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

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Date of decision: 24.08.2017

+ O.M.P. (COMM) 76/2016

GE T&D INDIA LIMITED

Through

..... Petitioner
Mr.Tejas Karia, Mr.Surjendu Sankar
Das & Mr.Siddhanth Kochhar,
Advocates

Versus

RELIABLE ENGINEERING PROJECTS

Through

..... Respondent
Dr.Amit George, Advocate (*Amicus
Curiae*)

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. The present petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'Act'*) seeking to impugn the award of the arbitral tribunal dated 22.11.2015.
2. Some of the relevant facts are that the Government of India awarded the work of installation of the Jhajjar Power Plant to Aravali Power Company Pvt. Ltd (*in short "APC"*) a joint venture between NTPC and other two companies. APC awarded a turnkey project for erection and commissioning of Power Transformer Package to the petitioner. On 08.09.2009, the petitioner issued a purchase order to the respondent for a contract for value of Rs.1,20,00,000/- for certain works being part of the work awarded to the petitioner by APC. On 27.11.2012, it is stated by the petitioner that due to change in their SAP system, the purchase order was re-

issued against the balance/remaining works. The said purchase order issued in favour of the petitioner was amended subsequently on two occasions. The petitioner states that the respondent failed to complete its obligation.

3. It is further pointed out that on 18.12.2013 the respondent sent a letter to APC making various allegations against the petitioner. It was contented by the respondent that the petitioner was liable to pay to the respondent a) Extra claim of Rs.26,00,000/-; b) Overrun charges of Rs.1,38,00,000/-; and c) Compensation against damage of testing and other equipments in fire.

4. On 20.02.2015, the respondent is said to have filed a claim petition before the Facilitation Council constituted under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the MSME Act) claiming a) Rs.26,29,375/- towards extra dragging work; b) Rs.1, 38,00,000/- towards additional expenses for services provided in the extended period of the project; and c) Compensation for damage of equipments in fire of Rs.30,00,000/-.

5. Under Section 18 of the MSMED Act, a party to a dispute with regard to any amount due under Section 17 of the Act may make a reference to the Micro and Small Enterprises Facilitation Council (hereinafter referred to as Council). The Council may thereafter either itself or through an institution or centre conduct conciliation proceedings in terms of Section 65 to 81 of the Arbitration and Conciliation Act, 1996. Under Section 18(3) of the MSME Act where conciliation is not successful or stands terminated without any settlement, the Council can either itself or through an institution take up the dispute for arbitration and the provisions of the Arbitration and Conciliation Act, 1996 would apply.

6. The Facilitation Council on 20.02.2015 registered the claim of the

respondent, and passed an order recording filing of the claim by the respondent for conciliation proceedings. On 10.03.2015 the Facilitation Council was pleased to direct the parties to attempt settlement of the matter and issued notice to the petitioner. On 25.03.2015, the petitioner acknowledged the receipt of the notice dated 10.03.2015 and requested for two weeks time for appropriate representation. The request of the petitioner was accepted by the Council on 10.04.2015. Thereafter proceedings took place before the Council on 11.05.2015. The petitioner on 06.06.2015 sent a detailed representation under Section 65 of the Act including a challenge to its jurisdiction.

7. On 29.06.2015, the Council chose to terminate the conciliation proceedings for claim No.1 against the petitioner pertaining to payment of Rs.26,29,375/-. Noting that the petitioner has not appeared nor filed its written statement, the Council chose to proceed with the proceedings under Section 25 of the Arbitration and Conciliation Act and passed an award for Rs.26,29,375/- in favour of the respondent plus interest keeping the balance two disputes open for conciliation. The Award made on 29.06.2015 was signed on 18.10.2015.

