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

Reserved on: 6th March, 2017
Pronounced on: 21st April, 2017

+ **O.M.P. 853/2012**

ZUARI MAROC PHOSPHATE LTDPetitioner
Through: Mr. Ramesh Singh with Mr. A.T. Patra,
Advocates

versus

UNION OF INDIARespondent
Through: Mr. P.P. Malhotra, ASG with Mrs. Mamta
Tiwari, Ms. Sonia Malhotra Kumar and Mr. A.K.
Gautam, Advocates

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

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21.04.2017

1. Zuari Maroc Phosphate Ltd. ('Zuari') has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act') challenging the majority Award dated 9th May, 2012 passed by a three-member Arbitral Tribunal ('AT'), in the disputes between Zuari and the Respondent, Union of India, Department of Fertilizers, Ministry of Chemical & Fertilizers.

Background facts

2. The background facts are that Pradeep Phosphate Ltd. ('PPL') was incorporated in 1981 as a Joint Venture ('JV') in the ratio of 51:49 between the Republic of Nauru and the Government of India ('GoI'). Later the GoI

acquired the entire shareholding of the Republic of Nauru sometime in 1993-94.

3. PPL was referred to the Disinvestment Commission in July, 1998. In 2000-2001, GoI decided to disinvest 74% of its shares in the total restructured equity share capital in PPL to a 'strategic partner'. Deloitte Touche Tohmatsu India Pvt. Ltd. ('DTT') was appointed as Advisor for the said purpose. In 2001, GoI invited 'Expression of Interest' from various bidders through an International Competitive Bidding Process. On 8th February, 2002, Zuari submitted its bid based on the audited account of PPL for the year ending 31st March, 2001. It made an offer of Rs. 151.70 crores (@ Rs. 473.82 per share). As on 31st March, 2001, the net worth of PPL was around Rs. 1.15 crores. Its total liability was approximately Rs. 900 crores.

4. GoI accepted the above bid. A Share Purchase Agreement ('SPA') and a Shareholders' Agreement ('SHA') was executed between the parties on 28th February, 2002.

5. Article 3.4 of the SPA provided for 'Post Closing Adjustment'. (It may be noted that at various places in the impugned Awards of the majority and the minority as well as in the pleadings reference is made to 'Clause 3.4' whereas the SPA itself terms it as 'Article'. For the sake of uniformity in this judgment, the clauses of the SPA are referred to as 'Articles'). The objective behind Article 3.4 was to neutralize the effect of operation and business during the transitional phase between 31st March, 2001 and 28th February, 2002 so that neither party was a gainer nor a loser as a result of

the business operations conducted during the said period. Under Article 3.4(a) of the SPA, Zuari (described as a ‘Strategic Partner’) acknowledged that the value of the net assets, as reflected in the last balance sheet consequent upon restructuring, was Rs. 1,15,38,000/- which it accepted as true and correct. As per Article 3.4(b), within 90 calendar days following the ‘closing date’ (defined in Article 1.1 to mean the date on which closing occurs and is the later of (a) the date of the execution of the Agreement, or (b) the date mutually agreed to between the parties Zuari and PPL (described as a ‘Company’) were to cause an accounting firm jointly selected by the Government and Zuari to prepare and deliver to each of the strategic partners (i.e., Zuari and Maroc Phosphate SA, a company duly incorporated under the laws of Morocco) a statement showing in reasonable detail the computation of (i) the current and non-current assets of PPL, (ii) the current and non-current liabilities of PPL as of the close of business on the Closing Date and computed in a manner consistent with the computation of the current and non-current assets and the current and non-current liabilities of PPL reflected on the Last Balance Sheet and in accordance with the accounting principles used to complete the ‘2001 Net Assets Amount’ referred to as the ‘Closing Date Statement’. The sum constituting the difference between the current and non-current assets of PPL reflected in the ‘Closing Date Statement’ and the sum of the current and non-current liabilities of PPL reflected on the ‘Closing Date Statement’ was referred to as the ‘Closing Date Net Assets Amount’.

6. Under Article 3.4(c), the said determination was to be ‘final and binding on the parties’. Under Article 3.4(d), if the ‘2001 Net Assets Amount’

(already determined as Rs. 1,15,38,000/- in terms of Article 3.4(a) was greater than the 'Closing Date Net Assets Amount', then GoI was to pay Zuari an amount in Rupees, equal to the difference between the two multiplied by 0.74 and vice-versa. Under Article 3.4(e) of the SPA, the payment in terms of Article 3.4(b) was required to be made within 45 calendar days of the delivery of the Closing Date Statement by the Auditors to the parties.

