2024 INSC 711

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3981-3982 OF 2024
(Arising out of SLP (Civil) Nos.21017-21018 of 2021)

OPG POWER GENERATION PRIVATE LIMITED ... **APPELLANT(S)**

Versus

ENEXIO POWER COOLING SOLUTIONS INDIA PRIVATE LIMITED & ANR. ... **RESPONDENT(S)**

With
CIVIL APPEAL NOS. 3983-3984 OF 2024
(Arising out of SLP (Civil) Nos.21009-21010 of 2021)

J U D G M E N T

MANOJ MISRA, J.

1. These two appeals are directed against a common judgment and order of the High Court[1] dated 1 September 2021 passed in OSA (CAD) Nos. 174-175 of 2021, whereby, exercising powers under Section 37 of the Arbitration and Conciliation Act, 1996[2] read with Section 13(1) of the Commercial Courts Act, 2015[3] and Clause 15 of Amended Letters Patent, 1865 read with Order XXXVI

[1] High Court of Judicature at Madras
[2] 1996 Act
[3] 2015 Act

Rule 9 of O.S. Rules, the Division Bench of the High Court allowed the appeals, set aside the judgment and order of the Single Judge dated 23 December 2020 and restored the arbitral award dated 13 July 2020.

THE CONTRACT

2. OPG Power Generation Private Ltd (in short OPG - the appellant in the leading appeal), a subsidiary of Gita Power and Infrastructure Private Limited (in short Gita Power – Respondent No.2 (R-2) in the leading appeal, and appellant in the connected appeal), floated a composite tender for design, manufacture, supply, erection and commissioning of air-cooled condenser unit (ACC Unit) with auxiliaries for 160 MW Coal Based Thermal Power Plant (Project) at Gummidipoondi in the State of Tamil Nadu. Enexio Power Cooling Solutions (in short Enexio - Respondent No.1 (R-1) in the leading appeal) bid for the project. After a series of correspondences /negotiations, on 4 March 2013, R-2 issued two separate orders: (i) for design, engineering and supply of one ACC Unit with auxiliaries for 160 MW Coal Based Power Project at Gummidipoondi (in short, Supply Purchase Order); and (ii) for erection and commissioning of one unit of ACC with auxiliaries for 160 MW Coal Based Power Project at Gummidipoondi (in short, Erection Purchase Order). Interestingly, the tender was floated by OPG but the supply and erection orders were issued by its holding

company (Gita Power - R-2) on 4 March 2013. However, later, in the month of July 2013, OPG confirmed those orders by issuing two separate orders with same terms and bearing the same date i.e. 4 March 2013.

3. The supply / erection purchase orders with its enclosures contained an arbitration clause in the following terms:

> "**Clause 21. ARBITRATION**
>
> 21.1. In the event of any dispute or difference arising under the Order or in connection therewith including any question relating to existence, meaning and interpretation of the Order or any alleged breach thereof that cannot be amicably settled between the Parties, the same shall be referred to the arbitration.
>
> 21.2. Arbitration shall be conducted under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said rules. The place of arbitration will be at Chennai. The arbitration proceedings shall be conducted in the English language.
>
> 21.3. The arbitrators shall take into consideration the will of the Parties as expressed in the Order, the evidence presented, the principles of equity and good faith. The decision(s) of the arbitrators shall be final and both Parties undertake to fulfil and execute the said decision(s).
>
> 21.4. Notwithstanding any dispute between the parties, Parties shall not be entitled to withhold/ delay/defer their obligations under the Order and same shall be carried out strictly in accordance with the terms and conditions of the Order."

4. Clause 6 of the supply purchase order provided:

> "**6-Tax and duties:**
>
> 6.1. Taxes, duties and levies payable and charged by the competent authority such as Excise Duty, Sales Tax, Cess will be borne and paid by the Purchaser.
>
> 6.2. The Purchaser shall issue Central Sales Tax Form C or any other Form as applicable for interstate sale."

5. Likewise, clause 6 of the erection purchase order provided:

> "**6-Tax and duties:**
>
> 6.1. All taxes duties and local levies payable and charged by the Competent Authority for the Services, such as Service Tax, cess, work order tax and other charges which could be levied in connection with and during the Order, whether deducted at source or not, will be borne and paid by the Purchaser.
>
> 6.2. Any statutory variation due to implication of new taxes and duties shall be paid by Purchaser."

THE DISPUTE BETWEEN PARTIES

6. The intended completion/ commissioning date, as originally contemplated, was 31 March 2014. However, commissioning took place in May 2015. The total amount billed by Enexio (R-1) for the aforesaid two orders was Rs. 46,71,04,493 but the amount paid to it was Rs. 39,59,19,629 only. This gave rise to a dispute. According to Enexio (R-1), Rs.6,75,15,631 remained payable to it. Whereas, according to the appellant, nothing was due as from the remaining amount, following sums were deductible:

"(i) Rs.3,30,00,000, *vide* debit note dated 24.08.2015, towards liquidated damages for delay in supply and erection.

(ii) Rs.5,94,06,693, *vide* debit note dated 16.01.2016, towards customs duty.

(iii) Rs. 1,72,854 towards dismantling modification - TG building.

(iv) Rs. 27,40,161 towards ACC duct fabrication. Totaling Rs. 9,53,19,708."

7. On 19 April 2018 a meeting took place between the representatives of the parties. Minutes of that meeting were drawn in the following terms:

"Minutes of meeting with M/s. OPG Power Generation Pvt. Ltd. and M/s. ENEXIO Power Cooling Solutions (I) Pvt. Ltd. dated 19.04.2018.

Members Present:

	OPGS	ENEXIO
1.	Mr. S. Swaminathan	1. Mr. Parasuram
2.	Mrs. C. Kiruthiga	2. Mr. Ravi Rengasamy

Sub.: Supply of Air-cooled condenser with auxiliaries for 160 MW Coal based Power Project of OPG Power Generation Pvt. Ltd. (OPGPG) – Debit Notes.

Ref.: 1. Order No. OPGPG/ED/P-III/SUPPLY/008, dated 04.03.2013.

2. Order No. OPGPG/ED/P-III/ ERECTION /009, dated 04.03.2013

Description	**Amount in Rs.**
Total Billed Amount	467,104,493
Amount Paid	395,919,629
Balance Payable incl Retention	67,515,618
OPGPG Debit	
LD- Delay in Supply	30,900,000
LD- Delay in Erection	2,100,000
Customs Duty	59,406,693
Dismantling Modification – TG Building	172,854
ACC duct Fabrication (Debit raised for Rs.63,40,161/- against which	

GEA have accepted for Rs.36,00,000/- that is reduced from payable)	2,740,161
Total OPGPS Debit	95,319,708
Final Payable by Enexio	27,804,090

> The above figures are validated by respective Projects and Finance departments.
>
> However, we request that the CD, CVD and LD's be looked at leniently and mutually settled. The Contract calls for all taxes such as ED, ST to be reimbursed and CVD is equivalent to Excise duty.
>
> LD is not only due to our ENEXIO's fault. In any case, this did not cause for any delay in Plant commissioning. We have had huge losses due to US dollar increase during Project stage to the tune of Rs.1.82 crores.
>
> ENEXIO requested that the above amount of Rs.2,78,04,090/- payable by them to M/s. OPG Power Generation Pvt. Ltd. be adjusted against the amount to be received by M/s. ENEXIO Power Cooling Solutions (I) Pvt. Ltd. from M/s. OPGS Power Gujarat Pvt. Ltd."

8. According to Enexio (R-1), in that meeting, the parties were *ad idem* regarding the outstanding principal amount payable to Enexio (R-1) and there was no consensus on any other item mentioned in the minutes of the meeting.

9. On 26 May 2018 OPG extended an offer of Rs. 300 lacs to Enexio (R-1) as full and final settlement of the account. This was not accepted by Enexio. Hence, the claim.

ENEXIO'S (R-1's) CLAIM

10. On 2 May 2019 Enexio (R-1) invoked the arbitration clause, under the extant ICC Rules, raising the following claims:

S.No.	Claim	Amount (in INR)
A	Outstanding principal amount as due under the Purchase Orders	6,75,15,631
B	Declaration that the Debit Note Nos.076/2015-16 and 077/2015-16, both dated 24.08.2015, issued by the Employer, claiming deduction of aggregate amount of INR 3,30,00,000/- towards Liquidated Damages for the delay, are unlawful and unsustainable.	-
C	Declaration that the Debit Note No.032/2015-16 dated 12.01.2016, issued by the Employer, claiming deduction of Rs.5,94,06,693/- towards Customs Duty, including CVD and SAD, is unlawful and unsustainable.	-
D	Interest on outstanding principal amount calculated @ 18% p.a. from respective due date(s) of payments till 31.03.2019.	3,51,43,446
E	Interest on outstanding principal amount calculated @ 18% p.a. for further period starting from 01.04.2019 till the date of payment.	-
F	Damages under the Purchase Orders	8,00,00,000
G	Costs of arbitration	

THE COUNTERCLAIM

11. On 15 July 2019 OPG submitted its defense, and raised counterclaims in respect of: (a) liquidated damages for delay; (b) customs duties; (c) cost of erection of horizontal and vertical exhaust through external agency; (d) cost of repair/ replacement of gear boxes; and (e) cost of repair/ replacement of fan modules.

THE AWARD

12. On 13 July 2020 ICC Arbitral Tribunal, comprising of three members, delivered a unanimous award, whereunder OPG and Gita Power, who have separately filed these two appeals, were required to pay, jointly and severally, to the claimant (R-1 - Enexio):

> (i) Rs. 6,11,75,470/- towards outstanding principal amount due under the purchase orders;
>
> (ii) Rs. 95,27,533/- towards ICC Administrative Costs and the Tribunal fees and expenses incurred in the arbitration; and
>
> (iii) Rs. 40,65,515/- towards claimant's legal fees and expenses.
>
> In addition to the above, OPG and Gita Power were directed to pay simple interest

at a rate of 10% per annum on: (a) Rs. 6,11,75,470/- from 30 October 2015 until the date of payment; (b) Rs.95,27,533/- from the date of the award till the date of payment; and (c) Rs. 40,65,515/- from the date of the award till the date of payment.

However, all other claims including counterclaims were rejected.

KEY FINDINGS IN THE AWARD

13. The key findings of the Arbitral Tribunal were:

(a) Gita Power and OPG are jointly and severally liable – Gita Power, being the holding company of OPG, had actively participated in the negotiations and had placed the purchase orders, which were later confirmed by OPG. In fact, they both acted as a single economic enterprise. Therefore, mere issuance of another set of purchase orders by OPG with same terms and conditions would not relieve Gita Power of its obligations, rather both would be jointly and severally liable to the claimant (Enexio).

(b) Claimant is entitled to the unpaid principal amount with interest – Principal amount of Rs. 6,75,15,631/- is due and payable to the claimant

(Enexio) under the terms of the purchase orders, subject to reconciliation of Rs.63,40,161 spent on vertical duct erection. Thus, net amount payable to the claimant is Rs. 6,11,75,470 plus interest.

(c) No Damages are payable by Enexio to OPG/ Gita Power for the delay – The claimant was entitled to extension up to the date of completion i.e., 21 September 2015. Therefore, Enexio has no liability towards liquidated damages for the delay. Moreover, all the completion requirements were achieved by that date.

(d) No liability of Enexio to pay customs duty – Clause 6 of the Supply / Erection Purchase orders stipulated that all taxes, duties and local levies payable would be borne and paid by the purchaser. Therefore, liability to pay customs duty would fall upon the purchaser/ employer.

(e) Limitation -

(i) Declaratory relief sought by Enexio *qua* the debit notes (i.e., towards liquidated damages and customs duty) is beyond the period of limitation prescribed by Article 58 of the Limitation Act, 1963[4];

[4] 1963 Act

(ii) However, Enexio's claim for unpaid dues payable under the contract is within the period of limitation; and

(iii) OPG's counterclaim for cost of repair/replacement of gearboxes and fan modules is barred by limitation.

Reasoning of the Arbitral Tribunal on limitation:

14. Regarding the finding on limitation, the Arbitral Tribunal (in short the "Tribunal") observed that the declaratory relief *qua* the debit notes (i.e., towards: (a) Liquidated damages for the delay; and (b) Customs duty) was sought beyond three years from the date when the right to sue first accrued, therefore it was beyond the limitation period prescribed by Article 58 of the Schedule to the 1963 Act. The Tribunal noticed that the debit note for liquidated damages was issued on 24 August 2015; the claimant acknowledged its receipt *vide* letter dated 28 August 2015; whereas the request for arbitration was received by ICC Secretariat on 2 May 2019. Likewise, the debit note for customs duty was issued on 12 January 2016 that is, beyond three years from the date of request for arbitration.

15. Insofar as the relief for recovery of the unpaid amount under the purchase orders was concerned, the Tribunal opined that it was not barred by limitation

because meaningful negotiations were ongoing between the parties as evidenced by the minutes of meeting dated 19 April 2018, which was followed by a written offer of the purchaser/ employer, dated 26 May 2018, to pay Rupees three crores to the claimant as full and final settlement of the account. The relevant observations in that regard are found in paragraph 16.03 (d) of the award, which is extracted below:

> "16.03 (d) Based on the arguments of the Parties' respective Counsel and with reference to the case law and statutes cited during the oral hearing in this arbitration, the Tribunal finds that as long as meaningful negotiations were ongoing between the parties the period of limitation of three years had not begun to run. Following the meeting held between the parties on 19th April 2018 the respondents made a written offer to settle the matter on 26th May 2018. Thus, the Tribunal finds that the period of limitation had not commenced until 26th May 2018 and consequently had not expired when the Request for Arbitration was received by the ICC Secretariat on 2nd May 2019. Accordingly, the Tribunal finds that items A, D, E and F claiming payment of money are not time barred."

16. Regarding the counterclaim for cost of repair/ replacement of gearboxes and fan modules as barred by limitation, the Tribunal reasoned thus:

> "16.04 Time Bar in relation to the Respondents' counterclaims for the cost of repair/replacement of gearboxes and fan modules.
>
> There is no evidence that these counterclaims were included in the ongoing negotiations. The Tribunal has found that the Taking Over Certificate is deemed to have been issued on 21st September 2015. (See Section 13.13 above). On that date the Claimant is deemed to have

> completed its obligations and thus, that is the latest date from which the limitation period of three years must run. The Claimant's liabilities are barred by limitation on or earlier than 21st September 2018. The Counterclaim was delivered on 15th July 2019 and is, thus, barred by limitation……."

CHALLENGE TO THE AWARD U/S 34 OF THE 1996 ACT

17. Two applications, namely, O.P. Nos. 533 and 562 of 2020, were filed by OPG (the appellant in the leading Civil Appeal) and Gita Power (appellant in the connected appeal and R-2 in the leading appeal) respectively, under Section 34 of the 1996 Act, for setting aside the award dated 13 July 2020.

Grounds of Challenge

18. OPG and Gita Power laid challenge to the arbitral award, *inter alia*, on the following grounds:

(i) Enexio's (R-1's) claim was made beyond the period of limitation prescribed by Articles 14 and 18 of the Schedule to the 1963 Act. The arbitration clause was invoked on 2 May 2019, well beyond three years from the date (i.e., 31 March 2014) when the work ought to have been completed as per the contract. It was also beyond three years from the deemed date of completion (i.e., 21 September 2015).

(ii) Different yardstick was adopted in computing the limitation period of the claim than what was adopted for the counterclaim, which was not at all justified as both arose out of same contractual relationship.

(iii) One part of the minutes of meeting dated 19 April 2018 that supported the counterclaim was discarded, while the other part, which favored the claimant, was accepted. This is nothing but perverse.

(iv) The time for completion of the work under the contract was extended without any basis.

(v) Findings in the award are self-contradictory in as much as, if challenge to the debit note for damages on account of the delay was beyond limitation, there was no logic in denying adjustment of those damages against the unpaid dues payable to Enexio under the purchase orders.

(vi) Material evidence *qua* liability for customs duty was ignored.

SINGLE JUDGE'S ORDER U/S 34 OF THE 1996 ACT

19. The learned Single Judge in its judgment and order on the application, under Section 34 of the 1996 Act, charted the undisputed dates as follows:

Date	Events
31.03.2014	Said work ought to have been completed by Enexio.
24.08.2015	Debit note pertaining to liquidated damages was raised by Gita and OPG
21.09.2015	Deemed date of completion of said work
12.01.2016	Debit note regarding customs duty was raised by Gita and OPG
19.04.2018	Talks between adversaries namely Enexio on one side and Gita/OPG on the other side culminated in minutes of meeting (Ex.C.78)
26.05.2018	Gita/OPG offered to settle at Rs. 300 lacs as full and final settlement (Ex. C. 79)
22.08.2018	Gita/OPG sent communication enclosing cheque for Rs. 25 lakhs as part of Rs. 3 Crores in full quit (Ex. C. 80)
29.10.2018	Enexio returned Rs. 25 lakhs cheque (Ex. C. 82)
02.05.2019	Arbitral institution, namely, ICC request for arbitration (to be noted, both parties agreed that this is the date of commencement of arbitration within the meaning of section 21 of A and C Act)
15.07.2019	Gita/OPG made counter claim vide its pleadings before AT

20. After charting the relevant dates, and perusing the arbitral award, in paragraph 25 of the judgment, the learned Single Judge observed:

> "25. There is a clear dichotomy in impugned award regarding the legal drill of testing limitation. AT has taken 26.05.2018 as the reckoning date, that being the date on which written offer to settle the matter was made by Gita/OPG vide Ex. C. 79, but for testing the counter claim of Gita/OPG, AT has taken

> 21.09.2015 as the reckoning date or starting point of limitation, that being the date of deemed completion of said work. This Court is constrained to observe that this dichotomy is akin to classical division between science and mysticism. Therefore, this Court unhesitatingly holds that this is patently illegal and an implausible view. To be noted, this dichotomy is not a mere erroneous application of law, and it needs no reappreciation of evidence. It is also an infract of section 18 of A and C Act which provides for equal treatment of parties. More importantly, the law of limitation being based on public policy, as already delineated supra, infract of the same would clearly vitiate the impugned award as one being in conflict with public policy of India."

21. The learned Single Judge thereafter proceeded to observe that the counterclaim and heads of claim were so intertwined with each other that a decision on one, with no decision on the other, would vitiate the entire award. Further, it was observed, if the arbitral tribunal had taken the date of joint meeting (i.e., 19 April 2018), and the follow up offer dated 26 May 2018, as the starting point of limitation for the claim, the same would be the starting point of limitation for the counterclaim as well. And if the starting point of limitation is taken as 21 September 2015 (i.e., the date of completion of the work), the claim, which was filed on 2 May 2019, was well beyond three years and as such barred by limitation. Thus, according to the learned Single Judge there was inherent contradiction in the arbitral award which made it vulnerable to a challenge under Section 34 of the 1996 Act. Consequently, the learned Single Judge set aside the arbitral award.

22. Aggrieved by the judgment and order of the learned Single Judge, dated 23 December 2020, Enexio (R-1 herein) filed two appeals, namely, O.S.A. (CAD) Nos. 174 and 175 of 2021, before the Division Bench of the High Court, which came to be allowed by the impugned judgment.