8. On 01.07.2015, the petitioner wrote a letter to the Council reiterating its challenge to the jurisdiction of the Council. Various other objections of the petitioner were stated. It was also pointed out to the Council that the order dated 29.06.2015 has been passed without giving an opportunity to the petitioner to present its case in violation of the principles of natural justice. On 14.07.2015, the respondent filed its para wise rejoinder to the petitioner's representation dated 06.06.2015. On 16.07.2015, the Council took cognizance of an affidavit filed by the respondent seeking a

consolidated award of Rs.1,94,81,875/- and retained its decision made on 29.06.2015.

9. Thereafter, on 13.08.2015 the Council decided to terminate the conciliation proceedings with regard to the second claim regarding extra work done amounting to Rs.1,38,52,500/- on the same basis as done vide order dated 29.06.2015. It passed an award in favour of the respondent for payment of the second claim of Rs.1,38,52,500/- plus interest keeping the third dispute regarding the claim of the respondent for recovery of Rs.30 lakhs open for conciliation. The order made on 13.08.2015 was also signed on 18.10.2015. Hence, including interest a total award of Rs.72,10,891/- + Rs.3,62,75,954/- has been passed in favour of the respondent and against the petitioner. The fate of the third dispute for recovery of Rs.30 lakh is not known.

10. I may note that under Section 19 of the MSME Act, no application for setting aside a decree or award made by the Council shall be entertained by any court unless the appellant has deposited 75% of the amount in terms of the Award. On the issue of applicability of Section 19 of the said Act, this court on 15.02.2017 passed a judgment negating the plea of the petitioner that MSME Act does not apply and directed the petitioner to deposit 75% of the awarded amount in court. In compliance of the said directions, the payment has been deposited in court by the petitioner.

11. I have heard learned counsel for the parties.

12. Learned counsel for the petitioner has taken me through various orders passed by the Council to contend that after having closed the conciliation proceedings, the Council has without affording an opportunity to the petitioner has on that date itself passed an award against the petitioner

on two of the disputes. He submits that having closed the conciliation proceedings, the Council was obliged to afford an opportunity to the petitioner to file a reply and documents to the claim petition and to submit its defence and make submissions to the Tribunal before any award could be passed. He has also taken me through the two documents relied upon in the Award, namely, the Minutes of the meetings held between the parties on 01.05.2013 and 28.12.2013 to contend that the entire assumption in the award that the claim of the respondent is not disputed is erroneous, as a reading of the Minutes of the two meetings does not show any admission by the petitioner. Hence, he submits that the award is liable to be set aside having been passed without an opportunity to the petitioner. He relies upon the judgment of the Bombay High Court in the case of ***Maharashtra State Road Transport Corporation vs. M/s Super Fine Extrusions Pvt. Ltd., 2016 SCC OnLine Bom 9615*** to support his contention.

13. Learned Amicus Curiae appearing for the respondent has however submitted that on the facts of the case, it is apparent that there was no dispute or controversy regarding the amount payable to the respondent as stipulated in the award. He stresses that the Council has merely noted that there is no dispute about the fact that the said payment is payable to the respondent and has noted the stand of the petitioner that unless the principal, namely, APC makes the payment, no payment could be released to the respondent. He further submits that in light of these facts, no prejudice was caused to the petitioner by the procedure followed by the Council. He relies upon the judgment of the Supreme Court in the case of ***Sohan Lal Gupta & Ors. Vs. Asha Devi Gupta & Ors., (2003) 7 SCC 492*** to support his submissions.

14. The main plea raised by the petitioner is that it was not given an opportunity to file its defence or documents and make its submission in the arbitration proceedings. I may first see the manner in which the Council has conducted the proceedings. Pursuant to the filing of the claim petition by the respondent on 20.02.2015, the Council passed an order registering the claim. On 10.03.2015, the Council was pleased to direct the parties to attempt a settlement. On 25.03.2015, the petitioner wrote a communication to the Council seeking two weeks' time for filing appropriate representation. On 10.04.2015, the Council granted time to the petitioner. On 29.04.2015, the Council on the request of the petitioner fixed 11.05.2015 for Conciliation Proceedings. On 11.05.2015, the Council recorded the arguments of the respondent and hence, directed the petitioner to invite the respondent for mutual disposal of the case by Conciliation and to inform the Council accordingly.

