findings in the impugned Award that the Certificate dated



31.08.2014 issued by the Engineer is actually a Final Statement under Sub-Clause 60.11 of COPA run contrary to the findings returned by both these members, Mr. A.K. Yadav and Mr. Ashok Khurana, in their separate opinions, in the earlier award dated 01.12.2019 in contract package C-5.

60. Mr. Ashok Khurana and Mr. A.K. Yadav are two members who are common to the Arbitral Tribunal which decided the Arbitration proceedings in contract package C-5 and contract package C-6 [subject contract]. The terms and conditions of the two contracts are identical. The Engineer issued a Certificate bearing nomenclature Final Payment Certificate dated 19.08.2014 [‘FPC dated 19.08.2014’] under contract package C-5 and a certificate bearing nomenclature Final Payment Certificate dated 31.08.2014 under contract package C-6 [‘FPC dated 31.08.2014’].

61. In identical facts and in identical contractual terms, while dealing with contract package C-5, Mr. A.K. Yadav has held FPC dated 19.08.2014 is an IPC, which is governed by Sub-Clause 60.9 of COPA and held that the same *can be* corrected or revised by the Engineer. However, in contradiction, Mr. A.K. Yadav, while deciding contract package C-6, has held the FPC dated 31.08.2014 as a Final Statement, which is governed by Sub-Clause 60.11 of COPA and has opined that the same *cannot be* corrected or revised by the Engineer.

There is no distinction discernible on the face of the record to justify the contradictory findings returned by Mr. A.K. Yadav. The impugned Award does not disclose any cogent reason for such a departure. Mr. A.K. Yadav has neither explained the basis on which the earlier finding was arrived at in the award dated 01.12.2019, nor identified any material



distinguishing circumstances in which the subsequent finding was returned in the impugned Award. In the absence of any such explanation, the departure from the earlier finding remains unexplained and renders the reasoning of the impugned Award *wholly inconsistent* with the award dated 01.12.2019.

62. Similarly, Mr. Ashok Khurana in his dissent opinion dated 01.12.2019, while dealing with contract package C-5 has held that FPC dated 19.08.2014 is indeed a final payment certificate in terms of Sub-Clause 60.13 of COPA and therefore *cannot be* corrected or revised by the Engineer. However, in contradiction, Mr. Ashok Khurana, in the impugned Award while deciding contract package C-6, has held that the FPC dated 31.08.2014 is not a final payment certificate as per Sub-Clause 60.13 of COPA. He held that instead the FPC dated 31.08.2014 is a Final Statement as per Sub-Clause 60.11 of COPA.

Similarly, there is no distinction discernible on the face of the record in these contradictory findings returned by Mr. Ashok Khurana in the two arbitration proceedings. The nuanced shift in the finding is anomalous, and the Court is unable to appreciate the distinction. There is no explanation recorded in the impugned award by Mr. Ashok Khurana to justify the distinct views returned by it on the document titled final payment certificate[s] as issued by the Engineer.

63. The contradiction in the findings returned by Mr. A.K. Yadav and Mr. Ashok Khurana in the arbitral awards concerning contract packages C-5 and C-6 is, in the facts of the present case, neither justified on appreciation of evidence nor an alternative interpretation of contractual terms. The



impugned Award in contract package C-6 was rendered subsequent to the award dated 01.12.2019 in contract package C-5. Yet, notwithstanding their participation in the earlier proceeding, the common members have returned diametrically opposite findings on the character and legal effect of the corresponding certificates, without the impugned Award disclosing any distinguishing feature in the contractual stipulations or the relevant factual circumstances, or any reason for departing from the position taken in the earlier proceeding. The distinction in these findings in the two awards has had dramatically different consequences on the permissibility of subsequent actions of the Engineer in correcting or revising the certificates on the basis of the documents and objections raised by the Respondent.