IMPUGNED JUDGMENT

23. The Division Bench of the High Court, *inter alia*, took the view that the minutes of meeting dated 19 April 2018, read with e-mail dated 26 May 2018, amounted to an acknowledgment of the dues payable to Enexio, thereby satisfying the ingredients of Section 18 of the 1963 Act for a fresh period of limitation to run from that date. It observed that when the last part of the minutes' dated 19 April 2018 is read with subsequent communication dated 26 May 2018, it belies the stand of the counterclaimant that the counterclaims were admitted to the claimant. Thus, the Division Bench, *inter alia*, held that the view taken by the arbitral tribunal was a possible view and there was no patent illegality in the award meriting interference under Section 34 of the 1996 Act. Consequently, the order of the learned Single Judge was set aside, and the arbitral award was restored.

24. We have heard Mr. Abhimanyu Bhandari for the appellants; Mr. Gaurab Banerjee for the claimant-respondent and have perused the record.

SUBMISSIONS ON BEHALF OF APPELLANT(S)

25. The learned counsel for the appellants, *inter alia*, submitted:

(i) The Arbitral Tribunal, in paragraph 16.03(d) of the award *qua* claims (i), (iv), (v) and (vi) (corresponding claim numbers A, D, E and F) of the claimant-respondent, observed:

> "As long as meaningful negotiations were ongoing between the parties, the period of limitation of three years had not begun to run. Following the meeting held between the parties on 19th April, 2018 the respondents made a written offer to settle the matter on 26 May 2018. Thus, the Tribunal finds that the period of limitation had not commenced until 26 May 2018 and consequently had not expired when the request for arbitration was received by the ICC Secretariat on 2 May 2019."

The afore-quoted observations are in teeth of decisions of this Court in (i) **Bharat Sanchar Nigam Limited v. Nortel Networks Pvt. Ltd.**[5] and (ii) **B & T AG v. Ministry of Defence**[6] where it has been held that mere negotiations will not postpone the cause of action for the purpose of limitation.

[5] (2021) 5 SCC 738, paragraphs 20 and 21
[6] (2024) 5 SCC 358, paragraph 73

(ii) The period of limitation for the claim would have to be counted as three years from the date of completion i.e., 21 September 2015, which got over before 2 May 2019 i.e., the date when request was received for arbitration. Once the claim is barred by limitation, the award allowing the claim would be deemed to be violative of fundamental policy of Indian law and, therefore, vulnerable in the light of the law declared in (i) **Ssangyong Engg. & Construction Co. Ltd. v. NHAI**[7] and (ii) **Associate Builders v. Delhi Development Authority.**[8]

(iii) The Arbitral Tribunal applied different yardstick for computing limitation of the claim than what was adopted for the counterclaim. For example, the start point of limitation for the claim was taken as 26 May 2018 whereas for the counterclaim it was taken as 21 September 2015. This amounted to unequal treatment of the parties more so when claim as well as counterclaim arose from the same contractual relationship.

[7] (2019) 15 SCC 131
[8] (2015) 3 SCC 49

(iv) Once the declaratory relief *qua* Debit Notes dated 24 August 2015 (i.e. in respect of Rs. 3,30,00,000 towards liquidated damages for the delay in supply and erection under the purchase orders) and 12 January 2016 (i.e. in respect of Rs. 5,94,06,693/- towards Customs Duties) was held barred by limitation, the amount reflected in the Debit Notes ought to have been deemed payable by the claimant and that amount ought to have been adjusted against any amount payable to the claimant.

(v) The Division Bench erroneously relied on the minutes dated 19 April 2018 to apply Section 18 of the 1963 Act for extending the period of limitation of the claim when it was nobody's case that limitation stood extended thereby. Further, if the minutes dated 19 April 2018 were to be relied, it ought to have been relied in toto and not in part. That is, it should have been taken as an admission of liability of the claimant towards liquidated damages for the delay as well as customs duty.

(vi) In paragraph 13 of the impugned judgment, the Division Bench sought to appreciate the evidence i.e. the minutes of meeting dated 19 April 2018, which was beyond the scope of powers exercisable

under Section 37 read with Section 34 of the 1996 Act. In this regard, reliance was placed on: (i) **UHL Power Company limited v. State of Himachal Pradesh**[9]; (ii) **Dyna Technologies Pvt. Ltd. v. Crompton Greaves Lt.,**[10]**;** (iii) **Heidelbergh Cement India Ltd. v. The Indure Pvt. Ltd.**[11]; (iv) **MMTC Ltd. v. Vedanta Ltd.**[12]; (v) **Ssangyong Engg (supra); and** (vi) **Haryana Tourism Ltd. v. Kandhari Beverages Ltd.**[13]

(vii) The learned Single Judge justifiably set aside the award that was self-contradictory and perverse.

(viii) Counterclaims for cost of repair/ replacement of gear boxes, which were defective, ought to have been adjudicated. In absence thereof, the arbitral award is rendered bad in law.

(ix) The Division Bench of the High Court misconstrued the ratio of the decision of this Court in **Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd**[14] for treating the claim within, and the counterclaim beyond, the period of limitation.

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[9] (2022) 4 SCC 116, paragraphs 16 to 21
[10] (2019) 20 SCC 1, paragraphs 27-43
[11] 2022/DHC/003952
[12] (2019) 4 SCC 163, paragraphs 11 to 13
[13] (2022) 3 SCC 237, paragraphs 7 & 8
[14] (2020) 14 SCC 643 (para 28)

(x) The subsequent purchase orders issued by OPG replaced the earlier purchase orders issued by Gita Power, and the supply/ work was in respect of an OPG project, therefore Gita Power could not have been dragged into arbitration and made jointly and severally liable with OPG.

SUBMISSIONS ON BEHALF OF FIRST RESPONDENT /ENEXIO

26. The learned counsel for the first respondent, *inter alia,* submitted:

(i) The findings in the award are factually correct. There is no patent illegality, as alleged, or otherwise, which may warrant interference under Section 34 of the 1996 Act. Therefore, the Division Bench of the High Court was justified in setting aside the order of the Single Judge and restoring the award.

(ii) The appellant's case that all counterclaims were treated as barred by limitation and, therefore, not considered on merits, is factually incorrect. In all five counterclaims were there. Out of those five, counterclaims towards: (i) liquidated damages for the delay in supply and erection; (ii) customs

duty; and (iii) cost of erection of horizontal and vertical exhaust duct through an external agency, were considered and decided on merits. The counterclaims for liquidated damages and customs duty were rejected whereas counterclaim for cost of erection of vertical duct was allowed. Only two counterclaims towards (i) cost of repair/ replacement of Gear Boxes, due to alleged defective supply, amounting to Rs.9,76,000, and (ii) cost of repair/ replacement of Fan Modules, due to alleged defective supply, amounting to Rs.14,80,802, were dismissed as barred by limitation. The finding that these two counterclaims were barred by limitation is premised on there being no material to indicate that they were included in the ongoing negotiation.

(iii) The arbitral tribunal considered the three counterclaims on merit by adopting the same yardstick *qua* limitation as applied to the claims. These three counterclaims were not treated as barred by limitation as they were cited in the minutes of the meeting dated 19 April 2018 wherein the principal amount due to OPG was also

acknowledged. It is thus incorrect to state that the arbitral tribunal adopted different yardstick on the point of limitation while deciding counterclaims than what was adopted to decide the claims.

(iv) Enexio's claim of the balance amount was not barred by limitation even if the limitation period is counted from the date of completion of the project i.e., 21 September 2015, because before expiry of the period of limitation of three years, that is before 20 September 2018, *vide* minutes of the meeting dated 19 April 2018, OPG had acknowledged in writing its liability towards the balance of the principal amount (i.e., Rs. 6,75,15,631) albeit subject to deductions. Thus, by virtue of Section 18 of the 1963 Act, from the date of written acknowledgment, which was followed by written communication dated 26 May 2018, fresh period of limitation of three years began to run.

(v) Inference drawn from the minutes of the meeting as well as subsequent conduct of the parties to conclude lack of consent on Enexio's part for deductions in the

outstanding amount, is a decision within the remit of the arbitral tribunal. Therefore, any error, if at all, would be an error within its jurisdiction, which is not amenable to interference under Section 34 of the 1996 Act. Because, while examining the validity of an award under Section 34, the Court exercises supervisory and not appellate jurisdiction (***vide:*** **(i) Steel Authority of India Ltd. versus Gupta Brothers Steel Tubes Ltd.[15]; (ii) Associated Builders (supra)**; **(iii) Ssangyong Engg (supra)**; **and (iv) Delhi Airport Metro Express Pvt. Ltd. v. DMRC Ltd.[16])**.

(vi) The learned Single Judge had erred in observing:

(a) *'That any infract qua limitation would violate public policy and attract Section 34 (2) (b) (ii) read with Explanation 1 of the 1996 Act.'* Because limitation is a mixed question of fact and law and if its determination depends on interpretation / appreciation of evidence / materials on record, any

[15] (2009) 10 SCC 63
[16] (2022) 1 SCC 131

error, *ipso facto,* would not render the award amenable to interference as is clear from the Proviso to sub-section (2-A) of Section 34 of the 1996 Act.

(b) *'That different dates could not have been taken for determining limitation of the claim and the counterclaim, when both were intertwined and had arisen from a common supply/works contract.'* Because three out of five counterclaims were decided on merits and not on limitation. The remaining two were rejected on limitation as they were not reflected in the minutes of meeting dated 19 April 2018. Therefore, benefit of Section 18 of the 1963 Act was not available *qua* those counterclaims. Moreover, there cannot be a general rule that limitation for claims and counterclaims must have a common run because counterclaim is a separate action which must stand on its own legs, as has been held by this Court in **Oil and Natural Gas**

Corporation Ltd. v. Afcons Gunanusa JV[17].

(vii) The counterclaim for the cost of repair/ replacement of gearboxes and fan modules was rightly rejected by the arbitral tribunal as barred by limitation as regarding it there was no recital in the minutes of meeting dated 19 April 2018. Moreover, it was not intertwined with the claim for the balance amount as the cause of action for the two were different. One arose from supply and erection, and the other arose subsequently, post commissioning/ completion of the project, on account of alleged defect in the material supplied.

(viii) Gita Power being the holding company of OPG and having actively participated in the formation of the contract as also in issuance of purchase orders for the supply/ works, which carried the arbitration clause, was bound by the arbitration agreement and also liable jointly and severally along with OPG for the dues.

[17] (2024) 4 SCC 481

ISSUES

27. Upon consideration of the rival submissions, the **core issue** which falls for our determination is:

> "Whether the arbitral award is in conflict with the public policy of India, or/ and is vitiated by patent illegality appearing on the face of the award?"

28. The answer to the above issue would depend, *inter alia*, on our determination of the following **sub-issues**:

(a) Whether Gita Power (R-2) could have been subjected to arbitration and made jointly and severally liable along with OPG for the award, when the project beneficiary was OPG?

(b) Whether Enexio's claim for the outstanding principal amount barred by limitation?

(c) Whether the counter claim, in respect of cost of repair / replacement of gear boxes and fan modules, could be treated as barred by time when the other side's claim, arising out of same

contractual relationship, was found within limitation?

(d) Whether arbitral award for payment of the outstanding principal amount with interest is perverse because it makes no adjustment for debit note(s) entries even though the prayer to declare them as invalid was rejected as barred by time?

(e) Whether the reasoning of the arbitral tribunal is flawed and vitiated by adopting different yardstick for adjudging the counterclaim than what was adopted for adjudging the claim? If so, whether it vitiated the award and rendered it vulnerable to a challenge under Section 34 of the 1996 Act?

RELEVANT LEGAL PRINCIPLES GOVERNING A CHALLENGE TO AN ARBITRAL AWARD

29. Before we delve into the issue/ sub-issues culled out above, it would be useful to have a look at the relevant legal principles governing a challenge to an arbitral award. Recourse to a Court against an arbitral award may be made through an application for setting aside such award

in accordance with sub-sections (2), (2-A) and (3) of Section 34 of the 1996 Act[18]. Sub-section (2) of Section 34 has two clauses, (a) and (b). Clause (a) has five sub-clauses which are not relevant to the issues raised before

[18] **Section 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 establishes on the basis of the record of the arbitral tribunal that---

(i) a party was under some incapacity; or

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

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with the 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 the provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that –

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1. — For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, –

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

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

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2--- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law, shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside, merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the set period of three months it may entertain the application within a period of 30 days, but not thereafter.

us. Insofar as clause (b) is concerned, it has two sub-clauses, namely, (i) and (ii). Sub-clause (i) of clause (b) is not relevant to the controversy in hand. Sub-clause (ii) of clause (b) provides that if the Court finds that the arbitral award is in conflict with the public policy of India, it may set aside the award.

Public Policy

30. "Public policy" is a concept not statutorily defined, though it has been used in statutes, rules, notification etc. since long, and is also a part of common law. Section 23[19] of the Contract Act, 1872 uses the expression by stating that the consideration or object of an agreement is lawful, unless, *inter alia*, opposed to public policy. That is, a contract which is opposed to public policy is void.

31. In **Chitty on Contracts**[20], scope of public policy, largely accepted across jurisdictions for invalidation of contracts, has been summarized in the following terms:

> "Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups: first, objects

[19] **Section 23.-- What consideration and objects are lawful, and what not. --** The consideration or object of an agreement is lawful, unless –
it is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or
involves or implies, injury to the person or property of another; or
the court regards it as immoral, or opposed to public policy.
In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is wide.

[20] Volume 1, 35th Edition, paragraph 19-112

> which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and, fifthly, objects economically against the public interest, viz contracts in restraint of trade….."

32. In **Gherulal Parakh v. Mahadeodas Maiya and others**[21], a three-Judge Bench of this Court, in the context of Section 23 of the Contract Act, summarized the doctrine of public policy as follows:

> "Public policy or the policy of the law is an elusive concept; it has been described as untrustworthy guide, variable quality, uncertain one, unruly horse, etc; the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which formed the basis of society, but in certain cases, the court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; Though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not

[21] AIR 1959 SC 781

> to make any attempt to discover new heads in these days.
>
> (Emphasis supplied)

33. In **Central Inland Water Transport Corporation v. Brojo Nath Ganguly**[22], this Court observed that the expressions 'public policy', 'opposed to public policy', or 'contrary to public policy' are incapable of precise definition. It was observed that public policy is not the policy of a particular government. Rather it connotes some matter which concerns the public good and the public interest. It was observed:

> "92.....what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and, similarly, where there has been a well- recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy."
>
> (Emphasis supplied)

34. In **Renusagar Power Co. Ltd. v. General Electric Co.**[23], a three-Judge Bench of this Court observed that the doctrine of public policy is somewhat open- textured and flexible. By citing earlier decisions, it was observed that there are two conflicting positions which are referred to as the "narrow view" and the "broad view". According to the

[22] (1986) 3 SCC 156, paragraph 92
[23] 1994 Supp (1) SCC 644

narrow view, courts cannot create new heads of public policy whereas the broad view countenances judicial law making in these areas. In the field of private international law, it was pointed out, courts refuse to apply a rule of foreign law or recognize a foreign judgment or a foreign arbitral award if it is found that the same is contrary to the public policy of the country in which it is sought to be invoked or enforced. However, it was clarified, a distinction is to be drawn while applying the rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. It was observed that the application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved. It was held that contravention of law alone will not attract the bar of public policy, and something more than contravention of law is required.

35. In fact, in **Renusagar (supra),** this Court was dealing with the enforceability of a foreign award. For that end, it had to interpret the expression "contrary to public policy" in the context of Section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961[24]. While

[24] **Section 7. Conditions for enforcement of foreign awards**. – (1) A foreign award may be enforced under this Act—

****

(b) if the court dealing with the case is satisfied that –

doing so, this Court held that -- (a) contravention of law alone will not attract the bar of public policy, and something more than contravention of law is required[25]; and (b) the expression 'public policy' must be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria, it was held that enforcement of a foreign award could be refused on the ground of being contrary to public policy if such enforcement would be contrary to (a) fundamental policy of Indian law or (b) the interests of India or (c) justice or morality[26]. The Court thereafter proceeded to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India as that 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[27].

36. What is clear from above is that for an award to be against public policy of India a mere infraction of the municipal laws of India is not enough. There must be, *inter alia*, infraction of fundamental policy of Indian law including a law meant to serve public interest or public good.

****

(ii) the enforcement of the award will be contrary to the public policy.

[25] paragraph 65 of Renusagar (supra)

[26] paragraph 66 of Renusagar (supra)

[27] paragraph 75 of Renusagar (supra)

37. In **Oil and Natural Gas Corporation (ONGC) v. Saw Pipes Ltd.**[28] a two-Judge Bench of this Court, in the context of a challenge to a domestic arbitral award under Section 34(2)(b)(ii) of the 1996 Act as it stood prior to 2015 amendment, ascribed wider meaning to the expression 'public policy of India' in the following terms:

> "31. ..... the phrase public policy of India used in section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/ judgment/ decision is likely to adversely affect the administration of justice. Hence, in our view, in addition to narrower meaning given to the term "public policy" in *Renusagar* case, it is required to be held that the award could be set aside if it is patently illegal. The result would be – award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
> (b) the interest of India; or
> (c) justice or morality, or
> (d) in addition, if it is patently illegal.
>
> Illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.
>
> (Emphasis supplied)

[28] (2003) 5 SCC 705

38. Following the expansive view of the concept "contrary to public policy", in **D.D.A v. M/s. R.S. Sharma & Co.**[29], which related to a matter arising from a proceeding under Section 34, as it stood prior to 2015 amendment, a two-Judge Bench of this Court, on the scope of the power to set aside an arbitral award, summarized the general principles as follows:

> "21. ...
> (a) An award, which is
> (i) contrary to substantive provisions of law; or
> (ii) the provisions of the arbitration and Conciliation Act, 1996; or
> (iii) against the terms of the respective contract; or
> (iv) patently illegal; or
> (v) prejudicial to the rights of the parties;
> Is open to interference by the court under Section 34(2) of the Act.
> (b) The award could be set aside if it is contrary to:
> (a) fundamental policy of Indian law; or
> (b) the interest of India; or
> (c) justice or morality.
> (c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.
> (d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to public policy of India."

39. In **Oil and Natural Gas Corporation Limited v. Western Geco International Limited**[30], which also

[29] (2008) 13 SCC 80

[30] (2014) 9 SCC 263 paragraphs 35, 38 and 39

related to the period prior to 2015 amendment of Section 34 (2)(b)(ii)[31], a three-Judge Bench of this Court, after considering the decision in **Saw Pipes (supra),** without exhaustively enumerating the purport of the expression 'fundamental policy of Indian law', observed that it would include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. The Court thereafter illustratively referred to three fundamental juristic principles, namely, (a) that in every determination that affects the rights of a citizen or leads to any civil consequences, the court or authority or quasi-judicial body must adopt a judicial approach, that is, it must act bona fide and deal with the subject in a fair, reasonable and objective manner and not actuated by any extraneous consideration; (b) that while determining the rights and obligations of parties the court or tribunal or authority must act in accordance with the principles of natural justice and must apply its mind to the attendant facts and circumstances while taking a view one way or the other; and (c) that its decision must not be perverse or so irrational that no reasonable person would have arrived at the same.