7. On 15th April, 2002 Price Waterhouse Cooper ('PWC') was selected as the auditors jointly by Zuari and the GoI. On 17th June, 2002, a letter of engagement stating the scope of work was signed by both the parties. The format of the statement was also enclosed with this document.

8. On 22nd July 2002, PPL prepared and signed a financial statement / balance sheet for the period up to 28th February, 2002 at Bhubaneswar. On 23rd July, 2002, PWC prepared the requisite report. The Net Assets Amount in terms of this report as on 28th February, 2002 worked out to (-) Rs. 203,64,39,000/-. The total amount payable in terms of Article 3.4(d) by GoI to Zuari accordingly worked out to Rs. 151.55 crores. This payment had to be made within 45 days in terms of Article 3.4(e).

9. It appears that GoI was unhappy with the report of PWC and referred it to DTT for examination. In the meanwhile, on 30th September, 2002, PPL was declared a sick company, based on the accounts of the financial year ending 30th September, 2002.

10. On 11th October, 2002, Zuari agreed to the above exercise undertaken

by DTT without prejudice to its rights under the SPA/SHA. On 30th December, 2002, DTT submitted their report in terms of which the total Net Assets Amount worked out to (-) Rs. 168,86,41,000/-. In terms thereof, the amount payable by GoI to Zuari worked out to Rs. 125.81 crores. This report, too, was unacceptable to GoI. According to the GoI, DTT did not follow the principles set out in Article 3.4(b) of the SPA. From the side of Zuari, it is stated that DTT's report was never shared, much less discussed with it by GoI.

11. On 25th April, 2003, GoI appointed Patro & Co., the statutory auditors of PPL, to examine the accounts of PPL in the context of the report of PWC. On 27th May, 2003 Patro & Co. gave its report to GoI in which they observed that PPL had inflated and/or wrongly computed items relating to loss on subsidy from GoI, discretion in stock, purchase of credit goods, manufacturing expenses, administrative and other expenses, selling and distribution expenses, prior period adjustments etc. amounting to Rs. 71.36 crores.

12. On 23rd June, 2003 the report of Patro & Co. was discussed in a meeting between the representatives of Zuari, PPL, PWC, Patro & Co. and the Director of Finance, National Fertilizers Ltd. who was having additional charge as Chairman and Managing Director (CMD) of PPL. On 11th July, 2003, Zuari registered its objection to the further reference to Patro & Co. and maintained that the report of Patro & Co. was not binding on it.

13. On 26th December, 2003, a meeting was held between Zuari and the Secretary, Disinvestment, GoI. It was agreed that there would be a full audit

of PPL done by another independent auditor. According to Zuari, this was subject to the condition that the final amount would include interest as per the SPA/SHA. It was further accepted by Zuari that the fresh audit would be done without prejudice to their rights under the SPA/SHA. By its letter dated 29th December, 2003, Zuari proposed that the audit be conducted by KPMG, a renowned international firm of Chartered Accountants. It is insisted that the said accounting by KPMG should be final and binding on the GoI. After some negotiations on this aspect, the terms of KPMG's engagement were finalized and on 23rd November, 2004, KPMG confirmed that it would act pursuant to Article 3.4(b) of the SPA.

14. On 27th January, 2005, a draft report was prepared by KPMG and sent to both the parties for their comments and objections. While Zuari sent its comments/objections on 14th March, 2005, GoI did so on 8th June, 2005. After considering both objections, KPMG prepared its final report and issued it on 27th July, 2005. In terms of this report, the total Net Assets Amount worked out to (-) Rs. 189,82,34,000/- and the total amount payable to Zuari by GoI worked out to Rs. 141,32,31,280/-.

15. On 17th August, 2005, Zuari accepted the report and requested the Respondent to pay the said amount along with interest with effect from 7th September, 2002. The stand of GoI was that KPMG also did not adhere to the accounting principles of the preceding year and, therefore, its report was not binding on GoI. It was also stated by GoI that KPMG did not prepare a 'Closing Date Statement' and instead asked the parties to prepare it.

Arbitration proceedings

16. Since GoI refused to make payment in accordance with the report of KPMG, Zuari invoked the arbitration clause on 6th March, 2006. It is stated that only thereafter on 5th May 2006 did GoI send its objections to the report of KPMG.