64. Consistency, certainty and predictability are recognized as the hallmarks of a sound justice delivery system. The intent which ordinarily parties have while selecting common members of Tribunals for adjudicating disputes arising between the same parties, in related disputes, is to ensure that parties receive consistent decisions from the arbitral tribunal. In the present case, Mr. A.K. Yadav, who is the nominee member of the Respondent and Mr. Ashok Khurana, who is the nominee member of the Appellant, have both returned inconsistent findings in the two arbitral awards referred above, which are irreconcilable despite the fact that the contractual terms of the contract and facts in both arbitral proceedings are identical, or near identical.

65. There is no justification recorded by the common members in the impugned Award for taking this diametrically different view. Since the impugned Award is dated 26.06.2021, it is ex-facie subsequent to the award



dated 01.12.2019. The common members of the Arbitral Tribunal are obliged to justify the different view being taken by them in the subsequently passed impugned Award.

In this regard, we find it apposite to rely on the dicta in the judgment of **National Highway Authority of India v. Progressive- MVR (JV)**²⁶ by the Supreme Court wherein it was held that, because conflicting arbitral awards had interpreted the same clause of the contract differently, the ordinary rule of non-interference with a plausible arbitral view under Section 34 of the Act of 1996, could not be mechanically applied. The relevant paragraph reads as follows:

“40. Once we interpret the formula in the manner indicated above, the necessary consequences would be to hold that the Arbitral Tribunal(s) did not decide the cases with the correct application of the formula and further that the claim for price adjustment in respect of bitumen laid by the contractors was not correct. Therefore, it can be held that the Award(s) are contrary to the contractual terms. At the same time, this outcome poses a dilemma inasmuch as in these cases, the Arbitral Tribunal has taken a particular view and when this was a plausible view, keeping in mind the parameters of judicial review of the Court in exercise of powers under Section 34 of the Act, normally the Court would not interfere with such Awards. However, as already indicated above, **such a situation has arisen because of conflicting Awards given by the Arbitral Tribunals themselves, which has provoked this Court to take a final view in the matter, necessitated by the aforesaid reason.** If one takes into consideration the theory that one applies the principle mechanically i.e. that a plausible view is not to be interfered with, then it may lead to very anomalous situation. In such an eventuality, view taken by a particular Arbitral Tribunal in favour of the Contractor would be upheld as plausible view. Likewise, the Court will have to uphold the view taken by a particular Arbitral Tribunal in favour of NHAI as well, as a plausible view. Therefore, **the purpose is to avoid such a situation which cannot be permitted as it would result in upholding both kinds of arbitral awards interpreting the same clause, whether they go in favour of the employer or they go in favour of the contractor.** When the exercise is done keeping in view

²⁶ (2018) 14 SCC 688



these considerations and outcome thereof is not determined, interest of justice would also demand that this result has to be applied to the pending cases, which have not attained finality. Therefore, in these peculiar circumstances, we hold that the principle of issue estoppel will apply only in those cases where matters have attained finality and no judicial proceedings are pending. In all those cases, including the present one, where awards are challenged on this particular aspect, this judgment will govern the outcome.”

[Emphasis Supplied]

In our considered opinion, the view expressed by the Supreme Court in the aforesaid judgment is relevant. The Supreme Court observed that arbitral tribunals had created an anomalous situation by interpreting identical contractual terms distinctly in separate awards, which resulted in contrary awards in favour of the parties. The Supreme Court recognised that this was not permissible. The Supreme Court held it is imperative that identical clauses should be interpreted consistently by the arbitral tribunals.

66. The Appellant has contended that inconsistent views between the two arbitral awards cannot be a ground for setting aside the impugned Award under Section 34 of the Act of 1996. The Appellant, on the merits, sought to contend that the view taken by its nominee member Mr. Ashok Khurana, is consistent in both the arbitral award[s]. The Appellant has also relied on the fact that Mr. Prabhat Krishna, the presiding Arbitrator in the impugned Award, is not common.

In our considered opinion, these pleas of the Appellant are not meritorious. As discussed above, Mr. Ashok Khurana himself has taken a distinct view in both the arbitral award[s] and has not given any reasons for taking a different view. Similarly, Mr. A.K. Yadav, the third member, has taken two diametrically opposite views in both the award[s] and has not



recorded any reasons for taking this opposite view.