40. In **Associate Builders (supra)**, a two-Judge Bench of this Court, held[32] that *audi alteram partem* principle is

[31] See Footnote 18

[32] See paragraph 30 of the judgment in Associate Builders (supra)

undoubtedly a fundamental juristic principle in Indian law and is enshrined in Sections 18[33] and 34 (2)(a)(iii)[34] of the 1996 Act. In addition to the earlier recognized principles forming fundamental policy of Indian law, it was held that disregarding: (a) orders of superior courts in India; and (b) the binding effect of the judgment of a superior court would also be regarded as being contrary to the fundamental policy of Indian law[35]. Further, elaborating upon the third juristic principle (i.e., *qua* perversity), as laid down in **Western Geco (supra),** it was observed that where: (i) a finding is based on no evidence; or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse[36]. To this a caveat was added by observing that when a court applies the 'public policy test' to an arbitration award, it does not act as a court of appeal and, consequently, errors of fact cannot be corrected; and a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal

[33] **Section 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] See Footnote 18
[35] See paragraph 27 of the judgment in Associate Builders (supra)

[36] Paragraph 31 of the judgment in Associate Builders (supra)

mind would not be held to be invalid on that score. Thus, once it is found that the arbitrator's approach is not arbitrary or capricious, it is to be taken as the last word on facts[37].

2015 Amendment in Sections 34 and 48

41. The afore-mentioned judicial pronouncements were all prior to 2015 Amendment. Notably, prior to the Amendment, 2015 the expression "in contravention with the fundamental policy of Indian law" was not used by the legislature in either Section 34(2)(b)(ii) or Section 48(2)(b). The pre-amended Section 34(2)(b)(ii) and its Explanation read:

> "**S.34. Application for setting aside arbitral award—**
> (1) *******
> (2) An arbitral award may be set aside by the court only if—
> ******
> (b) the court finds that –
> ******
> (ii) the arbitral award is in conflict with the public policy of India.
> Explanation.-- Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

Whereas pre-amended Section 48(2)(b) and its Explanation read:

[37] Paragraph 33 of the judgment in Associate Builders (supra)

> **S. 48. Conditions for enforcement of foreign awards. –**
> (1) ********
> (2) Enforcement of an arbitral award may also be refused if the court finds that—
> (a). ******
> (b) the enforcement of the award would be contrary to the public policy of India.
> Explanation. – Without prejudice to the generality of sub-clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

42. By the Amendment, 2015, in place of the old Explanation to Section 34(2)(b)(ii), *Explanations 1 and 2* were added to remove any doubt as to when an arbitral award is in conflict with the public policy of India.

43. At this stage, it would be pertinent to note that we are dealing with a case where the application under Section 34 of the 1996 Act was filed after the Amendment, 2015, therefore the newly substituted/ added *Explanations* would apply[38].

44. The Amendment, 2015 adds two explanations to each of the two sections, namely, Section 34(2)(b)(ii)[39] and Section 48(2)(b)[40], in place of the earlier Explanation. The

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[38] Ssangyong Engineering & Construction Co. Ltd (supra)
[39] See footnote 18
[40] Section 48(2)(b).--
Explanation 1. — For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if ,--
(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
(ii) it is in contravention with the fundamental policy of Indian law; or

significance of the newly inserted *Explanation 1* in both the sections is two-fold. First, it does away with the use of words: (a) *"without prejudice to the generality of sub-clause (ii)"* in the opening part of the pre-amended Explanation to Section 34(2)(b)(ii); and (b) "*without prejudice to the generality of clause (b) of this section*" in the opening part of the pre-amended Explanation to Section 48(2)(b); secondly, it limits the expanse of public policy of India to the three specified categories by using the words *"only if"*. Whereas, *Explanation 2* lays down the standard for adjudging whether there is a contravention with the fundamental policy of Indian law by providing that a review on merits of the dispute shall not be done. This limits the scope of the enquiry on an application under either Section 34(2)(b)(ii) or Section 48(2)(b) of the 1996 Act.

45. The Amendment, 2015 by inserting sub-section (2-A)[41] in Section 34, carves out an additional ground for annulment of an arbitral award arising out of arbitrations other than international commercial arbitrations. Sub-section (2-A) provides that the Court may also set aside an award if that is vitiated by patent illegality appearing on the face of the award. This power of the Court is, however,

(iii) it is in conflict with the most basic notions of morality or justice.
Explanation 2.-- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

[41] See Footnote 18

circumscribed by the Proviso, which states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

46. *Explanation 1* to Section 34(2)(b)(ii), specifies that an arbitral award is in conflict with the public policy of India, *only if*,- (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

47. In the instant case, there is no allegation that the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or Section 81. Therefore, we shall confine our exercise in assessing as to whether the arbitral award is in contravention with the fundamental policy of Indian law, and/ or whether it conflicts with the most basic notions of morality or justice. Additionally, in the light of the provisions of sub-section (2-A) of Section 34, we shall examine whether there is any patent illegality on the face of the award.

48. Before undertaking the aforesaid exercise, it would be apposite to consider as to how the expressions (a) "in contravention with the fundamental policy of Indian law";

(b) "in conflict with the most basic notions of morality or justice"; and (c) "patent illegality" have been construed.

In contravention with the fundamental policy of Indian law

49. As discussed above, till the Amendment, 2015 the expression "in contravention with the fundamental policy of Indian law" was not found in the 1996 Act. Yet, in **Renusagar (supra)**, in the context of enforcement of a foreign award, while construing the phrase "contrary to the public policy", this Court held that for a foreign award to be contrary to public policy mere contravention of law would not be enough rather it should be contrary to: (a) the fundamental policy of Indian law; and /or (b) the interest of India; and/ or (c) justice or morality.

50. In the judicial pronouncements that followed **Renusagar (supra),** already discussed above, the domain of what could be considered contrary to the 'public policy of India'/ 'fundamental policy of Indian law' expanded, resulting in much greater interference with arbitral awards than what the lawmakers intended. This led to the Amendment, 2015 in the 1996 Act.

51. In **Ssangyong Engineering (supra)**, this Court dealt with the effect of the Amendment, 2015. While doing so, it took note of a supplementary report of February

2015 of the Law Commission of India made in the context of the proposed 2015 amendments. The said supplementary report has been extracted in paragraph 30 of that judgment. The key features of it are summarized below:

> (a) Mere violation of law of India would not be a violation of public policy in cases of international commercial arbitrations held in India.
>
> (b) The proposed 2015 amendments in 1996 Act (i.e., in Sections 34(2)(b)(ii) and 48(2)(b) including insertion of sub-section (2-A) in Section 34) were on the assumption that the terms, such as, "fundamental policy of Indian law" or conflict with "most basic notions of morality or justice" would not be widely construed.
>
> (c) The power to review an award on merits is contrary to the object of the Act and international practice.
>
> (d) The judgment in ***Western Geco (supra)*** would expand the court's power, contrary to international practice. Hence, a clarification needs to be incorporated to ensure that the term 'fundamental policy of Indian law' is narrowly

> construed. The applicability of *Wednesbury* principles to public policy will open the floodgates. Hence, Explanation 2 to Section 34(2)(b)(ii) has been proposed.

After taking note of the supplementary report, the statement of objects and reasons of the Amendment Act, 2015, and the amended provisions of Sections 28, 34 and 48, this Court held:

> "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* i.e. the fundamental policy of Indian law would be relegated to *Renusagar's* understanding of this expression. This would necessarily mean that *Western Geco* expansion has been done away with. In short, *Western Geco,* as explained in Paras 28 and 29 of *Associate Builders*, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach the court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, in so far 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 the grounds of challenge of an award, as is contained in para 30 of *Associate Builders*.
>
> 35.*****
>
> 36******
>
> 37. In so far as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015 to section 34. Here, there

must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter, but which does not amount to mere erroneous application of the law. In short, what is not subsumed within the fundamental policy of Indian law, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the back door when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of *Associate Builders*, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of *Associate Builders*, however, would remain, for if an arbitrator gives no reasons for an award and contravenes section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders*, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with the matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34 (2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders*, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award.

> Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.
>
> ********* ******* *******
>
> 69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent errors of jurisdiction, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation [which would include going beyond the terms of the contract], could be said to have been fairly comprehended as disputes within the arbitration agreement or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of patent illegality, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the back door grounds relatable to Section 28 (3) of the 1996 Act to be matters beyond the scope of submission to arbitration under section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the arbitral tribunal."

52. The legal position which emerges from the aforesaid discussion is that after the '2015 amendments' in Section 34 (2)(b)(ii) and Section 48(2)(b) of the 1996 Act,

the phrase "in conflict with the public policy of India" must be accorded a restricted meaning in terms of *Explanation 1*. The expression "in contravention with the fundamental policy of Indian law" by use of the word 'fundamental' before the phrase 'policy of Indian law' makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that (a) violation of the principles of natural justice; (b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and (c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law. However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in *Explanation 2* to Section 34(2)(b)(ii).

Most basic notions of morality and justice

53. In **Renusagar (supra)** this Court held that an arbitral award is in conflict with the public policy of India if it is, *inter alia*, contrary to "justice and morality". Explanation 1, inserted by 2015 Amendment, makes it clear that an award is in conflict with the public policy of India, *inter alia*, if it conflicts with the 'most basic notions of morality or justice'.

Justice

54. Justice is the virtue by which the society/ court / tribunal gives a man his due, opposed to injury or wrong. Justice is an act of rendering what is right and equitable towards one who has suffered a wrong. Therefore, while tempering justice with mercy, the court must be very conscious, that it has to do justice in exact conformity with some obligatory law, for the reason that human actions are found to be just or unjust on the basis of whether the same are in conformity with, or in opposition to, the law[42]. Therefore, in 'judicial sense', justice is nothing more nor less than exact conformity to some obligatory law; and all human actions are either just or unjust as they are in conformity with, or in opposition to, the law[43].

[42] Union of India v. Ajeet Singh, (2013) 4 SCC 186, paragraph 26.
[43] P. Ramanatha Aiyar's Advanced Law Lexicon, 6th Edition, Volume III, page 2621.

55. But, importantly, the term 'legal justice' is not used in *Explanation 1*, therefore simple conformity or non-conformity with the law is not the test to determine whether an award is in conflict with the public policy of India in terms of *Explanation 1*. The test is that it must conflict with the most basic notions of justice. For lack of any objective criteria, it is difficult to enumerate the 'most basic notions of justice'. More so, justice to one may be injustice to another. This difficulty has been acknowledged by many renowned jurists, as is reflected in the observations of this Court in **Delhi Administration v. Gurdip Singh Uban**[44] , extracted below:

> "23. The words 'justice' and 'injustice', in our view, are sometimes loosely used and have different meanings to different persons particularly to those arrayed on opposite sides. *One man's justice is another's injustice* [Raplph Waldo Emerson: Essays (1803-82), First Series, 1841, "Circles]. Justice Cardozo said: "The web is entangled and obscure, shot through with a multitude of shades and colors, the skeins irregular and broken. Many hues that seem to be simple, are found, when analyzed, to be a complex and uncertain blend. *Justice* itself, which we are wont to appeal to what as a test as well as an ideal, *may mean different things to different minds* and at different times. Attempts to objectify its standards or even to describe them have never wholly succeeded (*Selected Writings of Cardozo*, pp 223-224, Falcon Publications, 1947)."

[44] (2000) 7 SCC 296

56. In **Associate Builders (supra)**, while this Court was dealing with the concept "public policy of India", in the context of a Section 34 challenge prior to 2015 amendment, it was held that an award can be said to be against justice only when it shocks the conscience of the court[45]. The Court illustrated by stating that where an arbitral award, without recording reasons, awards an amount much more than what the claim is restricted to, it would certainly shock the conscience of the court and render the award vulnerable and liable to be set aside on the ground that it is contrary to justice.

57. In **Ssyangyong (supra)**, which dealt with post 2015 amendment scenario, it was observed that an argument to set aside an award on the ground of being in conflict with 'most basic notions of justice', can be raised only in very exceptional circumstances, that is, when the conscience of the court is shocked by infraction of some fundamental principle of justice. Notably, in that case the majority award created a new contract for the parties by applying a unilateral circular, and by substituting a workable formula under the agreement by another, *dehors* the agreement. This, in the view of the Court, breached the fundamental principles of justice, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the

[45] See paragraph 36 of the judgment in Associate Builders (supra)

agreement be liable to perform a bargain not entered with the other party[46]. However, a note of caution was expressed in the judgment by observing that this ground is available only in very exceptional circumstances and under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the court because that would be an entry into the merits of the dispute.

58. In the light of the discussion above, in our view, when we talk about justice being done, it is about rendering, in accord with law, what is right and equitable to one who has suffered a wrong. Justice is the virtue by which the society/ court / tribunal gives a man his due, opposed to injury or wrong. Dispensation of justice in its quality may vary, dependent on person who dispenses it. A trained judicial mind may dispense justice in a manner different from what a person of ordinary prudence would do. This is so, because a trained judicial mind is likely to figure out even minor infractions of law/ norms which may escape the attention of a person with ordinary prudence. Therefore, the placement of words "most basic notions" before "of justice" in *Explanation 1* has its significance. Notably, at the time when the 2015 Amendment was brought, the existing law with regard to grounds for setting aside an arbitral award, as interpreted by this

[46] See paragraph 76 of the judgment in Ssyanyong (supra)

Court, was that an arbitral award would be in conflict with public policy of India, if it is contrary to: (a) the fundamental policy of Indian law; (b) the interest of India; (c) justice or morality; and /or is (d) patently illegal. As we have already noticed, the object of inserting *Explanations 1 and 2* in place of earlier explanation to Section 34(2)(b)(ii) was to limit the scope of interference with an arbitral award, therefore the amendment consciously qualified the term 'justice' with 'most basic notions' of it. In such circumstances, giving a broad dimension to this category[47] would be deviating from the legislative intent. In our view, therefore, considering that the concept of justice is open-textured, and notions of justice could evolve with changing needs of the society, it would not be prudent to cull out "the most basic notions of justice". Suffice it to observe, they[48] ought to be such elementary principles of justice that their violation could be figured out by a prudent member of the public who may, or may not, be judicially trained, which means, that their violation would shock the conscience of a legally trained mind. In other words, this ground would be available to set aside an arbitral award, if the award conflicts with such elementary/ fundamental principles of justice that it shocks the conscience of the Court.

[47] in conflict with most basic notions of morality or justice
[48] most basic notions of justice

Morality

59. The other ground is of morality. On the question of morality, in **Associate Builders (supra),** this Court, after referring to the provisions of Section 23 of the Contract Act, 1872; earlier decision of this Court in *Gherulal (supra);* and *Indian Contract Act* by Pollock and Mulla, held that judicial precedents have confined morality to sexual morality. And if 'morality' were to go beyond sexual morality, it would cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. The court also clarified that interference on this ground would be only if something shocks the court's conscience[49].

Patent Illegality

60. Sub-section (2-A) of Section 34 of the 1996 Act, which was inserted by 2015 Amendment, provides that an arbitral award not arising out of international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is visited by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. In **Saw Pipes (supra),** while dealing with the phrase 'public policy of India' as

[49] See paragraph 39 of Associate Builders (supra)

used in Section 34, this court took the view that the concept of public policy connotes some matter which concerns public good and public interest. If the award, on the face of it, patently violates statutory provisions, it cannot be said to be in public interest. Thus, an award could also be set aside if it is patently illegal. It was, however, clarified that illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against public policy.

61. In **Associate Builders (supra)**, this Court held that an award would be patently illegal, if it is contrary to:

(a) substantive provisions of law of India;

(b) provisions of the 1996 Act; and

(c) terms of the contract[50].

The Court clarified that if an award is contrary to the substantive provisions of law of India, in effect, it is in contravention of Section 28(1)(a)[51] of the 1996 Act. Similarly, violating terms of the contract, in effect, is in contravention of Section 28(3) of the 1996 Act.

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[50] See also three-Judge Bench decision of this Court in State of Chhattisgarh v. SAL Udyog (P) Ltd. (2022) 2 SCC 275

[51] **Section 28.** -- **Rules applicable to substance of dispute**. — (1) Where the place of arbitration is situated 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

****

(2) *****

(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. **(As substituted by Act 3 of 2016 w.e.f 23.10.2015)**

Prior to substitution by Act 3 of 2016, sub-section (3) of Section 28 read as under:

"(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

62. In **Ssangyong (supra)** this Court specifically dealt with the 2015 Amendment which inserted sub-section (2-A) in Section 34 of the 1996 Act. It was held that "patent illegality appearing on the face of the award" refers to such illegality as goes to the root of matter, but which does not amount to mere erroneous application of law. It was also clarified that what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to 'public policy' or 'public interest', cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality[52]. Further, it was observed, reappreciation of evidence is not permissible under this category of challenge to an arbitral award[53].

Perversity as a ground of challenge

63. Perversity as a ground for setting aside an arbitral award was recognized in **Western Geco (supra)**. Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.

[52] See paragraph 37 of Ssyangyong (supra)
[53] See paragraph 38 of Ssyangyong (supra)

64. In **Associate Builders (supra)** certain tests were laid down to determine whether a decision of an arbitral tribunal could be considered perverse. In this context, it was observed that where: (i) a finding is based on no evidence; or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse. However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that 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 that score.

65. In **Ssangyong (supra)**, which dealt with the legal position post 2015 amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based

on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence in as much as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse[54].

66. The tests laid down in **Associate Builders (supra)** to determine perversity were followed in **Ssyanyong (supra)** and later approved by a three-Judge Bench of this Court in **Patel Engineering Limited v. North Eastern Electric Power Corporation Limited**[55].

67. In a recent three-Judge Bench decision of this Court in **Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.**[56], the ground of patent illegality /perversity was delineated in the following terms:

> "40. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; Or, that the view of the arbitrator is not even a possible view. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of patent illegality. An award without reasons would suffer from patent illegality. The arbitrator commits a patent

[54] See Paragraph 41 of Ssyangyong (supra).
[55] (2020) 7 SCC 167
[56] 2024 INSC 292

> illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice."

Scope of interference with an arbitral award

68. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorized as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.

69. In **Dyna Technologies (supra)**, a three-Judge Bench of this Court held that Courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be

equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law.

70. Now, we shall examine the scope of interference with an arbitral award on ground of insufficient, or improper/erroneous, or lack of, reasons.

Reasons for the Award – When reasons, or lack of it, could vitiate an arbitral award.

71. Section 31 (3)[57] of the 1996 Act provides that an arbitral award shall state reasons upon which it is based, unless (a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award on agreed terms under Section 30.

71.1 As to the form of a reasoned award, in **Russell on Arbitration** (24th Edition, page 304) it is stated thus:

> "6.032. No particular form is required for a reasoned award although 'the giving of clearly expressed reasons responsive to the issues as they were debated before the arbitrators reduces the scope for the making of unmeritorious challenges'. When giving a reasoned award the tribunal need only set out what, on its view of the evidence, did or did not happen and explain succinctly

[57] **Section 31. Form and contents of arbitral award. –** (1) ..... (2)....
(3) The arbitral award shall state the reasons upon which it is based, unless –
(a) the parties have agreed that no reasons are to be given, or
(b) the award is an arbitral award on agreed terms under section 30.

> why, in the light of what happened, the tribunal has reached its decision, and state what that decision is. In order to avoid being vulnerable to challenge, the tribunal's reasons must deal with all the issues that were put to it. It should set out its findings of fact and its reasoning so as to enable the parties to understand them and state why particular points were decisive. It should also indicate the tribunal's findings and reasoning on issues argued before it but not considered decisive, so as to enable the parties and the court to consider the position with respect to appeal on all the issues before the tribunal. When dealing with controversial matters, it is helpful for the tribunal to set out not only its view of what occurred, but also to make it clear that it has considered any alternative version and has rejected it. Even if several reasons lead to the same result, the tribunal should still set them out. That said, so long as the relevant issues are addressed there is no need to deal with every possible argument or to explain why the tribunal attached more weight to some evidence than to other evidence. The tribunal is not expected to recite at great length communications exchanged or submissions made by the parties. Nor is it required to set out each step by which it reached its conclusion or to deal with each and every point made by the parties. It is sufficient that the tribunal should explain what its findings are and the evidential route by which it reached its conclusions.