15. The translated copy of the order dated 11.05.2015 reads as follows:-

“Petitioner Sh. Virender Kumar Verma and learned counsel Sh. Ashish Gupta for opposite party are present. Sh. Gupta submitted the application that they shall submit their Vakalatnama before next meeting. The office informed the council that on the bases of conciliation application of opposite party dated 20.02.2015, the case has been enlisted for conciliation today. The opposite party has present before council without conciliation proposal.

Petitioner informed that opposite party had supplied the transformer to NTPC and had handed over the extra work of dragging to petitioner, for which payment of Rs. 26.00 lac is pending on opposite party. Besides this, Rs. 1.38 crores is outstanding on opposite party no. 1, for which opposite party has to make back-to-back payment to petitioner after receiving it from NTPC, i.e. when NTPC shall clear the payment of opposite party, then opposite party shall release the payment of the petitioner. Petitioner has also signed a M.O.M. with opposite no.1 in the meeting, which is not followed by

the opposite party. Petitioner informed the council that copy of M.O.M. has been filed alongwith the reference.

The counsel for opposite party produces the statement that they have not received any direction from the company and they are desirous of conciliation in this suit. The council ordered the opposite party to invite the petitioner for the mutual disposal of case by conciliation and inform the council.

The office also inform the council that opposite party no. 3 New India Insurance Company submitted an application in which it has requested to provide addition time of four weeks for submitting the written statement. The council accepted the application of the opposite party no. 3 and directed that it should submit the written statement/objection within two weeks alongwith affidavit and also send copy to other parties. The certified copies of this order should be dispatched to each party for the compliance.”

16. Thereafter, the petitioner on 06.06.2015 gave a detailed representation under Section 65 of the Act putting forth its contention that the Council does not have the jurisdiction to enter into the claim or counter claim of the petitioner and to adjudicate it. The representation further states that with regard to any proposal by the respondent in relation to the conciliation proceedings, the petitioner is willing to take instructions and comply with the orders of the Council.

17. Thereafter, the order of 29.06.2015 was passed by the Council. There are two documents prepared pursuant to the proceedings held on 29.06.2015. One is record of the proceedings that took place on the said date. Second document is an award which is dated 29.06.2015 but is signed on 18.10.2015. The record of the proceedings held on the said date records the presence of Sh.Arun Mehta and one other person on behalf of the petitioner. It also records that Sh.Mehta has prayed that Council may provide more time to try out conciliation, which request was rejected by the Council. The

said document then records that the Council has heard the statements of the respondent in detail. The petitioner had not produced any suitable proposal for conciliation nor submitted any written statement/objection. Hence, it notes that the Council has decided to issue an award with respect to the liability of the Rs.26,29,375/- for extra digging work.

18. The second document dated 29.06.2015 is the Award dated 29.06.2015/18.10.2015 which holds that none has appeared for the petitioner for the conciliation proceedings and no written statement has been filed by any of the parties. Accordingly, it chooses to terminate the conciliation proceedings for claim No.1 for extra work of dragging of power transformers and keep the other two claims open for conciliation. It framed three issues. On jurisdiction, the Council holds that the Council at Kanpur has jurisdiction. On the second issue, it notes the Minutes of the meetings between the parties dated 01.05.2013 and 28.12.2013 and concludes that the petitioner does not appear to have taken steps to realise the money from NTPC and hence has violated Section 15 of the MSME Act, 2006. It also concludes that there is no dispute about the liability of the petitioner to pay the amount. It passes an award in favour of the respondent for Rs.26,29,375/- plus interest of Rs.45,81,516/- under Section 16 of the MSME Act being a total of Rs. 72,10,891/-. As noted above, the Award is dated 29.06.2015 but was signed on 18.10.2015. On 22.11.2015 another document is signed based on the some calculation made by the Additional Statistical Officer which shows that the total award amount is Rs. 72,10,891/-.