67. The submission of the Appellant that each arbitral proceeding is distinct and there cannot be comparative review on merits, is a legal plea which cannot apply to the facts of this case in view of the peculiar facts that the Arbitral Tribunal members are common, parties are common, contractual terms interpreted by the Arbitral Tribunal are identical, the facts giving rise to the disputes are near identical, but the decision in the award[s] is diametrically opposite.

68. The Supreme Court in **OPG Power Generation Pvt. Ltd. v. Enxio Power Cooling Solutions India**²⁷ held that a ground for interference under Section 34 of the Act of 1996, and that the expression ‘most basic notions of justice’ in Clause (iii) of Explanation 1 to Section 34(2)(b)(ii) is attracted only where the award conflicts with such elementary and fundamental principles of justice that the violation shocks the conscience of the Court.

In the present case, the same two members of the Arbitral Tribunal have, in a subsequent proceeding between the same parties and under identical contractual provisions, adopted irreconcilable positions on materially similar certificates, without disclosing any reasons for such departure or identifying any distinguishing circumstance. Such an unexplained departure from the position earlier adopted by the common members strikes at the elementary requirement of consistency and reasoned adjudication and, in the peculiar facts of the present case, is of such a nature as to shock the conscience of the Court. We are, therefore, of the considered view that the impugned Award, to this extent, is in conflict with the most

²⁷ (2025) 2 SCC 417



basic notions of justice within the meaning of Clause (iii) of Explanation 1 to Section 34(2)(b)(ii) of the Act of 1996.

69. We therefore hold that the learned Single Judge has rightly set aside the impugned Award on this ground as well.

70. Before we part, it is necessary to clarify that the conclusions recorded in the present judgment are not on the basis of any re-appreciation of the evidence, re-evaluation of the merits of the rival claims, or substitution of this Court's interpretation of the contractual provisions for that adopted by the Arbitral Tribunal. This Court has consciously refrained from expressing any opinion on the correctness of the interpretations of the clauses of the contract, or on the merits of the parties' respective claims and counter-claims, all of which remain within the exclusive domain of the Arbitral Tribunal. The findings returned herein are founded upon the Arbitral Tribunal's failure to exercise the jurisdiction conferred upon it and the resultant violation of the principles of natural justice and the statutory mandate governing arbitral proceedings. The issues pertaining to the interpretation of the contractual provisions, the correctness of the Certificate dated 31.08.2014, the legality of the Engineer's subsequent revisions, and all other questions on merits are left open for adjudication by the Arbitral Tribunal in accordance with law.

71. In view of the foregoing discussion and the findings recorded hereinabove, we do not consider it necessary to examine in detail the judgments relied upon by the Appellant, which principally reiterate the limited scope of judicial interference with arbitral awards and the



impermissibility of re-interpreting contractual terms or re-appreciating evidence under Section 34 of the Act of 1996. The legal propositions enunciated in the said decisions are well settled and are not in dispute. However, since the present judgment proceeds on different facts and circumstances, specifically, the Arbitral Tribunal's failure to adjudicate a material dispute referred to arbitration and the consequential jurisdictional and procedural infirmities, the said authorities do not govern the controversy arising in the present case. We, therefore, do not find it apposite to deal with the Appellant's interpretation of the judgments relied upon by it in the present judgment.

72. In view of the aforesaid findings, this Court finds no merit in interfering with the impugned judgment dated 08.04.2024, including the direction therein remanding the matter to the Arbitral Tribunal for consideration and adjudication of the defence raised by the Respondent.

73. Since we have dismissed the challenge to the direction in the impugned judgment setting aside the impugned Award, FAO(OS)(COMM) 132/2024 is hereby dismissed. The challenge in FAO(OS)(COMM) 136/2024 to the non-grant of pre-award and pendente lite interest by the Arbitral Tribunal does not survive for consideration, as we have upheld the direction passed in the impugned judgment setting aside the impugned Award.

74. Accordingly, the appeals are disposed of. Pending applications, if any, also stand disposed of.



MANMEET PRITAM SINGH ARORA, J

V. KAMESWAR RAO, J

AUGUST 14, 2026/hp/mt/AM/aa