71.2 On the requirement of recording reasons in an arbitral award and consequences of lack of, or inadequate, reasons in an arbitral award, this Court in **Dyna Technologies (supra)** held:

> "34. The mandate under section 31 (3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.
> 35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the

> reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided in section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the court while exercising jurisdiction under section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue even if the court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the tribunal, the court needs to have regard to the document submitted by the parties and the contentions raised before the tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards."

71.3. We find ourselves in agreement with the view taken in **Dyna Technologies (supra)**, as extracted above. Therefore, in our view, for the purposes of addressing an application to set aside an arbitral award on the ground of improper or inadequate reasons, or lack of reasons, awards can broadly be placed in three categories:

(1) where no reasons are recorded, or the reasons recorded are unintelligible;
(2) where reasons are improper, that is, they reveal a flaw in the decision- making process; and
(3) where reasons appear inadequate.

71.4. Awards falling in category (1) are vulnerable as they would be in conflict with the provisions of Section 31(3) of the 1996 Act. Therefore, such awards are liable to be set aside under Section 34, unless (a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award on agreed terms under Section 30.

71.5. Awards falling in category (2) are amenable to a challenge on ground of impropriety or perversity, strictly in accordance with the grounds set out in Section 34 of the 1996 Act.

71.6. Awards falling in category (3) require to be dealt with care. In a challenge to such award, before taking a decision the Court must take into consideration the nature of the issues arising between the parties in the arbitral proceedings and the degree of reasoning required to address them. The Court must thereafter carefully peruse the award, and the documents referred to therein. If reasons are intelligible and adequate on a

fair-reading of the award and, in appropriate cases, implicit in the documents referred to therein, the award is not to be set aside for inadequacy of reasons. However, if gaps are such that they render the reasoning in support of the award unintelligible, or lacking, the Court exercising power under Section 34 may set aside the award.

Scope of interference with the interpretation / construction of a contract accorded in an arbitral award.

72. An arbitral tribunal must decide in accordance with the terms of the contract. In a case where an arbitral tribunal passes an award against the terms of the contract, the award would be patently illegal. However, an arbitral tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not intefere[58]. But where, on a full reading of the contract, the view of the arbitral tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference[59].

[58] See: Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Limited, (2009) 10 SCC 63; Pure Helium India (P) Ltd v. ONGC, (2003) 8 SCC 593; McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181; MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163

[59] South East Asia Marine Engg. & Construction Ltd. (SEAMEC Ltd.) v. Oil India Ltd., (2020) 5 SCC 164

Whether unexpressed term can be read into a contract as an implied condition.

73. Ordinarily, terms of the contract are to be understood in the way the parties wanted and intended them to be. In agreements of arbitration, where party autonomy is the *grund norm*, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions used[60].

74. However, reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by the parties thereto. An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. Rather, it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract[61].

[60] Bharat Aluminium Co. V. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126.
[61] Adani Power (Mundra) Ltd. v. Gujarat ERC, (2019) 19 SCC 9

75. But before an implied condition, not expressly found in the contract, is read into a contract, by invoking the business efficacy doctrine, it must satisfy following five conditions:

a. it must be reasonable and equitable;
b. it must be necessary to give business efficacy to the contract, that is, a term will not be implied if the contract is effective without it;
c. it must be obvious that "it goes without saying";
d. it must be capable of clear expression;
e. it must not contradict any terms of the contract[62].

ANALYSIS/ DISCUSSION

76. Having noticed the legal principles governing a challenge to an arbitral award, we shall now proceed to address the issues culled out above, which arise for our consideration in these appeals.

GITA POWER (R-2) BOUND BY THE ARBITRATION AGREEMENT AND THEREFORE JOINTLY AND SEVERALLY LIABLE

77. To have a clear understanding of the issue as to whether Gita Power (R-2), the appellant in the connected appeal, could be subjected to arbitral proceedings and

[62] Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Another, (2018) 11 SCC 508, followed in Adani Power (supra)

made jointly and severally liable along with OPG for the dues of Enexio, a look at the facts relating to formation of the contract including the conduct of the parties would be apposite.

78. The relevant facts in this regard, which find mention in the award, are as follows:

> (a) There were two companies, namely, Gita Power (R-2) and OPG (appellant). Gita Power is the holding company of OPG. Two Tenders were floated. One by a Gujarat Company in the same group, which related to design, manufacture, delivery to site, erection testing and commissioning of two ACC units with auxiliaries for a thermal power plant in Gujarat (for short Gujarat Unit). The other was issued by OPG in respect of design, manufacture, delivery to site, erection testing and commissioning of an ACC unit with auxiliaries for a thermal power plant at Gummidipoondi in Tamil Nadu (for short T.N. Unit).
>
> (b) Enexio (R-1 – the claimant) submitted a single unpriced techno-commercial offer covering both projects. Following negotiations, a revised techno commercial offer covering both projects was submitted in August 2012. Thereafter, following

further negotiations, another technical offer covering both projects was submitted by Enexio on 6 October 2012.

(c) On 5 November 2012, with reference to the techno offers, OPG addressed a letter to Enexio, in respect of T.N. Unit, stating thus:

> "Design, Engineering, Supply, Installation, Testing and Commissioning of Air Cooled Condenser with auxiliaries for 1 X 160 MW (Phase III) Coal Based Power Project at Gummudipoondi.
>
> We refer to your offer GCTQD/ OPG - Gujarat – Gummidipoondi /4239/12 / Rev 2 dated October 6, 2012 and technical and commercial discussions we had with you of date. We have pleasure in informing you of our intent to award a contract for Air Cooled Condenser with auxiliaries in conformance to the discussions you had with us.
>
> Price: The price for the total scope is Rs. 44,00,00,000/- (Forty four crores only).
>
> Price basis: F.O.R. destination (Power Project site at Gummidipoondi)
>
> Taxes and Duties: Extra at actuals, but inclusive of port handling charges.
>
> Delivery schedule: The overall agreed time for takeover of equipment will be March 2014."

(d) On 4 March 2013, Gita Power (R-2), holding company of OPG, issued two separate Purchase Orders for:

(i) Design, Engineering and Supply of 1 Unit of ACC with Auxiliaries for 160 MW Coal

Based project at Gummidipoondi (Supply Purchase Order); and

(ii) Erection and Commissioning of 1 Unit of ACC with Auxiliaries for 160 MW Coal Based Power project at Gummidipoondi (Erection Purchase Order).

(e) Pursuant to these purchase orders, on 1 April 2013 Enexio (R-1) submitted a Work Schedule. As per which, commissioning of the ACC Unit was planned on 31 March 2014.

(f) On 13 June 2013, the foundations for the ACC Unit were handed over to Enexio (R-1) by OPG.

(g) On 4 July 2013 Enexio received 10% of the Order price and on 23 July 2013 second payment of 10% of the Order price was received by Enexio. Both payments were made by Gita Power (R-2).

(h) While the work was in progress, OPG issued two separate Purchase Orders, namely, supply purchase order and erection purchase order, on similar terms and with similar references as were there in the Purchase Orders issued by R-2 (Gita Power).

(i) In the statement of defense, it was stated that when the purchase orders were ready for issue, since Gita Power (R-2) was the holding company of OPG, it was felt that in the commercial interest of the project, the order for supply and erection of ACC Unit should be placed on the claimant by R-2. The statement of defense further states that soon after issuance of the purchase orders in the beginning of April 2013, OPG and R-2 were advised that as the project was being set up by OPG, and it had all the required registrations, etc. it would be advisable that the Purchase Orders placed on the claimant by R-2 for supply and erection of ACC Unit be substituted/ replaced by Purchase Orders in the name of OPG. In addition to above, OPG pleaded that the substitution/ replacement of purchase orders maintained the continuity of the rights and obligations undertaken from 4 March 2013.

79. Based on the above-noted facts, and the evidence brought on record during the arbitral proceedings, the Tribunal concluded that the 'Group of Companies' doctrine is applicable, as OPG and R-2 have represented themselves as a single economic entity which could switch duties and obligations from one to the other. The Tribunal held that – (a) R-2 is a proper party; (b) both OPG and R-2 were bound by the arbitration agreements, which gave

rise to the arbitral proceedings; and (c) OPG and R-2 were jointly and severally liable to the claimant for complying with the award.

80. In **Cox & Kings Ltd. v. SAP India (P) Ltd.**[63], a Constitution Bench of this Court held that by interpreting the express language employed by the parties in the record of agreement, coupled with surrounding circumstances of its formation, performance, and discharge of the contract, a Court or Arbitral Tribunal is empowered to determine whether a non-signatory is a party to an arbitration agreement. It was held that 'Group of Companies' doctrine is premised on ascertaining the intention of the non-signatory to be party to an arbitration agreement. The doctrine requires the intention to be gathered from additional factors such as direct relationship with the signatory parties, commonality of subject matter, composite nature of the transaction, and performance of the contract.

81. In the instant case, the Arbitral Tribunal has found that: (a) Gita Power is the holding company of OPG; (b) Gita Power had issued the Purchase Orders and had actively participated in the formation of the contract even though the ACC unit of Gummudipoondi was of OPG; (c) initial 10% of the purchase price was provided by Gita

[63] (2024) 4 SCC 1

Power (R-2); (d) the subsequent Purchase Orders issued by OPG were on similar terms and were issued by way of affirmation to obviate technical issues. In our view, the above circumstances had a material bearing for invocation of "Group of Companies doctrine" to bind Gita Power (R-2) with the arbitration agreement and fasten it with liability, jointly and severally with OPG, in respect of the Purchase Orders relating to ACC Unit of Gummudipoondi project. Thus, bearing in mind that an arbitral tribunal has jurisdiction to interpret a contract having regard to the terms and conditions of the contract and conduct of the parties including correspondences exchanged, and, further, taking into account the provisions of sub-section (2-A) of Section 34 of the 1996 Act limiting the scope of interference with a finding returned in an arbitral award, we do not find a good reason to interfere with the above findings of the Arbitral Tribunal more so when it is based on a possible view of the matter. We, therefore, reject the argument on behalf of R-2 that it was not bound by the arbitration agreement and that it ought not to have been made jointly and severally liable along with OPG for the dues payable to Enexio. Sub-issue (a) is decided in the aforesaid terms.

ENEXIO'S CLAIM NOT BARRED BY LIMITATION.

82. On the issue as to whether Enexio's claim was barred by time, the submissions of the appellants, *inter alia*, are:

(a) The date fixed by the contract for completion of the obligations of supply of goods and erection of ACC unit is 31 March 2014. Hence, the date of reckoning for the purposes of limitation ought to be 31 March 2014.

(b) The contract was a mixture of supply of goods and services (i.e., works). Therefore, Article 14 of the Schedule to the 1963 Act applied for the price of goods supplied, and Article 18 applied for the price of works provided, for computing the limitation period of the claim. In either case, the limitation period of three years would commence to run, not later than, from 31 March 2014.

(c) Even if it is assumed that the deemed date of completion was 21 September 2015 (as held by the arbitral tribunal), the claim being filed on 2 May 2019, was well beyond 3 years from that date.

(d) Once the period of limitation started to run, in terms of Articles 14 and 18, mere negotiations could not have extended the period of limitation. Therefore, the award,

which takes a contrary view, is patently illegal.

83. Before proceeding further, we must remind ourselves that sub-section (1) of Section 43[64] of the 1996 Act makes the Limitation Act, 1963 (in short, 1963 Act) applicable to arbitrations as it applies to proceedings in Court. Sub-section (2) of Section 43 provides that unless otherwise agreed by the parties, an arbitral proceeding shall be deemed to have commenced on the date specified in Section 21[65]. On a conjoint reading of sub-sections (1) and (2) of Section 43 of the 1996 Act along with Sections

[64] **Section 43. Limitations. –** (1) The Limitation Act, 1963 (36 of 1963) shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within the time specified by the agreement, and a dispute arises to which the agreement applies, the court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the declaration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

[65] **Section 21. Commencement of arbitral proceedings. --** Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

3[66] and 2 (j)[67] of the 1963 Act it is clear that if on the date of commencement of the arbitral proceeding, as referred to in Section 21 of the 1996 Act, the claim(s) is/are barred by limitation, as per the provisions of the 1963 Act, the Arbitral Tribunal will have to reject such claim(s) as barred by limitation[68].

84. In the case in hand there is no dispute between the parties that the arbitral proceedings, in terms of Section 21 of the 1996 Act, commenced on 2 May 2019. Therefore, our exercise would be to determine whether the period of limitation got over prior to that date or not. For that purpose, it would be necessary to ascertain as to which Article of the Schedule was applicable to the claim. And if more than one applied, which one applied to which part of the claim.

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[66] **Section 3. — Bar of limitation. –** (1) Subject to the provisions contained in sections 4 to 24 inclusive, every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defense.

(2) For the purposes of this Act –

(a) a suit is instituted –

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against the company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set-off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted –

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court.

[67] **Section 2. Definitions. –** In this Act, unless the context otherwise requires, --

(j) '**period of limitation**' means the period of limitation prescribed for any suit, appeal or application by the Schedule, and '**prescribed period**' means the period of limitation computed in accordance with the provisions of this Act.

[68] **State of Goa v. Praveen Enterprises, (2012) 12 SCC 581, paragraph 16**.

85. According to the appellant(s) (i.e., OPG and Gita Power – appellant in the connected appeal), Articles 14 and 18 of the Schedule to the 1963 Act applied to the claim. Importantly, the award does not specify the Article(s) which were applied except Article 58 which was applied to the declaratory relief sought in the claim and which was found barred by time. However, as the claim is based on a contract, we will also consider the applicability of Article 55 and the residuary Article 113 of the Schedule[69], if none other Article(s) were applicable to the claim.

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[69] The Schedule (PERIODS OF LIMITATION) See sections 2(j) and 3:

PART II - SUITS RELATING TO CONTRACTS

Article No.	Description of Suit	Period of Limitation	Time from which period begins to run
14.	For the price of goods sold and delivered where no fixed period is agreed upon	Three years	The date of the delivery of the goods
18.	For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years	When the work is done.
55.	For compensation for the breach of any contract, express or implied not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.

PART III – SUITS RELATING TO DECLARATIONS

58.	To obtain any other Declaration	Three years	When the right to sue first accrues.

PART X – SUITS FOR WHICH THERE IS NO PRESCRIBED PERIOD

Facts having material bearing on limitation

86. For a proper determination of the aforesaid issue, we need to have a close look at the material facts relevant to the issue of limitation. In our view, the material facts[70], *inter alia*, are:

(a) There was a composite Tender inviting offer for design, manufacture, delivery to site, erection, testing and commissioning of an ACC unit with auxiliaries for a thermal power plant.

(b) Enexio submitted a composite unpriced techno-commercial offer for the project.

(c) On 5 November 2012, with reference to the techno offer, OPG addressed a letter[71] expressing intent to award contract for the project at a composite cost of 44 crores. This letter also sets out a tentative date for completion / takeover of the project i.e., March 2014.

113.	Any suit for which no period of limitation is provided elsewhere in this Schedule	Three years	When the right to sue accrues.

[70] As gathered from paragraph 7 (including sub paragraphs 7.01 to 7.76) of the Arbitral Award under the title 'Background to the Dispute'

[71] Quoted in paragraph 79 (c) above

(d) In that backdrop, on 4 March 2013, Gita Power (R-2) issued two separate orders, one, for Design, Engineering and Supply of 1 Unit of ACC with Auxiliaries (Supply Purchase Order) and, second, for Erection and Commissioning of it (Erection Purchase Order).

(e) Pursuant to these purchase orders, on 1 April 2013, Enexio (R-1) submitted a Work Schedule. As per which, commissioning of the ACC Unit was planned on 31 March 2014. In furtherance thereof, Enexio received 10% of the order price in advance on 4 July 2013, and another 10% on 23 July 2013. Both the advance payments were received from Gita Power (R-2).

(f) While the work was in progress, in July 2013 OPG issued two orders replicating those that were issued by Gita Power (R-2) with insignificant variation.

(g) As per the Supply Purchase Order, payments were to be made in the following order:

Payments:

(i) 10% of Order Price as advance money on submission of request for advance

and advance payment bank guarantee for 10% of the Order Price, valid until completion of supply;

(ii) 10% against approval of Engineering Documentation;

(iii) 65% of the Order Price on Pro Rata basis along with 100% taxes after receipt of material at site;

(iv) 5% of the Order Price upon submission of (a) invoice, and (b) certificate on completion of punch points duly signed by Parties;

(v) 5% of the Contract Price upon submission of (a) invoice, (b) take over certificate of Equipment issued by Purchaser; and (iii) warranty bond for 10% of the contract valid up to the end of warranty period;

(vi) 5% of the Contract Price upon submission of (a) invoice, (b) certificate of completion of performance test of equipment by purchaser;

(vii) Payments to be made within 25 days of submission of invoice/ request for payment and other documents

(h) Annexure A of the Supply Purchase Order carried commercial conditions, *inter alia*, providing for Performance Guarantee Test in the following terms:

(1) The Performance Guarantee Test of the equipment shall be carried out immediately after takeover of the equipment but in no case later than two months from the date of takeover.

(2) Performance guarantee test will be carried out by the representatives and manpower of the purchaser under the supervision of the supplier's engineer.

(3) In case the performance guarantee test is not carried out due to reasons outside supplier's control within 180 days from the date of takeover, the guaranteed performance shall be deemed to have been achieved and all liabilities of supplier with respect to the performance guarantee test shall be

over. Within these said 180 days, the supplier remains liable for the guaranteed performance of the equipment.

(4) The Erection Purchase Order repeated most of the clauses of the supply purchase order and provided for payment in the following manner:

> Payment
>
> (i) 80% against progress of work on pro rata basis and against certification by site officials.
>
> (ii) 10% after mechanical completion / Punch list.
>
> (iii) 10% of the contract price after Commissioning against bank guarantee in favor of the owner for equivalent value and valid for the entire warranty period.

(j) Enexio (R-1) asserted that it finished its work under the contract on or about February 2015. However, on 12 March 2015, OPG complained to Enexio in writing that certain work remained

and, therefore, Enexio must instruct its team to complete the pending work.

(k) Enexio claimed that successful operation of the vacuum pump was carried out on 21 May 2015, which implies commissioning of the ACC unit. In response OPG asserted that three components of the ACC unit were defective.

(l) On 2 July 2015, OPG issued a debit note towards modifications to the turbine generator building. Thereafter, on 24 August 2015, OPG issued two debit notes: (i) towards work related to lifting of the vertical duct; and (ii) towards liquidated damages permissible under the Supply Purchase Order and Erection Purchase Order for the delay in execution.

(m) On 28 August 2015 Enexio wrote to OPG questioning the debit notes.

(n) On 21 September 2015 Enexio informed OPG that the turbine generator was running at full load and, thereby, requested OPG to arrange for Performance Guarantee Test (PG Test). This request was repeated by e-mails dated 3 October 2015 and 8 October 2015. Later, on 9 October 2015, Enexio sent a letter

to OPG attaching six protocols confirming commissioning of all relevant segments of the project. Not only that, on 20 October 2015, Enexio sent a procedure for the PG Test. But the PG Test was not undertaken.