19. On receipt of the aforesaid communication, the petitioners has protested in its communication dated 01.07.2015 where apart from other

grievances, it was pointed out that on 29.06.2015, the petitioners had entered appearance through an authorised proxy counsel as the arguing counsel was unable to attend since he was out of station on account of court vacation. The representation further notes that refusal to grant an adjournment and the decision to adjudicate claim No.1 without giving an opportunity to the petitioner to submit its defence renders the order illegal as it is passed in violation of the principles of natural justice. There has been no effective hearing.

20. On 16.07.2015 the Council on a petition submitted by the respondent praying for a composite award reiterates that the Council retains its Award dated 29.06.2015. Thereafter, the matter was fixed before Council on 13.08.2015 where again similar type of proceedings were held namely on claim No.2 of the respondent, the Council terminated the Conciliation Proceedings and on the same date, without intimation or an opportunity to the petitioner stating that arbitration proceedings have commenced and that it may file its defence passed an award terming it as Award Part-II. The Council in the award after noting some of the facts terminated the conciliation proceedings with regard to the claim for payment of Rs.1,38,52,500/- of the respondent keeping the third dispute i.e. the claim of the respondent regarding payment of Rs.30 lakhs open. It framed four issues. On issue No.1 pertaining jurisdiction, the Council held that it would proceed with the matter. On issue No. 2 as to whether the petitioner is liable to make the payments, the Council again relied upon the Minutes of the meetings dated 01.05.2013 and 28.12.2013 to conclude that there is no dispute regarding the liabilities of the petitioner and the petitioner is liable to pay Rs.1,38,52,500/- plus interest. The interest was quantified at

Rs.2,24,23,454/-. An award for a total Rs. 3,62,75,954/- was passed on 13.08.2015 though signed on 18.10.2015. There is another signed page dated 22.11.2015 giving calculation by the Additional Statistical Officer quantifying the award for claim No.2 at 3,62,75,954/- including interest.

21. It is quite clear that the said award has been passed without the written statement or defence of the petitioner on record.

22. We may first look at the procedure for conciliation under the Arbitration Act which is contained in Chapter III. Sections 65 and 67 of the Act reads as follows:-

“65. Submission of statements to conciliator.—

(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate. Explanation.—In this section and all the following sections of this Part, the term “conciliator” applies to a sole conciliator, two or three conciliators as the case may be.”

“67. Role of conciliator.—

(1) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade

concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.”

Hence, the conciliator may request each party to submit brief written statement describing the general nature of the disputes and points at issues. He has to assist the parties thereafter in reaching an amicable settlement.

23. Section 76 of the Act deals with termination of the conciliation proceedings which reads as follows:-

“76. Termination of conciliation proceedings.—The conciliation proceedings shall be terminated—

(a) by the signing of the settlement agreement by the parties on the date of the agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.”

24. Hence, a conciliator may terminate the proceedings by a written declaration of the conciliator stating that conciliation is no longer justified.

25. Section 23 of the Arbitration Act reads as follows:-

“23. Statement of claim and defence.—

(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.”

26. Hence, after the Arbitrator enters reference within the time period either agreed by the parties or determined by the Arbitral Tribunal, the respondent will state his defence. The parties may also submit all their documents which they consider to be relevant along with their defence. It is manifest that the Arbitral Tribunal would have to in the absence of any agreement to the contrary grant sufficient time to the parties/respondent to states its defence/file documents in support of its defence.

27. The curious procedure followed by the Council in the present case shows that the Council has on both the dates when it passed the Award i.e. 29.06.2015 and 13.08.2015 chosen to terminate the conciliation proceedings and on the same date, has chosen to commence and conclude the arbitration proceedings and pass an award in favour of the respondent. It is clear that the Council has not followed the procedure as provided under Section 23 of the Act. Without giving an opportunity to the petitioner to file its statement of defence for the arbitration proceedings and to file its documents in

support of its defence or giving an opportunity to make its submissions, the Council has passed an award against the petitioner. Clearly grave prejudice was caused to the petitioner by the procedure followed by the Council and the undue haste shown by it to pass an Award.