17. A three-Member AT Tribunal was constituted. The nominee of Zuari (hereafter referred to as 'M1') and the nominee of the Respondent (hereinafter referred to as 'M2') jointly appointed the Presiding Arbitrator ('PA') who, like M1 and M2, was a former Chief Justice of India ('CJI'). Zuari filed its Statement of Claim ('SOC') before the AT on 14th October, 2006 making the following claims:

“(a) a sum of Rs. 141,32,31,2801- being 0.74 times the difference between the "closing date net asset amount" and "31st March net asset amount;

(b) a sum of Rs. 137,80,55,846/- being the interest amount calculated @ 18% per annum, compounded annually, w.e.f. 7.9.2002 till 14.10.2006, i.e. the date of the filing of the present statement of claim.

(c) *pendente-lite* and future interest @ 18% per annum, compounded annually on Rs. 279,12,87,126/- (i.e. sum of Rs. 141,32,31,2801- and Rs. 137,80,55,846/-).

(d) cost of the present arbitration.”

18. GoI filed its reply to the said claims on 30th December, 2006. A rejoinder was filed by Zuari on 15th January, 2007. On 25th July, 2007, the AT framed the following 12 issues for determination:

“1. Whether the respondent is liable to pay the claimant the

amount claimed or any part thereof in terms of the share purchase agreement dated 28.02.2002?

2. Whether the SPA dated 28.02.2002 was contingent in nature and if so its effects?

3. Whether the accounting principle mentioned in clause 3.4 (b) or SPA is fundamental terms of the contract and if so, its effects?

4. Whether the report of KPMG dated 27.07.2003 was final and binding on the party in terms of the Share Purchase Agreement dated 28.02.2002?

5. Whether in terms of SPA dated 28.02.2002 the Respondent had already undertaken a substantial liability upon itself, if so, its effects?

6. Whether the agreement and the claim of the Claimant is void and opposed to the public policy on the grounds set in their replies filed by the Respondent, if so, and its effects?

7. Whether the company and its management made an application before the BIFR praying inter alia, that it be declared sick and rehabilitation scheme be proposed for financial restructuring of the company and if so, its effects?

8. Whether the claim is barred by time, if the answer to issue number 1 is in the affirmative? Whether the claimant is entitled to any amount or any part thereof?

9. Whether the Claimant is entitled to any amount or any part thereof?

10. Whether the Claimant is entitled to initiate arbitration proceedings without resorting to conciliation as specifically mentioned in Clause (b) of Schedule III of the Share Purchase Agreement dated 28.02.2002?

11. Whether the Claimant is entitled to any amount and/or interest on admission?

12. Whether either party is entitled to cost?"

19. Issue No. 10 was treated as a preliminary issue and examined by the AT on 19th February, 2007. The AT decided to give 45 days' time to the parties to arrive at an amicable settlement and disposed of the issue. At the subsequent hearing on 16th April, 2007, the AT was informed that no settlement could be arrived at. Evidence was thereafter led by both the parties followed by arguments which concluded on 29th August, 2009.

20. On 11th July, 2011, with nearly 2 years having elapsed and no Award forthcoming, Zuari filed an application praying that an interim Award be passed by the AT particularly in terms of Issue No. 11 viz., the entitlement of Zuari to any amount and/or interest 'on admission'.

21. Meanwhile, under cover of a letter dated 11th June, 2010, the PA forwarded a 'draft Award' to M1 for his perusal and approval. On 13th December, 2010, M1 wrote to the PA stating that he had certain reservations about the preparation of the draft Award without prior consultation between the members of the AT. He drew attention to Issue No. 11 and submitted that for answering the said issue, "the draft award will require reconsideration". He, accordingly, requested the PA to call for a meeting on a convenient date to discuss the draft award "and/or finalizing the same".

22. On 29th August, 2011, the PA wrote to MI stating that it would not be

possible to convene a meeting as no date convenient to both M1 and M2 could be finalized. However, he stated that he had given the draft Award on 11th June, 2010 himself to M2 who had “already agreed with the same”. He, accordingly, requested M1 to finalize the Award and if he did not agree, then to give his dissenting note. The PA pointed out that since the Award was pending for a long time for consideration, “an early action from you (M1) is necessary”. It appears that another letter of the same date i.e., 29th August, 2011 was sent by the PA to M1 regarding the application filed by Zuari on 11th July, 2011 for an Interim Award. The PA did not call for a meeting of the AT to consider the said application. Instead, he stated:

“In the aforesaid case arguments were closed by the parties on 29th August, 2009 and I have prepared the Draft Award, which has been sent to you on 11th June, 2010. This Draft Award is under consideration by you. Under such circumstances, the present application filed by the Claimant, M/s Zuari Maroc Phosphates Ltd. appears to be misconceived. This is for your kind information.”