(o) On 12 January 2016, OPG issued debit note against OPG's account for customs duty.

(p) On 22 August 2016 OPG informed Enexio that fan assembly had detached. On 20 January 2017 Enexio sent an e-mail to OPG, saying:

> "Sir,
>
> This is further to our visit to your site on 7/1/2016.
>
> Considering the time availability and on the interest of closing the issue, we suggest the following:
>
> 1. Using in-situ machining agency, the shaft dia variation can be machined out after dismantling the hub and blade assembly alone. Gearbox will not be disturbed at all. We already obtained offer for this.
> 2. To match the machined out shaft dia and key way, existing fan hub bore and key way can be rebuild and machined after machining out existing bore by 5mm.
> 3. To start the work, the spare gearbox supplied by us at free of cost can be used and remaining seven gear boxes can be attended one or two at a time.
> 4. You being a valuable customer to us, we wish to execute the correction work even though this failure happened

> after our guarantee. We will depute our engineer to site for entire work.
> 5. But we could not bear the commercial implications since we already suffered loss and our money is also locked up in this project due to various reasons cited in our various earlier letters.
> 6. Hence, we request you to pay the correction cost and not to deduct the same from us.
> We request you for above proposal."

(q) On 2 March 2017 Enexio requested OPG to provide certificates for completion of Gummudipoondi as well as Gujarat project. The format of the desired certificate was sent by Enexio to OPG. Therein it was mentioned that ACC Unit was commissioned during May 2015 and was performing satisfactorily since then.

(r) On 6 March 2017 OPG confirmed that it would issue the required certificate for marketing purpose and that certificate would not absolve the claimant from its contractual obligations under the purchase orders which, according to OPG, were yet to be fulfilled.

(s) Following further exchanges between the parties, a meeting was held on 19 April 2018. The minutes[72] of that meeting, *inter alia*,

[72] See Paragraph 7 of this judgment.

reflected that the principal amount outstanding towards Enexio under the contract was the one that was claimed by Enexio in the claim. However, the minutes indicated that it was not payable because of certain deductions claimed by OPG. According to Enexio, those deductions (i.e. towards customs duty and liquidated damages) were incorrectly recorded in the minutes even though there was no agreement in respect thereof.

(t) On 26 May 2018, on reiteration of demand by Enexio, OPG responded, *vide* communication dated 26 May 2018, and offered Rs.3 crores to Enexio as full and final settlement of the account. This offer was rejected by Enexio. Whereafter, arbitration proceeding commenced.

Material Observations in the Award.

87. We shall now extract few observations/ findings in the award which, in our view, would be useful in determining the limitation issue. These observations/ findings, with their corresponding paragraph number in the award, are extracted below:

> "1). On 1st April 2013 the Claimant prepared its L1 Network Schedule which indicated the final activities leading to commissioning ..:

Hook up with TG: 8-Mar-14 to 14-Mar-14
Commissioning 22-Mar-14 to 31-Mar-14.
……(para 13.02 of the award)

2). The Purchase Orders are silent on the mode of payment of the Claimant's invoices except to note that:
7.3. 65% of the Order Price shall be paid on Pro rata basis along with 100% Taxes and Duties after receipt of material at site.
7.7 Payments will be made within twenty-five days of submission of Invoice/ request for payment and other documents.
….. (para 13.08 (b) of the award)

3). No indication is given in the Purchase Orders as to what 'other documents are required.
…..(para 13.08 (c) of the award)

4). The claimant asserts that until November 2013 payments were made to the claimant initially by Respondent no.2 and subsequently by Respondent no.1 by cheque/ RTGS but from 12th November 2013 all subsequent payments were made by letter of credit. In order to receive payment by this method the claimant asserts that additional documentation was required which created delays in payment.
……(para 13.08 (d) of the award)

5). Respondent no.1 denies that there was delay in clearing payments to the claimant and asserts that all payments validly due to the claimant were made in time. Respondent no.1 asserts that:

(i) Invoices were submitted by the claimant later than the date on the face of the invoice;

(ii) To compute the period in which payment of an invoice is to be made the start date is the date on which the invoice, complete with all supporting documents, is received by Respondent no.1 which must be after receipt of the relevant material at site; and

(iii) In many cases, invoices were not accompanied by the required backup documents and the payment of the invoice

could not be released until these backup documents were submitted by the claimant.
……(para 13.08 (e) of the award)

6). The tribunal accepts that delays by the Claimant in submitting its invoices, in providing the backup materials and in crediting payment to its account would be included in the times computed by the claimant between the date of the invoice and the date of payment as included in its tabulation of its invoices. However, examination of Exhibit C-21 indicates that for invoices paid before 12 November 2013, over 90%, were paid in less than 50 days from the invoice date. Whereas, for invoices paid after 12 November only about 30% were paid within 50 days. Indeed, about 25% of the invoices dated after 12 November 2013 were not paid for 100 days or longer. These percentages satisfy the tribunal that the introduction of payment by letter of credit, as it was arranged by Respondent no.1, was more onerous than could reasonably have been anticipated by the claimant when it entered into the contracts.
…..(para 13.08 (g) of the award)

7). Respondent no.1 decided that the original design of the Hot well drain pump was unnecessarily large and changed the specified pump to a smaller pump on 21st November 2013. As a result, both the pump and the electric motor, which was required to drive the pump, had to be re-ordered. The claimant asserts, and respondent no.1 does not deny, that the original pump and motor would have been delivered to site on or about 17th February 2014.
……..(para 13.10 (a) of the award)

8). It was agreed at the hearing in this arbitration that the actual delivery date of the motors (which arrived a few days after the pump) could be taken as on or about 7th May 2014. Thus, there was a delay of approximately 79 days in delivery.
……(para 13.10 (b) of the award).

9). On balance, the Tribunal is satisfied that the drain pump together with its motor, although

a low value component, was a necessary part of the ACC unit and the decision by Respondent no. 1 to replace it at a late stage risked delaying the project. The time elapsed between the original estimated delivery date, and the assumed actual delivery date was 79 days.

.....(para 13.10 (e) of the award)

10). The tribunal finds the following facts to be significant:

(i) The ACC unit could not be connected to the turbine generator flange until the turbine generator was in place to have the connection made. Thus, welding of the ACC unit to the turbine flange was dependent on both completion of the horizontal duct and pressure balancing bellows by the claimant and the installation of the turbine on behalf of Respondent no.1.

(ii) The ACC unit could not be commissioned, nor could the PG test be conducted without a flow of turbine exhaust steam. The turbine must be operational to provide the necessary flow of exhaust steam. Thus, both commissioning and the PG test were dependent on both the ACC unit and the turbine being operational.

(iii) Up until the claimant was ready to erect the first part of the horizontal duct there is no evidence that the claimant was delayed by any other construction activity on site. The claimant states that the vertical duct erection was completed on 15th July 2014. The vertical duct should have been completed on 7th February 2014. Thus, the tribunal finds that at 15th July 2014 the claimant was 158 days behind its program which is not attributable to non-readiness of Respondent no.1.

(iv) The tribunal is satisfied that steam flowing (steam blowing) was being conducted by the turbine generator contractor in early February 2015 which would have been likely to have prevented the welding of the duct to the turbine flange.

This process also indicates that the turbine was not operational.

(v) On the basis of Mr. Parasuram's evidence, the tribunal finds that the claimant had completed the connection between the horizontal duct and the turbine generator flange around February 2015 but that commissioning of the ACC unit did not start until April 2015. Mr. Parasuram attributes the delay between February and April 2015 to Respondent no.1's other contractors having outstanding work. Thus, completion of the Hook-up as described in the L1 network Schedule which should have taken place on 14th March 2014 did not take place until mid- February 2015 by which time the ACC unit construction was about 343 days behind schedule. On the evidence presented to the tribunal it is not possible to apportion the further delay of about 158 days which occurred between 15th July 2014 and mid- February 2015 between slow progress by the claimant and hindrance to the claimant's work by the ongoing turbine generator installation. However, the tribunal is satisfied that at least part of this delay was not attributable to the claimant.

.....(para 13.13 (c) of the award)

11). The tribunal now considers when, if at all, the ACC system was completed. There are three certificates which are referred to in the erection purchase order. These are:
A certificate on competition of punch points;
A Take Over Certificate of Equipment; and
A certificate of competition of performance test.
None of these certificates have been issued.

.....(para 13.13 (d) of the award)

12). The only certificate issued by the respondents was dated 2nd March 2017. In separate correspondence, Respondent no.1 stated that this certificate was issued for marketing purposes and did not absolve the claimant from its contractual obligation under the Purchase Orders.

.....(para 13.13 (e) of the award)

13). Notwithstanding the respondents' caveat, the issuance by the respondents of the 2nd March 2017 certificate is considered significant by the tribunal. The respondents knew the purpose for which the certificate was required by the claimant and, if it did not believe in the veracity of what it was certifying, even for marketing purposes, then it behaved dishonestly. The tribunal has no basis for assuming that the respondents would have acted in such a dishonest manner and thus, concludes that the respondents must have believed that the ACC unit was operating satisfactorily when it issued that certificate. The certificate states that the ACC unit was operating satisfactorily from May 2015. However, the tribunal does not rely on this date as it was not material to the purpose for which the certificate was required and was the date included in the draft certificate provided by the claimant.

.....(para 13.13 (f) of the award)

14). The tribunal concludes that all the criteria for issuing all three of the certificates listed above would have to be met before the ACC unit could be certified to be operating satisfactorily. The last alleged defects notified by Respondent no.1 in 2015, which has been exhibited, is dated 4th July 2015. (The fan assembly detached more than a year later, and that event could not have been the basis for withholding the relevant certificates through 2015). In its e-mail of 4th July 2015, Respondent no.1 notes gearbox defects but gave no details nor is the tribunal provided with any information about what action, if any, was taken in relation to the alleged gearbox defect. However, the tribunal is satisfied that on 4th July 2015 the ACC units were not yet in fit condition to merit the issue of the three relevant certificates.

.....(para 13.13 (g) of the award)

15). The first indication that the claimant thought it was ready for a performance guarantee test was in its e-mail dated 21st September 2015. There is no evidence to suggest

that both the certificate on completion of punch points and takeover certificate of equipment should not have been issued on or before 21st September 2015. In the absence of any evidence from Respondent no.1 that there were any remaining punch points or that the ACC system was not capable of being taken over, the tribunal finds that these certificates are deemed to have been issued on 21st September 2015 a delay from the planned date of 539 days.

……(para 13.13 (h) of the award)

16). Equally, there is no further indication that the ACC unit was not capable of passing the PG test on 21st September 2015. However, a PG test can only be deemed satisfactory if it is not carried out within 180 days of the issue of the taking over certificate. Accordingly, the PG test would be deemed to have been carried out satisfactorily only after a further 180 days had elapsed. Thus, the tribunal finds that the deemed achievement of Supplier's liability in respect to Performance Guarantee Test pursuant to Clause 10.5 of Annexure A of the Erection Purchase Order only became effective on 19th March 2016. As the claimant was still requesting a PG test as late as 20th May 2016 the tribunal is satisfied that the deeming provisions apply and the ACC unit is deemed to have passed the PG test. The Erection Purchase Order states that, where the PG test is deemed to have been carried out, the respondents remained liable for the guaranteed performance during the 180 days. However, it is silent on whether the deemed achievement of supplier's liability in respect to Performance Guarantee test is retrospective to the date when the performance can be said to have been achieved. The tribunal finds that for the purposes of determining the delay caused by the failure to arrange a PG test it would be just to consider that the required performance was achieved on 21st September 2015 - the date on which the tribunal has found that the ACC unit was deemed to have been taken over.

……(para 13.13 (i) of the award)

17). Respondent no.1 did not issue the takeover certificate of equipment or a certificate of completion nor did it arrange a PG test. However, it has offered no evidence of any defects in the ACC unit that it has shown existed on 21st September 2015. Accordingly, the tribunal is satisfied, on the balance of probabilities, that respondent no.1 delayed issuing the said certificates and the PG test because it was not in a position, due to other factors beyond the Claimant's control, to properly commission the ACC unit. Therefore, the tribunal is satisfied that at 21st September 2015, Respondent no.1 had delayed completion by 539 days and the claimant is entitled to 539 days' extension of time.

.....(para 13.13 (j) of the award)

18). Summary of Delays

Delay in payment	Nil
Delay in handing over site	Nil
Due to change of specification of the Drain Pump	79 days
Delay in BBU approval	Nil
Staircase and pipe rack Hindrance	Nil
Non-readiness of Respondent no.1	539 days

The tribunal finds that these delays are not cumulative but parallel. The effect of the drain pump being changed would have occurred before mid-February 2014 when the tribunal found that the project was delayed by 158 days. Thus, the delay at that point for which the claimant was responsible was 158 days less 79 days allowed for the change of drain pump. Thus, the claimant was in culpable delay of 79 days in mid-February. The delay in commissioning occurred after mid-February 2014. Thus, the total extension of time granted by the tribunal is 539 days.

.....(para 13.14 of the award)

19). Liquidated Damages

As the tribunal has granted an extension of time for completion of the ACC unit to 21st September

> 2015 and has also found that the requirements for completion of the ACC units were achieved on that date, the tribunal finds that the claimant has no liability for liquidated damages....
> .....(para 13.15 of the award)"

Relevant Article(s) of the Schedule to the Limitation Act, 1963 applicable to the claim

88. Having taken note of the relevant facts as well as material observations in the arbitral award, we shall now consider as to which Article, or Articles(s), if more than one is applicable, of the Schedule to the 1963 Act would apply to the claim(s) of Enexio. Notably, the claim was in respect of: (a) declaration *qua* invalidity of Debit note(s); (b) outstanding principal amount; and (c) interest. Insofar as relief *qua* declaration was concerned, it was found barred by time prescribed by Article 58, and there is no serious challenge to that finding. As regards claim for the outstanding principal amount, it was a composite claim for the balance amount payable for supplies made and work done under the Supply Purchase Order and the Erection Purchase Order respectively, which was found within limitation.

89. According to the appellant(s), Article 14 is applicable to the claim in respect of balance amount for the price of the goods supplied under the Supply Purchase Order; and Article 18 would apply to the claim for the work done under the Erection Purchase Order. It is their case

that if the project was to be completed by 31 March 2014, three years period should be counted from that date and, therefore, claim would be barred by limitation as on 2 May 2019 i.e., the date of commencement of the arbitral proceeding.

90. Per contra, Enexio's case is that it is a composite contract for design, manufacture, supply, erection and commissioning of air-cooled condenser unit (ACC Unit) with auxiliaries for 160 MW Coal Based Thermal Power Plant (Project) at Gummidipoondi in the State of Tamil Nadu whereunder payments were to be made on pro rata basis, and final payment was to be made only on completion of the work, subject to issuance of relevant certificates. The completion of work got delayed due to reasons beyond the control of Enexio, as held by the Tribunal, therefore, 539 days of extension, up to the deemed date of completion of the project i.e., 21 September 2015, was granted. In between, the contract was not repudiated by either party. Hence, the limitation period of three years would have to be counted from the date of completion of the work, that is, from 21 September 2015. It is also their case that before expiry of the prescribed period of three years, a written acknowledgment of the outstanding amount was made *vide* minutes of the meeting dated 19 April 2018.

Therefore, by virtue of Section 18[73] of the 1963 Act, a fresh period of three years would start from the date of acknowledgement, which got further extended, by virtue of the provisions of Section 19[74] of the 1963 Act, on account of the offer made on 26 May 2018 to pay Rs. 3 crores as full and final settlement of all dues. Hence, as on 2 May 2019, the claim was not barred by limitation.

91. A plain reading of Article 14 of the Schedule to the 1963 Act, which is *pari materia* Article 52[75] of the First Schedule to the Limitation Act, 1908 (in short 1908 Act), would indicate that it applies where: (a) the suit/ claim is

[73] **Section 18. Effect of acknowledgment in writing.—** (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.
(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its content shall not be received.
Explanation.-- for the purposes of this section, --
(a) an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right;
(b) the word 'signed' means signed either personally or by an agent duly authorized in this behalf; and
(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

[74] **Section 19. Effect of payment on account of debt or of interest on legacy.---** Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:
Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgement of the payment appears in the handwriting of, or in writing signed by, the person making the payment.
Explanation. — For the purposes of this section, --
(a) where mortgage land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;
(b) 'debt' does not include money payable under a decree or order of a court.

[75] See Footnote 83

for the price of goods sold and delivered; and (b) no fixed period of credit is agreed upon. Whereas Article 18 of the Schedule, which is *pari materia* Article 56[76] of the First Schedule of the 1908 Act, applies where: (a) the suit/claim is for the price of work done by the plaintiff/ claimant for the defendant at his request; and (b) no time has been fixed for payment. Thus, where a suit is for goods supplied and work done by the plaintiff (a contractor) and the price of materials and the price of work is separately mentioned, and the time for payment is not fixed by the contract, Article 14 will apply to the former claim, and Article 18 to the latter. But where a claim is made for a specific sum of money as one indivisible claim on the contract, without mentioning any specific sum as being the price of goods or price of the work done, neither Article 14 nor Article 18 will apply, but only Article 55, which provides for all actions *ex contractu* (i.e., based on a contract) not otherwise provided for, would apply[77].

92. Article 55, which is a combination of erstwhile Articles 115[78] and 116[79] of the First Schedule to the 1908 Act, is a residuary Article in respect of all actions based on a contract not otherwise specially provided for. For the applicability of Article 55, four requirements should be

[76] See Footnote 84
[77] See U. N. Mitra's Law of Limitation and Prescription, Sixteenth Edition, Volume 1, at page 1063, published by LexisNexis.
[78] See Footnote 86
[79] See Footnote 87

satisfied, namely, (1) the suit should be based on a contract; (2) there must be breach of the contract; (3) the suit should be for compensation; and (4) the suit should not be covered by any other Article specially providing for it.

93. A breach of a contract may be by non-performance, or by repudiation or by both[80]. In Anson's Law of Contract (29th Oxford Edition), under the heading 'Forms of Breach Which Justify Discharge', it is stated thus:

> "The right of a party to be treated as discharged from further performance may arise in any one of three ways: the other party to the contract (a) may renounce its liabilities under it; (b) may by its own act make it impossible to fulfil them, (c) may fail to perform what it has promised. Of these forms of breach, the first two may take place not only in the course of performance but also while the contract is still wholly executory i.e., before either party is entitled to demand a performance by the other of the other's promise. In such a case the breach is usually termed an anticipatory breach. The last can only take place at or during the time for performance of the contract."

94. Thus, failure of a party to a contract in performing its obligation(s) thereunder could be considered a breach of contract for the purpose of bringing an action against it by the other party. In such an event, the other party can claim compensation or damages, or/ and, in certain cases, obtain specific performance.

[80] P. Ramanatha Aiyar's Advanced Law Lexicon, 4th Edition at page 596

95. The phrase 'compensation for breach of contract', as occurring in Article 55 of the Schedule to the 1963 Act, would comprehend also a claim for money due under a contract. 'Compensation' is a general term comprising any payment which a party would be entitled to claim on account of any loss or damage arising from a breach of a contract, and the expression has not been limited only to a claim for unliquidated damages. The expression is wide enough to include a claim for payment of a certain sum[81].