28. Reference may also be had to Section 18 and Section 34 of the Arbitration Act which read as follows:

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

“34. Application for setting aside arbitral award. —

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

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

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

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

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the

parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

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

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

Explanation. —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.

.....”

29. The Supreme Court in the case of *Associate Builders vs. DDA*, AIR 2015 SC 620 held as follows:

Fundamental Policy of Indian Law

“Coming to each of the heads contained in the Saw Pipes judgment, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.”

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

The Audi Alteram Partem principle which undoubtedly is a

fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act.”

30. Reference may also be had to the judgment of the Calcutta High Court in the case of ***Agriculture Finance Co. Ltd. vs. Micro & Small Enterprises Facilitation Council, 2013 SCC OnLine Cal. 22786***. That was also a case in which there was an allegation that the Council had acted in violation of the principles of natural justice. That was also a case where the Council had terminated the conciliation proceedings but no notice was issued to the petitioner therein that the council would arbitrate upon the disputes between the parties and publish the award.

“9. If the Council took the petitioner’s silence in the matter following the meeting of January 2, 2011 to be the petitioner’s refusal to accept the conciliation, the Council ought to have issued a notice to the petitioner indicating the Council would take upon itself to arbitrate upon the disputes between the parties. In the Council not having adopted such procedure, there has been a complete violation of the principles of natural justice and the petitioner’s right to be heard in the matter.”

31. Reference may also be had to the judgment of the Supreme Court in the case of ***Oil and Natural Gas Corporation Ltd. Vs. Western Geco International Ltd., AIR 2015 SC 363*** where the Supreme Court held as follows:-

“28. Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural justice is that the Court/authority deciding the matter must apply its mind

to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the Court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law.

32. Reference may also be had to the judgment of the Division Bench of this court in the case of ***Power Grid Corporation of India Ltd. Vs. Electrical Mfg. Co. Ltd. And NTPC Ltd., 153(2008) DLT 440*** where the Division Bench held as follows:-

“17. Considering the above backdrop, we are of the view that the Arbitrators have unnecessarily acted in haste in concluding the arbitral proceedings. Once the appellant had appeared before them, the least they should have done was to afford some reasonable time to the appellant to file its objections to the statement of claim filed by the respondent EMC. The Arbitrators also could have given a peremptory notice to the appellant before proceeding ex parte against them. Even after proceeding ex-parte against the appellant the Arbitrators still could have called upon them to cause appearance in the matter. Although, the applicability of the principle of audi alteram partem depends on the facts of each case and in a given case the parties may be required to show as to what prejudice has been caused to its rights due to non-observance of principles of natural justice, yet keeping in view the sanctity and primacy of this basic and equitable principle, it is expected of every judicial and quasi judicial authority to always give due primacy and make a serious endeavour that the sacrosanct principles of audi alteram partem are duly observed in letter and spirit. The mechanism of arbitration came to be evolved for providing speedier justice to the parties, especially in commercial transactions where monetary stakes of the parties are sometimes very high and an

inordinate delay in the disposal of arbitration matters could prove fatal and ruinous. However, at the same time the cardinal principle of giving a fair opportunity to the parties should not have been lost sight of by the adjudicatory body. The appellant had appeared on 9th April, 1993 as well as on 20th April, 1993, but they were not allowed to participate in the proceedings and thereafter within four days i.e. from 21.4.1993 to 25.4.1993 the same were concluded. We do not find any justification on the part of the Arbitrators to have rushed through the matter to conclude the proceedings without examining the version of the other side.

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23. For Constituting a reasonable opportunity, the following conditions are required to be observed:

1. Each party must have notice that the hearing is to take place.
2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.
3. Each party must have the opportunity to be present throughout the hearing.
4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.
5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.
6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.