23. M1 replied to the PA on 5th September, 2011 stating as under:

“I received 2 letters, both dated 29th August 2011, from you on the captioned subject. I am rather surprised that you have not been able to arrange the meeting of the Arbitral Tribunal to discuss the matter. As you know there was no prior meeting of the Arbitral Tribunal to finalize the views on various issues as mentioned by me in my letter of 13-12- 2010. At best the 'draft award' can be described as your views; I do not know if there was any prior discussion between you and (M2) - at least not with me, I had been reminding you about the same from time to time when we met in the Dodsar arbitration but you were unable to fix a date convenient to all concerned. Besides, reminding you, what else could I have done! If the award is pending for long time it is because of non-fixing of the

meeting of the Arbitral Tribunal.

So far as the application filed by the Claimant is concerned, if you are planning to dismiss it without fixing a hearing, I do not think it proper to do so. At least you may note my reservation."

The majority Award

24. Thereafter on 9th May, 2012, the PA, M1 and M2 met to sign the Final Award. The PA and M2 wrote the majority Award in which they answered the issues as under:

(a) As far as Issue No. 1 was concerned, since the report of KPMG was held not to have any binding effect since it suffered from an infirmity in the manner indicated by GoI, the issue was answered in the negative and it was held that GoI was not liable to pay Zuari the amount claimed or any part thereof in terms of the SPA.

(b) As regards Issue No. 2, it was observed that the finality attached to the SPA in terms of Article 3.4(c) was contingent upon it being prepared in accordance with the mechanism envisaged in Article 3.4(b). Since that contingency was not fulfilled, the issue was answered by holding that there was no obligation on GoI to pay Zuari any amount.

(c) Issue No. 3 regarding the fundamental nature of Article 3.4(b) was answered in the affirmative. Since the 'Closing Date Statement' had not been prepared in terms of Article 3.4(b), it could not form the basis of the Zuari's claim.

(d) Issue No. 4 was answered in favour of GoI and against Zuari by holding

that KPMG's report dated 27th July, 2003 could not held to be binding.

(e) Issue No. 5 was not answered as it was observed that "the parties had not argued on that question".

(f) The majority AT also declined to answer Issue Nos. 6 to 8 as counsel for the parties "never raised these questions nor in the written submissions any reference has been made to these issues."

(g) Issue No. 9 was answered in favour of GoI by holding that Zuari was not entitled to any part of its claim.

(h) It was noted that Issue No. 10 viz., whether Zuari was entitled to initiate arbitration proceedings without resorting to conciliation had already been disposed of by the AT by its order dated 19th February, 2007.

(i) Issue No. 11 was answered against Zuari and in favour of GoI. It was observed that neither the Claimant had pleaded for award of any quantified amount on the basis of the alleged admission nor had their Senior counsel "made any arguments on that basis. In fact the entire argument was on the basis that the sum arrived at by KPMG should be awarded. In this view of matter, question of entitlement of the claimant on any admission on the part of the Respondent does not arise. The Issue No.11 really relates to whether whole or any part of the amount arrived at by KPMG could be awarded and it does not relate to amount which DTT had arrived at. At any rate when the Claimant's Counsel did not press the issue in his arguments it must be held that issue has been abandoned. Consequently, this issue is answered against

the Claimant and in favour of the Respondent”.

(j) On Issue No. 12, the majority AT held that each party should bear its own cost.

Dissenting Award

25. In his dissenting Award, M1 concluded as under:

"The said DTT indicated that the post closure adjustment would work out 161.86 crores and therefore the amount payable by the Respondent to the Claimant would work out at 125,81,32,460. Though the Government as willing to pay this amount, but the Claimant refused to agree with the report of DTT".

...

"In view of this admission, I fail to see why at least the admitted amount of Rs. 125,81,32,460/- should not be awarded to the Claimant with interest @ 18% per annum compounded w.e.f. September 7, 2002 till October 14, 2006 if not the higher claim put forth by the Claimant. I would therefore answer Issues No.1 to 9 and 11 accordingly."

26. The original impugned Award shows that it is in 37 pages. The Award of the majority AT concludes at page 33 and bears the signatures of both the PA and M2 with the date of 9th May, 2012. In the lower portion of the same page (page 33), the dissenting Award of M1 commences and concludes at page 37 with the signature of M1 in the right-hand corner. Below the said signature is the further statement to the effect that “Without prejudice to (M1's) dissent, by majority we make nil award in favour of the Claimant. There will be no order as to cost”. Below this are the signatures of all the 3 members of the AT with the date below the signatures written as “9th May 2012”.