96. In **Mahomed Ghasita v. Siraj-ud-Din and others**[82], the plaintiff was to supply Italian marble and other stone required for flooring and was also to do all the work necessary for constructing the floor. The plaintiff sued for the balance of the money due to him based on this contract and the plaint made no mention of the price of the materials as distinct from the price of the work. The matter came before a Full Bench of the then Lahore High Court. Before the Full Bench the question was, what Article of the Limitation Act, 1908 is applicable to the suit. Sir Shadi Lal C.J., as His Lordship then was, speaking for the Bench held:

> "The action brought by the plaintiff was for the recovery of the balance of the money due to him on the strength of the contract described above;

[81] See U. N. Mitra's Law of Limitation and Prescription, Sixteenth Edition, Volume 2, at pages 1342 & 1343, published by LexisNexis.
[82] AIR 1922 Lah 198 (FB) : ILR (1921) 2 Lah 376 (FB) : 1921 SCC OnLine Lah 303

and the question for consideration is what article of the Limitation Act governs the claim. Our attention has been invited, in the first instance, to article 52[83], which prescribes a period of three years (enlarged to six years by the Punjab Loans Limitation Act of 1904) for the recovery of the price of goods sold and delivered to the defendant; and also to article 56[84], which lays down a period of three years for a suit to recover the price of work done by the plaintiff for the defendant. Now, as stated above, the plaintiff supplied not only the materials, but also the labour, and it is clear that neither of the aforesaid articles governs the suit in its entirety. It is, however, urged that the action comprises two claims, one for the price of the material supplied by the plaintiff, and the other relating to the price of the work done by him, and that these two claims should be dealt with separately, and that they are governed by article 52 and article 56, respectively. The rule of law is no doubt firmly established that a combination of several claims in one action does not deprive each claim of its specific character and description. The Code of Civil Procedure allows a plaintiff, in certain circumstances, to combine in one action two or more distinct and independent claims, and it is quite possible that one of the claims may be barred by limitation, and the other may be within time; though both of them arise out of one and the same cause of action. In a case of that description there is no reason why

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[83] **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
52	For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Three years	The date of the delivery of the goods.

[84] **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
56	For the price of work done by the plaintiff for the defendant at his request where no time has been fixed for payment.	Three years	When the work is done.

the court should not apply to each claim the rule of limitation specially applicable thereto. It is nowhere laid down that only one article should govern the whole of the suit, though it may consist of several independent claims, and that the suit should not be split up into its component parts for the purpose of the law of limitation.

The question, however, is whether the action as brought by the plaintiff can be treated as a combination of two distinct claims. Now, the plaint makes no mention of the price of the materials as distinct from the price of the work and contains no reference whatsoever to two claims. There is only one indivisible claim, and that is for the balance of the money due to the plaintiff on the basis of a contract, by which he was to be paid for everything supplied and done by him in connection with the flooring of the building at a comprehensive rate. The claim, as laid in the plaint is an indivisible one; it cannot be split up into two portions. We must, therefore, hold that it falls neither under article 52, nor under article 56.

The learned advocate for the plaintiff contends that as neither of the above articles governs the claim, it should come within article 120[85]. The judgment in Radha Kishen v. Basant Lal, which is relied upon in support of this contention, no doubt, related to a suit for the recovery of a sum of money alleged to be due for the work performed and material supplied by the plaintiff to the defendant under a contract, and the learned judges held that neither article 52 nor article 56 was applicable to the entire claim. They then made the following observation –

> "There is no other articles specially applicable, and hence the only article which can be applied is article 120."

[85] **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
120	Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years	When the right to sue accrues.

Now with all deference to the learned judges we are unable to hold that there is no other article governing a claim of that character. It seems that their attention was not drawn to article 115[86], which governs every suit for compensation for the breach of a contract not in writing registered and not specially provided for in the Limitation Act. It is beyond doubt that this article is a general provision applying to all actions *ex contractu* not specially provided for otherwise; and the present claim certainly arises out of a contract entered into between the parties. The word 'compensation' in article 115 as well as in article 116[87] has the same meaning as it has in section 73[88] of the Indian Contract Act and

[86] **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
115	For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	Three years	When the contract is broken, or (where there are successive breaches) when the breach in in respect of which the suit is Instituted occurs, or (where the breach is continuing) when it ceases.

[87] **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
116	For compensation for the breach of a contract in writing registered.	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not registered.

[88] **The Indian Contract Act, 1872.**

Section 73. Compensation for loss or damage caused by breach of contract.-- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, would be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.---

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.-- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account

> denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract. It has been held, and we consider rightly, that a suit to recover a specified sum of money on a contract is a suit for compensation within articles 115 and 116 --- *vide* Nobocoomar Mookhopadhaya v. Siru Mullick[89] and Husain Ali Khan v. Hajiz Ali Khan[90].
>
> We are accordingly of opinion that the present claim must be regarded as one for compensation for the breach of a contract, and that there is no special provision in the Act which governs the claim. It must, therefore, come under the general provision contained in article 115, which governs every action arising out of contract, not otherwise specially provided for."

(Emphasis supplied)

97. In **Dhapia v. Dalla**[91] before a Full Bench of the Allahabad High Court the question was, what Article of the First Schedule to the 1908 Act would apply to a suit for recovery of a specified sum under a contract. In that suit, the plaintiff had made defendant(s) partner to one half of the fishery rights in the tank arising from a *Theka*, on the condition that they would pay him half the *Theka* money. The allegations made in the plaint showed that the defendant(s) had already worked out the *Theka* in respect of their share in it. As that suit was not filed within three years from the date of breach, it was dismissed by the trial court as barred by limitation by applying Article 115[92] of the First Schedule to the 1908 Act. The plaintiff preferred

[89] (1890) ILR 6 Cal 94
[90] (1881) ILR 3 All 600 (FB)
[91] 1969 All LJ 718 : AIR 1970 All 206 : 1969 SCC OnLine All 79
[92] See Footnote 86

appeal, which was allowed on the finding that Article 120[93] of the First Schedule to the 1908 Act applied, whereunder the limitation was six years. When the matter travelled to the High Court, an argument was raised that neither Article 115 nor Article 120 could apply, rather Article 113[94] would apply. It was contended before the High Court that Article 113 should apply as the claim is nothing but for specific performance. Rejecting this submission and holding that Article 115 of the First Schedule to 1908 Act would apply, the Full Bench held:

> "8. In our opinion there is no force in this argument. It is true that there was a contract between the parties inasmuch as the plaintiff gave to the defendants one half of the fishery rights in the tank, on the condition that they would pay him half the *theka* money. The allegations made in the plaint show that the defendants had already worked out the *theka* in respect of their share in it. All that remained to be done was to pay the proportionate *theka* money to the plaintiff. In such circumstances no suit for specific performance of contract could be filed: only a suit to enforce the agreement so far as it related to the payment of the proportionate *theka* money could be, and has been filed.
> 9. The relevant portion of section 12 of the Specific Relief Act (Act 1 of 1877) reads as follows:
>
> > "... The specific performance of any contract may in the discretion of the court be enforced—

[93] See Footnote 85

[94] **First Schedule of Limitation Act, 1908**

Article	Description of Suit	Period of Limitation	Time from which Period begins to run
113	For specific performance of contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

> (a) When the act agreed to be done is in the performance, wholly or partly, of a trust;
> (b) When there exists no standard for ascertaining the actual damages caused by the non-performance of the act agreed to be done;
> (c) When the act agreed to be done is such that pecuniary compensation for its non- performance would not afford adequate relief, or
> (d) When it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done……"

10. A suit for the recovery of a specified sum under a contract cannot be said to be a suit of the nature where pecuniary compensation would not afford adequate relief. We are, therefore, of the opinion that the suit out of which this civil revision arises cannot be said to be a suit for the specific performance of a contract and will not be governed by Article 113 of the First Schedule to the Indian Limitation Act, 1908

xxxxx xxxxx

13. We now proceed to consider why Article 115 of the First Schedule to the Limitation Act should apply to the facts of the present case. Article 115 applies when there is a breach of contract, and suit is for compensation for the loss suffered by the innocent party. A breach of contract 'occurs where a party repudiates or fails to perform one or more of the obligations imposed upon him by the contract': (*vide* Cheshire and Fifoot, p 484). 'If one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise – a right of action conferred upon the party injured by the breach' (*vide* Anson's Law of Contract, p 412). Admittedly, in the present case, there was a contract and according to the plaintiff and the findings of the court a breach of contract had occurred inasmuch as the defendants failed to pay the stipulated amount upon the date fixed under the contract.

14. Difficulty can, however, be caused by the word 'compensation' used in Article 115. It can

be argued that the words compensation for breach of contract point rather to a claim for unliquidated damages than to the payment of a certain sum, and, therefore, where the suit is for the recovery of a specified sum, and not for the determination of unliquidated damages, this article should not apply. In our opinion this contention would be wholly untenable because it was not accepted by this court in the Full Bench case of *Hussain Ali Khan versus Hafiz Ali Khan*[95] and by the Privy Council in the case of *Tricomdas Coovarji Bhoja versus Sri Gopinath Jiu Thakur*[96]. In the case of Husain Ali Khan Article 116 of Schedule II of the Limitation Act (Act XV of 1877) was the subject of interpretation. Articles 115 and 116 of Schedule II of Act XV of 1877 have been reproduced verbatim in the Indian Limitation Act, 1908. Article 115 deals with the breach of contracts not in writing and registered while Article 116 provided for breach of contracts in writing and registered. It is, therefore, obvious, that the meaning which has to be given to the words 'compensation for breach of contract' occurring in both the Articles will have to be the same.

xxx xxx xxx

16. In the case of *Tricomdas Cooverji Bhoja* the argument that the words 'compensation for breach of a contract' point rather to a claim of unliquidated damages than to the claim of payment of certain sum was not accepted because the word compensation has been used in the Indian Contract Act in a very wide sense.

17. The relevant portion of section 73 of the Indian Contract Act reads as follows:

> '73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

[95] I.L.R. 3 All 600

[96] AIR 1916 PC 182

> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach……
>
> Illustrations
>
> ……
>
> (n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day; B, in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.'

> 18. It is, therefore, clear that the word compensation has been used, in section 73 of the Indian Contract Act in a very wide sense and the present case would be covered by it.
>
> 19. We see no reason why the words 'compensation for breach of contract' as used in Article 115 should be given a meaning different from the same words as used in Article 116. Article 115 being a residuary Article for suits based on breach of contract, it is obvious that the suit out of which this revision arises would be governed by the said Article."

(Emphasis supplied)

98. On a consideration of the aforesaid decisions as well as the provisions of Section 73 of the Contract Act and Article 55 of the Schedule to the 1963 Act, we are of the view that even a suit for recovery of a specified amount, based on a contract, is a suit for compensation, and if the suit is a consequence of defendant breaching the contract or not fulfilling its obligation(s) thereunder, the limitation for institution of such a suit would be covered by Article 55 of the Schedule to the 1963 Act, provided the suit is not covered by any other Article specially providing for it.

99. In the instant case, there is no dispute that the claim is based on a contract. The finding of the Arbitral Tribunal in paragraph 13.13 (i)[97] of the award is that the appellant(s) herein had failed to undertake the performance guarantee test, despite request of the claimant, within the period specified therefor. The final payment of the bill(s) / invoice(s) was dependent on issuance of certificate(s) including one relating to successful completion of the performance guarantee test (PG Test). Further, the contract provided that if the performance guarantee is not undertaken by the purchaser (appellant(s) herein), it could be deemed that the supplier (claimant -R-1) had fulfilled its obligation of providing a guaranteed performance of the project under the contract. In these circumstances, when, despite request of the contractor /supplier, the employer/ purchaser failed to undertake the PG Test, the Arbitral Tribunal justifiably concluded that even though the supplier (claimant) had fulfilled its obligations under the contract, the purchaser (appellant(s) herein) had failed in fulfilling its obligation of making payment of the outstanding principal amount to the claimant, which had become due and payable under the contract. In our view, therefore, the claim being one for 'compensation' (which term includes a specified outstanding amount), based on

[97] Extracted in paragraph 88 (16) of this judgment.

breach of a contract, the limitation for the claim would fall within the ambit of Article 55 of the Schedule to the 1963 Act unless demonstrated that the claim is specially covered by any other Article of the Schedule.

100. In **Geo Miller (supra)**[98] a three-Judge Bench of this Court held that in a commercial dispute, though mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute and, therefore, a cause of action for reference to arbitration would come into existence. It was also observed that it would not lie in the mouth of the claimant to plead that it waited to refer the dispute to arbitration because it was making representations and sending reminders to the respondent to settle the matter.

101. In **Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority**[99], in the context of commencement of the period of limitation for making a reference application under Section 20 of the erstwhile Arbitration Act, 1940, it was held by this Court that to be entitled to have an order of reference under Section 20, it is necessary that there should be an arbitration agreement and secondly, differences must arise to which the

[98] See paragraph 29 of the judgment in Geo Miller (supra)
[99] (1988) 2 SCC 338

agreement applied. Once there is an assertion of claim by the appellant and silence as well as refusal in respect of the same by the respondent, a dispute would arise regarding non-payment of the alleged dues. The Court thereafter went on to observe:

> "4. ……. The High Court proceeded on the basis that the work was completed in 1980 and therefore, the appellant became entitled to the payment from that date, and the cause of action under article 137 arose from that date. But in order to be entitled to ask for the reference under section 20 of the Act there must not only be an entitlement to money but there must be a difference, or dispute must arise. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on 28.2.1983 and there was non- payment, the cause of action arose from that date, that is to say, 28.2.1983. It is also true that a party cannot postpone the approval of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or reference under section 20 of the Act. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

102. Interpreting the decision of this Court in **Inder Singh Rekhi (supra)**, in **B & TG AG (supra)** it was, *inter*

alia, held that three principles of law are discernible from the aforesaid decision: (1) ordinarily, on the completion of the work, the right to receive the payment begins; (2) a dispute arises when there is a claim on one side and its denial/ repudiation by the other; and (3) a person cannot postpone the accrual of cause of action by repeatedly writing letters, or sending reminders. In other words, bilateral discussions for an indefinite period would not save the situation so far as the accrual of cause of action and the right to apply for appointment of arbitrator is concerned.

103. In the case in hand, the award reveals that in respect of payment of Claimant's invoices, the Purchase Orders provided that 65% of the Order Price was to be paid on pro rata basis along with 100% taxes and duties after receipt of material at site, within 25 days of submission of Invoice/ request for payment, and other documents[100]. The award recites that there is no indication in the Purchase Orders as to what 'other documents' were required[101]. Not only that, payment, including balance payment, was dependent on issuance of: (i) certificate on completion of punch points signed by parties; (ii) take over certificate of equipment (to be issued by the Purchaser); and (iii) certificate of completion of performance test of

[100] Paragraph 13.08 (b) of the Award
[101] Paragraph 13.08 (c) of the Award

equipment (to be issued by the Purchaser)[102]. But none of these certificates was issued[103]. In these circumstances, the Arbitral Tribunal had to consider various facts and circumstances to come to a definite conclusion that the work was completed on 21 September 2015. In holding so, Tribunal relied on: (a) an e-mail sent by the claimant on 21 September 2015 showing its readiness to a performance guarantee test; and (b) the fact that there was no evidence to suggest that the certificates on completion, as ought to have been issued, should not have been issued on or before 21 September 2015[104]. The Tribunal also took note of the terms and conditions of the contract which were to the effect that the performance guarantee test can be deemed satisfactory if, despite request, it is not carried out within 180 days of the issue of the taking over certificate. The Tribunal noticed that *vide* certificate dated 2 March 2017 the appellant(s) admitted that unit was commissioned in May 2015 and there was a request of the claimant dated 21 September 2015 to undertake performance guarantee test[105]. Taking all of this into account, the Tribunal held that the "deemed achievement of supplier's liability in respect to performance guarantee", pursuant to clause 10.5 of Annexure A of the Erection Purchase Order, became effective on 19 March 2016[106].

[102] Paragraph 7.32 of the Award
[103] Paragraph 13.13 (d) of the Award
[104] Paragraph 13.13 (h) of the Award.
[105] See Paragraph 88 (16) above including paragraph 13.13 (f) of the Award.
[106] Paragraph 13.13 (i) of the Award.

104. From the discussion thus far, following dates emerge which, in our view, would be relevant for determining the start point of limitation for the claim:

(a) 21 September 2015 i.e., the deemed date of completion of the supply/ work undertaken by the claimant under the Purchase Orders/ contract; and

(b) 19 March 2016 i.e., the deemed date by which the supplier (Claimant) had fulfilled its liability under the contract relating to guaranteed performance of the Unit concerned.

105. Now, we shall consider whether Articles 14 and 18 of the Schedule to the 1963 Act were applicable or not. Article 14 applies where the suit is for the price of the goods sold and delivered, and there is no fixed period of credit agreed upon. Here, there is an indivisible claim in respect of the outstanding principal amount for the goods supplied and the work done. Moreover, the payment(s) under the supply purchase order were to be on pro rata basis, and full payment for the supplies was dependent on supporting documents, including certificates, to be provided by the purchaser, which were not provided. Thus, when full payment(s) under the supply/erection

purchase order(s) were dependent on certificates relating to completion/ commissioning /guaranteed performance etc., the claimant waited till successful completion / commissioning / guaranteed performance of the project to file a composite claim for the balance amount payable under both the purchase orders. In our view, therefore, Article 14 is not applicable to the claim as framed.

106. Insofar as Article 18 is concerned, it is to apply where the suit is for the price of the work done by the plaintiff for the defendant at his request, and where no time has been fixed for payment. In the instant case, there is an indivisible claim for the outstanding amount in respect of goods supplied and the work done. As already noticed above, the payment(s) under the contract were to be made on pro rata basis, dependent on work done and certificates issued, which, as per the finding in the award, were not issued. Hence, the claimant was entitled to make a composite claim for the goods supplied and the work done after the project was successfully complete i.e., when the Unit was commissioned followed by guaranteed performance. Because it is only then, when the outstanding amount, as per the Bills / Invoices raised, became due and payable to the claimant in terms of the contract. Thus, in our view, Article 18 would also not apply.

107. As it is not demonstrated that any other Article of the Schedule specially providing for the claim, as was made by R-1, was applicable, in our view, Article 55 of the Schedule was applicable to the claim, *inter alia,* for the following reasons:

> (a) The claim was for compensation (in as much as the term 'compensation' includes a specified amount payable under a contract[107]) in respect of the goods supplied and the work done under a contract; and
>
> (b) The claim was based on a breach of the contractual obligation as, according to the findings returned by the Arbitral Tribunal, the respondents to the claim (appellant(s) herein) had failed to fulfil their obligation(s) of making payment of the outstanding principal amount payable under the contract despite raising of bills / invoices by the claimant.

Starting Point of Limitation for the Claim

108. Having determined that limitation for the claim would be governed by Article 55 of the Schedule to the

[107] See our discussion in paragraphs 96 to 98 of this judgment

1963 Act, we shall now ascertain the date from which the limitation period is to be counted.

109. Under Article 55, the limitation period begins to run when the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or where the breach is continuing, when it ceases.