18. Indisputably, the arbitrators would in law neglect their duty if they do not listen to one party who might be interested either in controverting or who is legally entitled to controvert the claim of the party approaching them. Similarly, the person who is to be

affected by the evidence ought to be present to hear it so that he would be able to meet and answer it. The arbitrator is ordinarily free from the fetters of procedural law but that does not make him free from the fundamental principles of justice. Though the arbitrator may not strictly follow the rules and procedures as observed by the Civil Court but at the same time it would not imply that the Arbitrary Tribunal can ignore or circumvent the principles of natural justice and fair procedure. The omission in giving notice to a party before proceeding ex-parte is a serious irregularity in the procedure and amounts to misconduct. It is a salutary principle of natural justice that nobody should be condemned unheard.

19. In Halsbury's Laws of England, Fourth Edition, Vol. 2 Page 590 page 306 it has been stated as under:

Where the arbitrator proposes to proceed with the reference notwithstanding the absence of one of the parties, it is advisable that he should give that party distinct notice of his intention to do so. If reasonable excuse for not attending the appointment can be shown, the court will set aside an award made by an arbitrator who has proceeded ex parte.

20. In Russell on Arbitration, Nineteenth Edition page 271 the following passage appears.

Notice of intention to proceed ex parte:

In general, the arbitrator is not justified in proceeding ex parte without giving the party absented himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside. An ordinary appointment for a meeting with the addition of the word "Peremptory" marked on it is, however, sufficient.

If the arbitrator declines to proceed on the first failure to attend a peremptory appointment, and gives another appointment, he is not authorised to proceed ex-parte at

the second meeting, unless the appointment for it was also marked "peremptory" or contained a similar intimation of his intention.

21. The elementary Principle of Natural Justice implies a duty to act fairly i.e., fair play in action. The Principle of Natural Justice is not dogmatic in character and a duty is cast upon every adjudicatory body be it judicial or quasi judicial to strictly adhere to the Principle of Natural Justice unless such adherence is dispensed with under any particular Statute. The Rules of Natural Justice are although not embodied Rules, but the same afford minimum protection to the rights of any person against the arbitrariness of any authority be it judicial, quasi judicial or administrative whose decision involves any civil consequences or can affect the rights of an individual. The aim of Rules of Natural Justice is to secure justice or to put it in the negative to prevent miscarriage of justice.”

33. It is clear that the impugned award has been passed contrary to the principles of natural justice without affording any reasonable opportunity to the petitioner to file its defence and make its submissions on the merit of the case. Acting with undue haste, the Council has chosen to terminate the conciliation proceedings and on the same date chosen to start the arbitration proceedings and without calling upon the petitioner to file its defence has concluded the arbitration proceedings on the same day. The procedure adopted by the Council is completely illegal and stands vitiated being contrary to the provision of the Arbitration Act and the principles of natural justice.

34. Apart from the fact that no opportunity was given or notice was issued to the petitioner to inform that the arbitration proceedings has commenced, another curious feature appears from the record of the arbitration

proceedings. A perusal of the award dated 29.06.2015 shows that the hearing on 29.06.2015 records that none has appeared for the opposite party and no written statement has been filed and seeks to proceed under Section 25 of the Arbitration Act and pass an award. The award dated 29.06.2015 records as follows:-

“Despite sufficient service of notices on the opposite parties inviting them for conciliation by amicable settlement between them, none appeared. No written statement has been filed by any of the opposite parties. Minutes of meeting dated 28.12.2013 Annexure-3 reveals that opposite party No. 1 was present in that meeting.

In the Circumstances we feel that we should take up the matter step by step. The chances of conciliation are bleak. However keeping in mind that swift Justice in the form of Arbitration should be kept open ended. It should not be unresponsive to cannons of Justice and Fair play. We, therefore, terminate conciliation for the basic claim against Alstom opposite party No.1 for 66 extra dragging of Transformers only and keep rest of the two claims still open for conciliation. We accordingly take up dispute for payment of Rs.26,29,375/- for Arbitration to present in the particular-circumstances of this case.

As none of the opposite party has appeared before us, nor filed any written statement, we proceed u/s 25 of the Arbitration and conciliation Act 1996 to decide the matter on merits.”

35. The Council has also issued a summary of proceedings that took place on 29.06.2015. The proceedings record that Sh.Arun Mehta, Advocate has appeared for the petitioner and has prayed for time to try conciliation. Relevant portion of the said document issued by the Council reads as

follows:-

“The above case has been submitted before the council today on date 29.06.2015. The Petitioner Sh. Virender Kumar Verma and two others are present. Learned counsel Sh. Arun Mehta and one other are present for opposite party no. 1 (ALSTOM T & D India Limited). Sh. Mehta prayed the council to provide more time to try for the conciliation, in the sequence of conciliation letters, which is rejected by the council.

Council perused the file. The opposite party, after compliance of notice, submitted the application for conciliation dated 25.03.2015 and 20.04.2015. In the last hearing, it was questioned from the present counsel for opposite party Sh. Ashish Gupta about the progress of conciliation, then Sh. Gupta informed that he has not received any directions from the company. On this statement of Sh. Gupta, it was directed to the opposite party that they should invite the petitioner for the mutual disposal of case by conciliation and inform the result to the council, but opposite party did not ensure the compliance of above orders and today also, the opposite party is present before council without any conciliation proposal. (Emphasis added)

xxx

The council heard the statements of petitioner in detail. The opposite party has neither produced any suitable proposal for conciliation nor submitted any written statement/objection. Taking the delay in disposal of reference into account, council has decided to issue award under the provisions of Act 2006 in relation to liability payment of Rs.26,29,375/- for ‘Extra Digging Work’. The copies of this order should be dispatched to parties.”

36. The Award on the face of it is recording erroneous facts regarding the presence of the petitioner. It makes a categorical statement that despite service of notice on the petitioner inviting them for conciliation, none has appeared and no written statement has been filed. In contrast, in the record

of the proceedings that has took place on 29.06.2015 which is the date on which the Award is purportedly passed though signed subsequently on 18.10.2015, the record categorically states the presence of Sh. Arun Mehta, Advocate for the petitioner. It also records his submission for giving some more time to finalize the conciliation proceedings. It is also a matter of fact that on 06.06.2015 a detailed representation has been filed by the petitioner under Section 65 of the Act in response to the conciliation proceedings initiated by the Council which was on record. There is no reference to this document/reply filed by the respondent.

37. The Award dated 29.06.2015/18.10.2015 is factually incorrect as it ignores the presence of the petitioner and proceeds erroneously under Section 25 of the Act. It is quite clear that the Council has passed the order with undue haste without following a fair procedure.

38. The other important aspect is the reliance of the Council in the Award on the Minutes dated 01.05.2013 and 28.12.2013. The two minutes reads as follows:-

“Minutes of Meeting held between Alstom and M/s. Reliable Engineering Projects and Marketing on 01.05.2013 at Alstom Naini Works

M/s. Alstom

1) Raja Ram

2) S.K.Swami

M/s. Reliable Engineering

1) Vijendra Verma

2) Amit Kumar

3) Harsh Kapil Verma

Following were discussed and agreed;

1. Payment of app. Rs.5 lacs against rework of 8 MVA (ST-1) and others has been processed and sent to finance will be released within a month time.

2. Against retention bills documents as per annexure-1 required to be submitted by Reliable. Considering the case sympathetically 50% amt. Apprx. 12.5 lacs will be released by Alstom, for balance 50% documents required to be submitted by Reliable.

3. Extra dragging charges will be processed as per existing rate Rs.875/- meter based on certification by Site Engineer and Project Manger within next 15 days time.

4. Total outstanding of Alstom appx. Rs 9.00 Crs is yet to be collected from NTPC, against ETC work and retention. M/S reliable to complete all the pending works as per various correspondence with NTPC.