110. In the case in hand, it is nobody's case that either party repudiated the contract. Further, the claim is not in respect of non-payment of any specific bill or invoice during execution of the contract. Rather, it is for the outstanding principal amount due to the claimant on discharge of his obligations under the contract. No doubt, list of unpaid bills / invoices was placed on record of the arbitral proceedings to demonstrate that bills / invoices were raised / issued, but the same was by way of evidence to support the claim, which was for the entire outstanding principal amount payable to the claimant on discharge of its obligations under the contract. Thus, simply put, the cause of action for the claim in question is appellant(s)' failure to make payment of the outstanding principal amount to the claimant despite discharge of contractual obligations by it.

111. At this stage, we would like to put on record that nothing was brought to our notice that there was any fixed

date, or period of credit, for payment of the balance amount. In the above circumstances, in our view, the starting point of limitation should be the date when the claimant had fulfilled all its obligations under the contract and was entitled for release of the outstanding amount payable under the contract.

112. As per the contract, if, after takeover, the purchaser (appellant(s) herein) fails to undertake the performance guarantee test, within 180 days from the date of request for it by the supplier (i.e., claimant), it is to be deemed that the supplier has fulfilled its liability in respect of the guaranteed performance. Apparently, passing the performance guarantee test was last of the supplier's (claimant's) obligations, whereafter the supplier was entitled for release of the balance amount. The Tribunal has found: (a) that as per certificate dated 2 March 2017, the commissioning took place in May 2015; (b) at that time there were certain technical issues, which were resolved later; (c) on 21 September 2015, claimant sent request to the appellant(s) to undertake performance guarantee test, but there was no response to the request; and (d) the period of 180 days, counted from 21 September 2015, expired on 19 March 2016. In the light of the above findings, the Tribunal concluded that commissioning took place in the month of May 2015; technical issues were resolved by 21 September 2015; and performance guarantee period expired on 19 March 2016.

113. Based on the above, while bearing in mind that final payment of the principal outstanding amount was dependent on meeting the requirement of performance guarantee, in our view, the cause of action for the claim, as made, matured on expiry of that stipulated period of 180 days within which, despite request, the appellant(s) (i.e., purchaser) failed to undertake the performance guarantee test. Thus, even though there might be several bills/ invoices raised/issued by the claimant during execution of the contract, the claim of the claimant for the outstanding principal amount matured on expiry of 180 days from the date of the notice given by the claimant to the appellant(s) (i.e., respondents to the claim) to undertake the performance guarantee test. We, therefore, conclude that limitation for the claim started to run from 19 March 2016.

114. At this stage, we may notice, only to reject, an alternative submission made on behalf of the appellant, which is, that if Article 55 was applicable, the breach of the contract occurred when the claimant failed to complete the project by 31 March 2014, as promised, therefore, the period of limitation should be counted from that date. This argument, in our view, is not sustainable, because time was not the essence of the contract in as much as there was a clause for liquidated damages for delay in completion (See Clause 13 of Annexure A of the

Supply Purchase Order as extracted in paragraph 7.32 of the award). Moreover, there is no material on record to indicate that the contract was repudiated by the appellant on any date for non-completion of the project by the date stipulated. Rather, the materials on record, as recited in the award, indicate that parties continued to engage with each other and accepted performance of contractual obligations even beyond the stipulated date. Further, there is a clear finding in the award that the claimant was entitled to extension of 539 days. For the above reasons, we reject the alternative submission made on behalf of the appellant(s).

Limitation Extended by Acknowledgement dated 19.04.2018 under Section 18 of the 1963 Act

115. As the limitation period of three years prescribed by Article 55, if counted from 19 March 2016, expired before the date of commencement of the arbitral proceeding (i.e., 2 May 2019), we will have to consider whether, by virtue of acknowledgment, if any, the claimant was entitled to extension of the period of limitation.

116. Section 18[108] of the 1963 Act deals with the effect of acknowledgement in writing. Sub-section (1) thereof provides that where, before the expiration of the prescribed period for a suit or application in respect of any

[108] See Footnote 73

right, an acknowledgement of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. The Explanation to this section provides that an acknowledgment may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the right.

117. In **Khan Bahadur Shapoor Fredom Mazda v. Durga Prasad Chamaria and others**[109] while dealing with Section 19 of the 1908 Act, which is *pari materia* Section 18 of the 1963 Act, this Court held that for a valid acknowledgement, under the provision, the essential requirements are: (a) it must be made before the relevant period of limitation has expired; (b) it must be in regard to the liability in respect of the right in question; and (c) it must be made in writing and must be signed by the party against whom such right is claimed. In paragraph 6 of the judgment, it was observed:

> "6. ..... The statement on which a plea of acknowledgement is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however,

[109] AIR 1961 SC 1236: (1962) 1 SCR 140

> indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally courts lean in favor of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning……
>
> 7. …… The effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor of the said document……."

(Emphasis supplied)

118. In **J.C. Budhraja v. Chairman Orissa Mining Corporation Ltd. and Others**[110] , following the decision in **Khan Bahadur Shapoor (supra)**, a three-Judge Bench of this Court held:

> "21. It is now well settled that a writing to be an acknowledgement of liability must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation

[110] (2008) 2 SCC 444

of an intention of continuing such relationship in regard to an existing liability. The admission need not be in regard to any precise amount nor by expressed words. If a defendant writes to the plaintiff requesting him to send his claim for verification and payment, it amounts to an acknowledgment. But if the defendant merely says, without admitting liability, it would like to examine the claim or the accounts, it may not amount to acknowledgment. In other words, a writing, to be treated as an acknowledgement of liability should consciously admit his liability to pay or admit his intention to pay the debt. Let us illustrate. If a creditor sends a demand notice demanding payment of Rs.1,00,000 due under a promissory note executed by the debtor and the debtor sends a reply stating that he would pay the amount due, without mentioning the amount, it will still be an acknowledgment of liability. If a writing is relied on as an acknowledgement for extending the period of limitation in respect of the amount or right claimed in the suit, the acknowledgement should necessarily be in respect of the subject matter of the suit. If a person executes a work and issues a demand letter making a claim for the amount due as per the final bill and the defendant agrees to verify the bill and pay the amount, the acknowledgement will save limitation for a suit for recovery of only such bill amount, but will not extend the limitation in regard to any fresh or additional claim for damages made in the suit, which was not a part of the bill or the demand letter. ..... What can be acknowledged is a present subsisting liability. An acknowledgement made with reference to a liability, cannot extend limitation for a time-barred liability or a claim that was not made at the time of acknowledgement or some other liability relating to other transactions. Any admission of jural relationship in regard to the ascertained sum due or a pending claim, cannot be an acknowledgment for a new additional claim for damages.

(Emphasis supplied)

119. In the instant case, as found above, the limitation period started to run from 19 March 2016. Within three years therefrom, in the minutes of meeting dated 19 April 2018[111] there was a clear acknowledgement that the amount claimed by Enexio (as is there in the claim) is the balance amount payable, though subject to debit, by way of set off, against various claims made by the appellant(s) herein upon the claimant. In our view, such an acknowledgment is sufficient to extend the limitation period as it admits the existing liability of the appellant(s) *qua* the balance amount payable to the claimant under the contract. Benefit of such an acknowledgement would not be lost merely because a set off is claimed, inasmuch as clause (a) of the Explanation to Section 18, *inter alia*, provides that an acknowledgement for the purposes of this Section may be sufficient though it is accompanied by a refusal to pay, or is coupled with a claim to set off. This would imply that, subject to fulfilment of other conditions of Section 18, once the defendant acknowledges that he owes a certain sum to the plaintiff there would be sufficient acknowledgment within the meaning of Section 18, even though he states that he is entitled to set off against this sum another sum which the plaintiff owes him. Thus, in our view, the minutes of meeting dated 19 April 2018, though claims a set off, is a valid acknowledgement of the existing liability within the ambit

[111] Minutes are quoted in paragraph 7 of this judgment

of Section 18 of the 1963 Act and it extends the period of limitation for a period of 3 years from the date it was made. In consequence, the claim of Enexio, made on 2 May 2019, was well within the period of limitation. Sub-issue (b) is decided in the aforesaid terms.

APPELLANT(S) COUNTERCLAIM IN RESPECT OF COST OF REPAIR/ REPLACEMENT OF GEAR BOX AND FAN MODULES BARRED BY TIME

120. Now, we shall consider whether the counterclaim was barred by limitation. Before that, we must understand the true nature of a counterclaim. A counterclaim is a claim made by a defendant in a suit against the plaintiff. It is a claim, independent of and separable from the plaintiff's claim, which can be enforced by a cross action. Counterclaim preferred by the defendant in a suit is a cross suit and even if the suit is dismissed, counterclaim shall remain alive for adjudication. The purpose of the scheme relating to counterclaim is to avoid multiplicity of proceedings[112].

121. In **Afcons Gunanusa JV (supra)**, after considering a plethora of precedents and authoritative texts, this Court summarized the legal principles relating to counterclaims, in the context of arbitral proceedings, as under:

[112] Rajni Rani v. Khairati Lal, (2015) 2 SCC 682, paragraph 9.6.

> "168. On our analysis of the statutory framework of the Arbitration Act and the CPC, related academic discourse and judicial pronouncements, the following conclusions emerge:
>
> (i) Claims and counter-claims are independent and distinct proceedings;
>
> (ii) A counter-claim is not a defense to a claim and its outcome is not contingent on the outcome of the claim;
>
> (iii) Counter-claims are independent claims which could have been raised in separate proceedings but are permitted to be raised in the same proceeding as a claim to avoid a multiplicity of proceedings; and
>
> (iv) the dismissal of proceedings in relation to the original claim does not affect the proceedings in relation to the counter-claim."

122. Section 23 (2A)[113] of the 1996 Act gives respondent to a claim a right to submit a counterclaim or plead a set off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set off falls within the scope of the arbitration agreement. Section 43 (1)[114] of the 1996 Act provides that the 1963 Act shall apply to arbitrations as it applies to proceedings in court. Section 3(2)(b)[115] of the 1963 Act provides that any claim by way of set off or a counterclaim, shall be treated as a separate

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[113] **Section 23. Statement of claim and defence.—**

(1) .....

(2) .....

(2-A) The respondent, in support of his case, may also submit a counter-claim or plead set-off, which shall be adjudicated by the arbitral tribunal, if such counter-claim or set-off falls within the scope of the arbitration agreement.

[114] See Footnote 64

[115] See Footnote 66

suit and shall be deemed to have been instituted – (i) in the case of a set off, on the same date as the suit in which the set off is pleaded; (ii) in the case of a counterclaim, on the date on which the counterclaim is made in court. It is thus clear that a counterclaim is to be treated as a separate suit for the purposes of limitation and, to ascertain whether it is within limitation, the date of reckoning is the date when the counterclaim is filed and not when the claim/ suit is filed. At this stage, it be noted that Section 21 of the 1996 Act is not relevant for determining the date of institution of a counterclaim as it is for a claim. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counterclaim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the 1996 Act, the limitation for such counterclaim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counterclaim[116].

123. In **Thomas Mathew v. KLDC Ltd.**[117] this Court, in the context of a claim referable to Article 55 of the Schedule to the 1963 Act, by relying on Section 3 (2)(b) of

[116] See State of Goa v. Praveen Enterprises, (2012) 12 SCC 581, paragraph 20; and Voltas Ltd. v. Rolta India Ltd., (2014) 4 SCC 516.
[117] (2018) 12 SCC 560, paragraph 9

the 1963 Act, held that a counterclaim is required to be treated as a separate suit and the period of limitation would be three years from the date of accrual of the cause of action.

124. It is therefore well settled that a counterclaim is like a cross suit, or a separate suit, and the limitation of a counterclaim is to be counted from the date of accrual of the cause of action which it seeks to espouse. As a logical corollary thereof, it is quite possible that even though a suit or a claim is within the period of limitation, the counterclaim may well be barred by limitation, if the cause of action espoused therein accrued beyond the prescribed period of limitation.

125. In the instant case, the counterclaims were for: (a) liquidated damages for the delay in supply and erection; (b) reimbursement of customs duties; (c) cost of erection of horizontal and vertical exhaust duct through an external agency; (d) cost of repair/ replacement of Gear Box, due to alleged defective supply; and (e) cost of repair/ replacement of Fan Modules, due to alleged defective supply. Out of the above five counterclaims, three counterclaims, namely, (a), (b) and (c), were dealt by the Arbitral Tribunal on merits, as they stood recited in the minutes of meeting dated 19 April 2018. Whereas the remaining two, namely, (d) and (e), were treated as barred by limitation because in respect thereof there was no

recital / material to show that they were subject matter of negotiation between the parties. The counterclaim (a) (i.e., relating to liquidated damages for the delay) was rejected because the Tribunal found the claimant entitled to extension of time as the ACC Unit project envisaged Hook-up / connection to the turbine generator flange which could took place only in February 2015 as turbine generator installation, which was being done by another contractor employed by OPG, got delayed[118]. The counterclaim (b) (i.e., reimbursement of customs duties) was rejected because, according to the Tribunal, as per the Supply Purchase Order, all Taxes, duties and levies were to be borne by the purchaser (appellant(s) herein)[119]. Insofar as counterclaim (c) was concerned, it was allowed and the counterclaimant was allowed set off in respect thereof. The summary of how each of the counterclaims were dealt with, is found in paragraph 17 of the Award.

126. We have, therefore, to consider whether the two counterclaims (d) and (e) were justifiably held time-barred or not. More particularly, because claimant's claim which arose out of same contract was found within limitation.

127. Since counterclaim is to be treated as a separate suit or a cross-suit, its limitation would have to be determined independent of the claim, based on the cause

[118] See paragraphs 13.13 (c) and 13.15 of the Award, extracted in 88 (10) and 88 (19) above.
[119] Paragraph 14 of the Award.

of action espoused therein. Therefore, we would have to determine as to when the right to seek for the counterclaims (d) and (e) accrued. In this context, while dealing with the previous issue i.e., regarding the claim being within limitation, we noticed a few dates which, in our view, would be helpful in determining the present issue. These dates are:

(a) May 2015 - when ACC Unit got commissioned and was operating satisfactorily, as per certificate dated 2 March 2017 issued by OPG.

(b) 21 September 2015 – deemed date of takeover of the project i.e., when all alleged defects were removed by the claimant, and a request was made by the claimant to the purchaser (appellant(s) herein) to undertake performance guarantee test.

(c) 19 March 2016 – when the period of 180 days of guaranteed performance expired. This date is important because, as per the contract, if, within the aforesaid period, the performance guarantee test is not undertaken, despite request of the supplier, it is to be deemed that the supplier has discharged its liability of a guaranteed performance of 180 days.

128. The Tribunal takes 21 September 2015 as the start point of limitation for the counterclaim on the premise that it would be the date when the Takeover Certificate is deemed to have been issued. That is, the supplier had fulfilled its obligations. On basis thereof, the Tribunal found counterclaims (d) and (e) barred by time as the counterclaim was filed on 15 July 2019 i.e., more than three years later, and there existed no acknowledgement in respect thereof.

129. However, while dealing with the previous issue, we found 19 March 2016 as the start point of limitation for the claim because that is the date when 180 days period of guaranteed performance, which was part of supplier's liability, expired. Be that as it may, whether we count the limitation period from 21 September 2015 or 19 March 2016, the counterclaim which was filed on 15 July 2019 was beyond the prescribed period of three years inasmuch as its cause of action could not have arisen after 19 March 2016 because by 19 March 2016, the supplier / contractor had fulfilled its obligation of guaranteed performance for 180 days.

Minutes of meeting dated 19 April 2018 did not extend limitation of counterclaims (d) and (e)

130. In these circumstances, the question that falls for our consideration is whether the minutes of meeting dated

19 April 2018 extended the period of limitation for counterclaim(s)[120] (d) and (e) as it did for the claim as well as counterclaims (a) (b) and (c). The contention on behalf of the appellant(s) is that the claim and the counterclaim arose out of same contractual relationship, therefore, if the acknowledgment dated 19 April 2018 extends limitation of one part of the claim/ counterclaim, it would automatically extend limitation of the remaining part of the claim / counterclaim. Per contra, learned counsel for Enexio (R-1) contended that there could be multiple claims arising out of the same contract, if the acknowledgment extending limitation under Section 18 of 1963 Act relates to only few, limitation for the rest would not get extended. Thus, the Tribunal committed no such error which may warrant interference under Section 34 of the 1996 Act.

131. We have given our thoughtful consideration to the rival submissions. The minutes of meeting dated 19 April 2018 was drawn within three years of accrual of the cause of action for the claim, whether we count limitation from 19 March 2016 (as determined by us) or 21 September 2015 (as determined by the Tribunal). Therefore, the crucial question, which we must consider and decide, is whether those minutes could be considered as an acknowledgment of subsisting liability *qua* counterclaims (d) and (e).

[120] For description of counterclaims (a) to (e), see paragraph 126 of this judgment.

132. The minutes[121] of meeting dated 19 April 2018 incorporates a table giving specific description of the items and their corresponding value on which parties, purportedly, admitted their respective liabilities. Interestingly, the balance amount payable to the contractor (Enexio - R-1) finds mention there and so does contractor's liability towards liquidated damages, customs duty, dismantling – TG Building and ACC Duct fabrication, which have all been addressed on merits in the Award. But, there is no mention of items referable to counterclaims (d) and (e), which have been held time barred. Further, the minutes do not state that parties acknowledge, or are willing to settle, any other, or all their rights/ obligations, arising from, or under, the contract. Thus, the acknowledgment is specific and in respect of certain items only.

133. In **J.C. Budhraja (supra)** this Court held that a writing to be an acknowledgement of liability must involve an admission of a subsisting jural relationship between the parties and conscious affirmation of an intention of continuing such relationship regarding existing liability. The Court added that the admission need not be in respect of any precise amount nor by expressed words. However, it was clarified that any admission of jural relationship in regard to a certain sum due, or a pending claim, cannot

[121] Extracted in paragraph 7 of this judgment

be an acknowledgement for a new additional claim for damages[122]. That apart, in **J.C. Budhraja** (supra), this Court rejected an argument that if there was acknowledgment of any liability in regard to a contract, then one was at liberty to make any claim in regard to the contract. Relevant portion of the judgment is extracted below:

> "27. The appellant next contended, relying on Section 18 of the Limitation Act, that as there was acknowledgement of liability in regard to Contract no. 30/F-2 in the letter dated 28-10-1978, and the notice invoking arbitration was issued on 4-6-1980 within three years from 28-10-1978, he was at liberty to make any claim in regard to the contract before the arbitrator even though such claims had not been made earlier and all such claims have to be treated as being within the period of limitation. Such a contention cannot be countenanced. As noticed above, the cause of action arose on 14-4-1977. But for the acknowledgement on 28-10-1978, on the date of invoking arbitration 4-6-1980, the claims could have been barred by time as being beyond the period of limitation. The limitation is extended only in regard to the liability which was acknowledged in the letter dated 28-10-1978. It is not in dispute that either on 28-10-1978 or on 4-3-1980, the contractor had not made the fresh claims aggregating to Rs.67,64,488 and the question of such claims made in future for the first time on 27-6-1986, being acknowledged by OMC on 28-10-1998 did not arise."
>
> (Emphasis supplied)

134. On the question of extension of limitation, where only a part of the liability, or a specific amount, is acknowledged during the period of limitation, there are long-standing decisions of various High Courts upholding

[122] See paragraph 21 of J.C. Budhraja (supra) extracted in paragraph 119 of this judgment.

the same principle as is discernible from the decision in **J.C. Budhraja (supra)**. Some of these decisions are being noticed below.

135. In **Bans Gopal v. Mewa Ram**[123] in the context of applicability of Section 19 of the 1908 Act, which is *pari materia* Section 18 of the 1963 Act, the question before the Allahabad High Court was, whether a creditor could recover Rs.585 when acknowledgment was in respect of Rs.200 only. One of the arguments was that acknowledgment of a sum of Rs.200 cannot be taken as an acknowledgment of a sum of Rs.585. Accepting the argument, the Court held:

> "4. ..... It is true that if no definite sum had been mentioned and there had been an acknowledgement in general terms the amount of the debt would have been discovered from the evidence as mentioned in Explanation 1, Section 19 of the Limitation Act. In the present case, however, there is a definite acknowledgement of Rs.200 and if this is to be used to save limitation, it could be done only with respect to the sum acknowledged, and not with respect to any sum that may be proved to be due on that date."

(Emphasis supplied)

136. In **Kali Das Chaudhuri v. Drapaudi Sundari Dassi**[124] for the purpose of seeking the benefit of extension of limitation, the letter sought to be relied by the plaintiff as an acknowledgement made by solicitor of the defendant stated thus:

[123] AIR 1930 All 461 : 1929 SCC OnLine All 152
[124] AIR 1918 Cal 294: 1917 SCC OnLIne Cal 23

> "Your client Babu Hari Prasad Saha was the *gomoshta* at Calcutta in the employ of the firm of Dwarka Nath Makhan Lal Saha, remunerated by a share of the profits, and being liable for a proportionate share of the losses. He was struck by paralysis in the Bengali year 1307, from which time he could not do active work. He, however, continued to be in Calcutta till 1311 when he left Calcutta and went away to his home at Urapara. Our clients have all along been ready and willing to have the accounts duly taken up to this time that your client retired from Calcutta. Your client as the managing *gomostha* has to make up and explain the accounts up to that time. Our clients will offer every facility in the matter of the adjustment of accounts. ..... It is not the fact that your client retired on 27th June 1910. He ceased to do active work in 1307 and retired in 1311. Our clients have no recollection of any notice from Messrs Dutta and Guha. Our clients are ready to pay to your client whatever may be found due on an adjustment of the accounts up to 1311."

Interpreting the aforesaid letter, in the context of plaintiff's argument that it be treated as an acknowledgment of subsistence of relationship up to 27 June 1910, the Calcutta High Court held:

> "Now, as I read that letter, that contains three material statements: it contains a statement that plaintiff was *gomostha* of the defendants; the second statement is that he was employed up to 1311 (BS) (corresponding with 1904 - 1905], and no longer; and the third statement is that the defendants were willing and ready to pay to the plaintiff whatever might be found due to him on an adjustment of the accounts up to 1311. Now, what is the claim of the plaintiff in this case? He brought his suit in order to establish his right to have the accounts taken upon the basis that he was a partner, and that he was entitled to have the accounts taken down to June 1910. The

> defendants' solicitors wrote that he was not a partner and that he was not entitled to have the accounts taken up to 1910, but that he was only entitled to have the accounts up to 1311 (BS) (corresponding with 1904 – 1905). I cannot understand how that can be taken to be an acknowledgement of the right which the plaintiff was endeavoring to substantiate in his plaint. I can understand it being said and argued with considerable force that it was an acknowledgement of some part of the plaintiffs claim, inasmuch as his claim was to have the accounts taken up to June 1910, and inasmuch as the defendants admitted that he was entitled to have the accounts taken up to 1904 - 1905: to that extent it is an acknowledgment, but in my judgment it is not an acknowledgement of the right alleged by the plaintiff, namely, that he was entitled to have the accounts taking up to June 1910."
>
> (Emphasis supplied)

137. Having considered the judicial precedents on the subject, in our view, to extend the period of limitation with the aid of Section 18, the acknowledgment must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship regarding an existing liability. Such intention can be gathered from the nature of the admission. In other words, the admission in question need not be express, or regarding a precise amount, but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as on the date of the statement. However, where an acknowledgement is in respect of a specified sum of

money or a specific right only, and not in general terms, it would extend the period of limitation only in respect thereof, and not of other claims which, though may have arisen out of same jural relationship, are not specified therein. In other words, where an acknowledgement of liability is made only with reference to a portion of the claim put forward by the plaintiff/ claimant, it would extend limitation only in respect of such portion, and not of the entire claim of the plaintiff.

138. Reverting to the case in hand, the minutes of meeting dated 19 April 2018 made no reference to the items referable to counterclaims (d) and (e). There is also no acknowledgment in general terms in regard to liabilities subsisting under the contract. Therefore, in our view, the said minutes could not be treated as an acknowledgment for the purpose of extending limitation of counterclaims (d) and (e), which were not specified therein. In consequence, when counterclaims (d) and (e) were otherwise barred by limitation on the date of filing of counterclaim, the Tribunal was legally justified in rejecting them as barred by limitation. Sub-issue (c) is decided in the aforesaid terms.

REJECTION OF PRAYER TO DECLARE DEBIT NOTES INVALID DID NOT AFFECT ENEXIO'S CLAIM FOR THE OUTSTANDING PRINCIPAL AMOUNT.

139. We shall now consider whether rejection of Enexio's prayer to declare debit notes invalid, had adversely affected the claim for the outstanding principal amount in respect of the goods supplied/ work done under the contract. In this regard, at the outset, we must bear in mind that it is trite that limitation bars the remedy but does not extinguish the right, save in a case which is covered by Section 27 of the 1963 Act[125]. It is equally settled that in a suit or a claim, multiple reliefs may be claimed by virtue of Order II Rule 3 of the Code of Civil Procedure, 1908[126] , that is, the plaintiff may unite in the same suit several causes of action against the same defendant(s). The period of limitation is prescribed by the Schedule to the 1963 Act[127]. The Schedule to the 1963 Act is divided into three Divisions. The First Division, which deals with suits, is relevant for the purposes of this case inasmuch as by virtue of Section 43 (1) of the 1996 Act the provisions of the 1963 Act apply to arbitrations as they apply to proceedings in Court. The First Division of the Schedule comprises of ten (X) Parts. Each Part deals

[125] Prem Singh & Ors v. Birbal & Ors., (2006) 5 SCC 353, paragraphs 11 and 12.

[126] **Order II Rule 3, CPC.— Joinder of causes of action.—** (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matter at the date of instituting the suit.

[127] See Section 2(j) of the Limitation Act, 1963.

with suit(s) of a different nature. The period of limitation, including its start point, is dependent on its nature as well as event, if any, as specified in the Article(s) of the Schedule. Therefore, when CPC, in certain circumstances, permits combining in one action two or more distinct and independent claims, it is quite possible that one of the claims may be barred by limitation and the other may be within time[128].

140. In the instant case, as already held, the claim for compensation i.e., recovery of outstanding principal amount was covered by Article 55 of the Schedule and the start point of limitation was 19 March 2016; whereas for the relief of declaration, Article 58 was applicable. For which, the start point of limitation was the date when the debit note was communicated to Enexio i.e., the claimant. According to the arbitral tribunal, one debit note was issued on 24 August 2015, which was acknowledged by the claimant *vide* letter dated 28 August 2015, and the other was issued on 12 January 2016. Therefore, the period of limitation i.e., three years expired before 2 May 2019, that is, when request for arbitration was received by ICC Secretariat. In these circumstances, the relief for declaratory relief was held barred by limitation, and rightly so, by the arbitral tribunal.

[128] See Mohamed Ghasita v. Siraj-ud-Din and Ors. (supra), extracted in paragraph 97 of this judgment.

141. Now, the question is whether rejection of declaratory relief impacted the relief for compensation. Answer to it, in our view, is obviously no. The reason is that the relief for compensation was not a consequential relief i.e., dependent on debit note(s) being declared invalid because issuance of debit note(s) was a unilateral act of the employer which on its own did not extinguish the right of the contractor. No doubt, where the relief sought is consequential to the declaration, and declaratory relief is found barred by time, the prayer for consequential relief will also fail[129]. But where declaration is just an optional relief i.e., on which the main relief is not dependent, rejection of it as barred by limitation would not extinguish the claim in respect of which substantive relief is sought. In the instant case, debit note was unilaterally issued by the employer of the contractor. It, therefore, did not bind the contractor. In such circumstances, it was open for the contractor to sue for its dues without seeking a declaration *qua* the debit notes. Consequently, rejection of the declaratory relief as barred by limitation, in our considered view, did not have a material bearing on Enexio's claim against the appellant(s) herein for the outstanding principal amount payable under the contract. And, further, that amount, as shown debited in the debit note(s), was not to be automatically adjusted against the principal outstanding amount payable to Enexio. In our

[129] See Padhiyar Prahladji Chenaji v. Maniben Jagmalbhai & Ors., (2022) 12 SCC 128, paragraph 17

view, while deciding the claim of Enexio, the arbitral tribunal was well within its remit to adjudicate upon the issue whether such amount should be adjusted or not against the outstanding principal amount payable to Enexio. For the reasons aforesaid, there is no perversity in the award on this count. Sub-issue (d) is decided accordingly.

THE ARBITRAL TRIBUNAL DID NOT ADOPT DIFFERENT YARDSTICK / REASONING OF THE ARBITRAL TRIBUNAL IS NOT FLAWED OR PERVERSE

142. The next argument on behalf of the appellant(s) is that the arbitral tribunal adopted different yardstick for adjudicating the claim than what was adopted for the counterclaim; and the reasoning is completely flawed and perverse. By referring to paragraphs 16.03 (d)[130] and 16.04[131] of the award it was submitted:

> (a) If negotiations could extend limitation for the claim, it would extend limitation for the counterclaim as well, because both arise from same contractual relationship. Moreover, it is well settled that negotiations by themselves do not extend limitation as held by this Court in **Geo Miller (supra)** and **B & T AG (supra)**.

[130] See paragraph 15 of this judgment wherein paragraph 16.03(d) of the award has been extracted.
[131] See paragraph 16 of this judgment wherein paragraph 16.04 of the award has been extracted.

(b) If the minutes of meeting dated 19 April 2018 could be relied on to hold that appellant(s) had admitted their liability *qua* the claim for the outstanding principal amount, it ought to have been relied also for upholding Enexio's liability *qua* liquidated damages for delay and customs duty.

143. At first blush, the above arguments appear attractive, but, when we test them by reading the award in its entirety, we find that the tribunal did not reject the counterclaims *qua* liquidated damages and custom duties as barred by limitation. Rather, rejected them on merit. Liquidated damages were denied because Enexio was entitled to 539 days extension for completion; and customs duties were found payable by the purchaser. The findings thereon are based on construction of the terms of the contract with reference to the conduct of the parties, therefore, it does not call for interference under Section 34 of the 1996 Act.

144. As far as extension of limitation by negotiation is concerned, a careful look at paragraph 16.03(d) of the arbitral award would indicate that there is a reference to two more aspects, 'apart from meaningful negotiations', to conclude that limitation for the claim was saved. These are: (a) the minutes of meeting dated 19 April 2018; and (b) the written offer of OPG (respondent(s) to the claim)

dated 26 May 2018 to settle the matter. We have already found, while deciding sub-issues (b) and (c), that the minutes of meeting dated 19 April 2018 tantamounted to an acknowledgment under Section 18 of the 1963 Act *qua* the items mentioned therein. We also noticed that it carried no mention regarding those items on which counterclaims were based, and therefore, they were rejected as barred by limitation. In these circumstances, though paragraph 16.03(d) of the award gives the impression that limitation was extended because negotiations were ongoing in respect of items related to the claim, the limitation was extended by applying the principle of acknowledgment as enshrined in Section 18 of the 1963 Act on basis of two documents i.e., the minutes of meeting dated 19 April 2018; and the offer letter dated 26 May 2018. Importantly, the principle of extension of limitation by acknowledgement was applied in respect of only those claims regarding which a mention was there in the minutes of meeting dated 19 April 2018. In respect of claims regarding which there was no recital in the minutes, the tribunal observed that they were not part of the negotiations. Thus, though the term used in paragraph 16.03(d) of the award is 'negotiation(s)', the tribunal, by referring to minutes dated 19 April 2018 and settlement offer dated 26 May 2018, indicated the underlying legal principle / rationale behind its conclusion. We, therefore, conclude that though reasons recorded in the award at first blush appear insufficient, or

a bit confusing, but, when those reasons are examined in the context of the documents placed and the arguments advanced, the underlying reasons, which form basis of the conclusion, are not only intelligible but sound. For the aforesaid reasons and in the light of the law expounded in paragraph 71.6 above, we reject the submission of the appellant(s)' counsel that the reasoning of the arbitral tribunal is flawed/perverse or that the award is vitiated by adopting different yardstick for adjudging the claim than what was adopted for the counterclaim. Even otherwise, the mistake, if any, committed by the arbitral tribunal in using the words 'ongoing negotiations' in place of acknowledgement is trivial does not go to the root of the matter as to have a material bearing on the conclusion. Therefore, for this mistake alone, the award is not liable to be set aside.

145. The other submission on behalf of the appellant that the arbitral tribunal was obliged to accept the admission contained in the minutes of meeting dated 19 April 2018 *qua* liquidated damages and customs duties, because it relied on it for extending the limitation, is equally unacceptable. Reason being that acknowledgment is just a piece of evidence, like an admission. An admission can always be explained. Therefore, even if it is used for extending the limitation, it cannot be regarded as conclusive proof of either the claim or the counterclaim regarding which there is an acknowledgement. Because

the Court or the Tribunal would have to decide the claim or the counterclaim, if within limitation, upon consideration of the entire evidence led before it. No doubt, in that process, the acknowledgement would also have to be considered as a piece of evidence. Thus, in our view, the tribunal was well within its jurisdiction in drawing a conclusion, based on consideration of the entire evidence, at variance with the recitals in the acknowledgement.

146. Otherwise also, as is clear from the award, the claimant had challenged the recital in the minutes i.e., regarding its liability for liquidated damages and customs duties, by claiming that it was economically coerced into making such admission. Circumstances, proven on record, indicated that (a) soon after the meeting dated 19 April 2018, the claimant had sent a denial of its liability; and (b) later, on 26 May 2018, the appellant(s) herein had made an offer of Rs.3 crores to Enexio towards full and final settlement of all its claim. In these circumstances, based on the evidence led by the parties, the tribunal was well within its remit to conclude that the claimant was not liable in respect of those items which formed part of the counterclaim. Such conclusion, which is based on proven circumstances, is a plausible view and cannot be termed perverse. Hence, it is not amenable to interference in a challenge under Section 34 of the 1996 Act. In our view, therefore, the learned Single Judge of the High Court erred in law while interfering with the arbitral award.

147. Before closing discussion on the issue, it would be necessary to address an alternative submission raised on behalf of the appellants. It was argued that the learned Single Judge and the Division Bench of the High Court, admittedly, were exercising jurisdiction under Sections 34 and 37, respectively, of the 1996 Act. As, while exercising jurisdiction under Section 34, the Court does not sit in appeal over the award, it cannot substitute the reasoning in the award with its own. Likewise, the appellate court exercising power under Section 37 cannot have greater power than what a Court possesses under Section 34. Consequently, it was argued, the appellate court (i.e., the Division Bench of the High Court) exceeded its jurisdiction while providing its own reasons to support the conclusion in the award. It was also urged that in absence of proper reasons in the award, the only course available was to set aside the award with liberty to the parties to undertake fresh arbitration.

148. We have given due consideration to the above submission. In our view, a distinction would have to be drawn between an arbitral award where reasons are either lacking/unintelligible or perverse and an arbitral award where reasons are there but appear inadequate or insufficient[132]. In a case where reasons appear insufficient

[132] See paragraphs 71.2 to 71.6 of this judgment.

or inadequate, if, on a careful reading of the entire award, coupled with documents recited/ relied therein, the underlying reason, factual or legal, that forms the basis of the award, is discernible/ intelligible, and the same exhibits no perversity, the Court need not set aside the award while exercising powers under Section 34 or Section 37 of the 1996 Act, rather it may explain the existence of that underlying reason while dealing with a challenge laid to the award. In doing so, the Court does not supplant the reasons of the arbitral tribunal but only explains it for a better and clearer understanding of the award.

149. In the instant case, the appellate court took pains, and rightly so, to understand and explain the underlying reason on which the claim of Enexio was found within limitation. As noticed above, paragraph 16.03 (d) of the award contains the reason based on which the arbitral tribunal concluded that Enexio's claim was within limitation. However, in paragraph 16.03 (d), the arbitral tribunal failed to state, in so many words, that it was treating the minutes of meeting dated 19 April 2018 as an acknowledgment within the meaning of Section 18 of the 1963 Act. This omission on the part of the arbitral tribunal was trivial and did not travel to the root of the award, therefore, in our view, the appellate court was well within its jurisdiction to explain the underlying legal principle which the arbitral tribunal had applied; and in doing so, it did not supplant the reasons provided in the award. In

this view of the matter, the impugned order of the Division Bench does not suffer from any legal infirmity. Sub-issue (e) is decided in the aforesaid terms.

SUMMARY OF OUR CONCLUSIONS

150. In the light of the analysis above, we summarize our conclusions as follows:

(i) Though the ACC Unit /project was of OPG, Gita Power, as the holding company of OPG, had actively participated in the formation of the contract for the project. Not only did it place purchase order(s) on Enexio but made advance payment(s) thereunder to Enexio, which were subsequently affirmed by OPG. The two, therefore, not only acted as a single economic entity but as agents of each other. Hence, the arbitral tribunal was justified in holding that Gita Power was bound by the arbitration agreement and jointly and severally liable along with OPG to pay the awarded amount.

(ii) The claim of Enexio was an indivisible claim for compensation in lieu of goods supplied, and work done, based on breach of the contract, therefore limitation for the claim was governed

by Article 55, and not by Articles 14, 18 and 113, of the Schedule to the 1963 Act.

(iii) The claimant's claim for the outstanding principal amount matured on 19 March 2016. Therefore, limitation started to run from that date. However, even if we count limitation from 21 September 2015 (as found by the Tribunal) it will have no material bearing on the award for the reason indicated below.

(iv) The limitation for the claim as well as counterclaim(s), other than those relating to cost of repair/replacement of gear boxes and fan modules, stood extended, under Section 18 of the 1963 Act, on the basis of acknowledgement made in the minutes of meeting dated 19 April 2018, and, therefore, those were within limitation as on the date of : (a) commencement of arbitration (i.e. 2 May 2019); and (b) the date of filing counterclaim (i.e. 15 July 2019) and were rightly considered on merit.

(v) The counterclaims *qua* cost of repair /replacement of gear boxes and fan modules were rightly held barred by time as in respect thereof there was no recital in the minutes of meeting dated 19 April 2018.

(vi) Rejection of prayer to declare debit notes invalid, on ground of limitation, had no adverse impact on the claimant's claim for compensation, which was well within the extended period of limitation.

151. Based on our conclusions above, we are of the view that there is no palpable error in the arbitral award as to be termed 'patently illegal' / 'perverse', or in conflict with public policy of India. Therefore, the Division Bench of the High Court was justified in setting aside the judgment and order of the Single Judge and restoring the arbitral award. Accordingly, the appeal(s) fail and are hereby dismissed. Parties to bear their own costs.

152. Pending application(s), if any, stand disposed of.

.....CJI.
(Dr. Dhananjaya Y. Chandrachud)

.....J.
(J B Pardiwala)

.....J.
(Manoj Misra)

New Delhi;
September 20, 2024