5. List of documents as per annexure-1 to be submitted by Reliable max within next 15 days time at one time to proceed further.

6. Claim for over run charges shall be submitted jointly by REPM and Alstom to NTPC after completion of work.”

39. “Minutes of Meeting held between Alstom and M/s Reliable Engineering Projects and Marketing on 28.12.2013 at Alstom Naini work

M/s. Alstom
1) Raja Ram
2) S.K.Swami

M/s. Reliable Engineering
1) Vijendra Verma
2) Amit Kumar
3) Harsh Kapil Verma

1. M/s. Reliable visited Alstom Naini works on 27th to 28th Dec. 2013 regarding settlement of payments against work carried out at NTPC Jhajjar Site.

2. Contract of Rs.120 lacs (Taxes and duties extra) was placed on Reliable. Payment of Rs.11910000/- already made to Reliable. Uploading of One ICT carried out by Alstom from its transporter. Rs.90000/- on this account was adjusted from Reliable Account. All the payments which was due according to contract has been

released on M/s. Reliable. Reconciliation statement is attached as per Annexure 1

3. In addition to above payment of Rs.3.33 lacks and Rs.15 Thousands were also made against rework at site.

4. M/s. Reliable has claimed for Over Run Charges of Rs.138 lacs, extra dragging of Rs.26 lacs and also against insurance claim of Rs.30 lacs. Which can be considered only on “back to back” basis with NTPC/Insurance Company.

5. During the meeting it is decided that M/s Reliable and Alstom will approach NTPC for realization of above payment. Alstom will raise the invoice to NTPC for over run and Extra Dragging claim.”

40. The Council in its two Award dated 29.06.2015 and 13.08.2015 which are signed on 18.10.2015 has relied heavily on the above two minutes to interpret them as if the same tantamount to an admission of dues by the petitioner. In fact the learned Amicus Curiae who had appeared for the respondent relying upon the judgment of the Supreme Court in the case of ***Sohan Lal Gupta & Ors. Vs. Asha Devi Gupta & Ors.(supra)*** has pleaded that in view of these admissions by the petitioner, no prejudice was caused to the petitioner by the procedure that has been followed by the Council and an Award has been rightly passed by the Council.

41. In my opinion, the plea is misplaced. In ***Sohan Lal Gupta & Ors. Vs. Asha Devi Gupta & Ors.(supra)***, the Supreme Court has merely noted that the principles of natural justice cannot be put in a straight jacket formula. A reading of the minutes dated 28.12.2013 and 01.05.2013 cannot lead to any conclusion that the petitioner admits its liability.

42. Accordingly, it is clear that the Award suffers from manifest error and

is against the fundamental policy of Indian law. It is passed in complete breach of principles of natural justice without giving an appropriate opportunity to the petitioner. It is passed in violation of Sections 18 and 23 of the Act. It is passed without following the principles of natural justice. I quash the Award Part I and Part II.

43. It is true that the respondent is a small enterprise and has to suffer on account of the manner in which the proceedings have been conducted by the Council. In addition, it appears that the respondent has paid stamp duty of Rs.4.38 lacs on the award, which is a needless burden on the respondent. In the peculiar facts and circumstances of the case, I direct that the parties shall share the cost of the said arbitration proceedings. The share of the cost of the respondent is quantified at Rs.4 lakhs.

44. Liberty is granted to the respondent to take steps as per law for fresh adjudication of the disputes. The respondent will be entitled to the benefit of Section 43(4) of the Act

45. In terms of the order of this court dated 15.02.2017, the petitioner has already deposited 75% of the amount awarded by the Council in court. The petitioner shall be entitled to release of the amount with accumulated interest after deduction of Rs.4 lakhs which sum shall be paid to the respondent. The court would also like to place on record its appreciation for the efforts of Dr.Amit George, Advocate-Amicus Curiae in the matter.

46. The petition stands disposed of as above. All pending applications, if any, also stand disposed of.

JAYANT NATH, J.

AUGUST 24, 2017/v/rb