27. It is plain, therefore, that all three members of the AT met on 9th May, 2012 at the same place and signed the Award as noted above. The majority was aware of and had read the dissenting Award and vice versa.

Submissions on behalf of Zuari

28. Mr. Ramesh Singh, learned counsel appearing for the Petitioner, Zuari, submitted as under:

(a) The absence of consultation amongst the Members of the AT before finalizing the draft Award vitiated the majority Award. The observations in the dissenting Award about M1 having spoken frequently to the PA about his reservations to the draft Award only reflected the conversations that took place between the two of them and not the consultation *inter se* amongst the three of them. In any event, there was no consultation as regards the application filed by Zuari on 11th July, 2011 for an Award on Issue No. 11. Reliance was placed on the decisions in *Union of India v. Niko Resources Ltd. Manu/ DE/2914/ 2012*; *Subash Chugh & Company v. Girnar Fibres Ltd. (2000) 3 RAJ 461*; *Medical Council of India v. Christian Medical College AIR 2016 SC 1774*; *Dharmu Saboto v. Krushna Saboto AIR 1956 Orissa 24*; *NHAI v. HCC Manu/DE/1892/ 2015*.

(b) Section 29 of the Act would apply both to the Award and also to orders and applications filed by the parties. Therefore, even the application by Zuari could not have been decided except by consultation amongst the members of the AT.

(c) Issue No. 11 was framed only on account of a categorical admission by GoI regarding the amount found payable to Zuari in terms of CDS prepared by DTT. It had nothing to do with the amount arrived at by KPMG. The very basis of declining the admitted amount of Rs. 125,81,32,460/- by the majority Award was perverse. What was held by the majority AT in respect of Issue No. 11 was contrary to what the majority itself had noticed in page 6 of their Award regarding the admission by GoI in its reply.

(d) The observations in the majority Award that no argument was addressed by the counsel for Zuari on Issue No.11 was contrary to what was recorded at pages 9/10 of the majority Award. There it was noted that in response to a query to the learned Additional Solicitor General of India ('ASG') representing the GoI whether the Respondent was willing to pay the admitted amount, the ASG answered in the negative. Even in the present petition in Ground C, Zuari has questioned the above observations in the majority Award. In that view of the matter, the Respondent was bound by the determination of the CDS to the extent of (-) Rs. 168,86,41,000/- and the corresponding amount payable by it to Zuari i.e., Rs. 125,81,32,460/-.

(e) The majority erred in interpreting Article 3.4(c) of the SPA and the expression "final and binding on the parties". The majority wrongly understood the decision of the Court of Appeal in *Alfred Topefer v. Continental Grain Company 1974 (1) LL R 11* as being no longer good law when it in fact was expressly affirmed by the House of Lords in *Gill & Duffus SA v. Berger & Co. Inc. (1984) 1 All ER 438 (HL)*. Reliance was placed on *Jones & Ors. v. Sherwood Computer Services 1992 (2) All ER*

170 to urge that where the parties by agreement have referred the matter within the expertise of the accountancy profession for accountants to determine, the Court should not substitute its own opinion with the assistance of some other accountant's evidence. KPMG had followed the instructions in terms of Article 3.4(b). The view in *Jones & Ors. v. Sherwood Computer Services* (*supra*) was reiterated in *Veba Oil Supply and Trading GmbH v. Petrotrade Inc. (2002) 1 All ER 703* and *Homepace Ltd. v. Sita South East Ltd. (2008) EWCA Civ 1*. In the present case also, there is clear finding even in the majority Award that there are no allegations of bad faith against the auditors.

(f) A bare reading of the final report prepared by KPMG under the head 'Closing Date Statement' demonstrates that the CDS figures in terms of the balance sheet prepared for the period ending 28th February, 2002 is (-) 217,28,35,000/- where the CDS figures as per the report the KPMG were only (-) 189,82,34,000/-. Thus, KPMG had made a positive substantial adjustment in the sum of Rs. 27.46 crores. It gave an exhaustive explanation therefor. In other words, it was wrong to allege that KPMG had merely rubber-stamped the balance sheet prepared by PPL. KPMG had, in the course of preparation of the CDS, undertaken an audit exercise as well insofar as the financials necessary for the said CDS as on 28th February, 2002 were concerned.

(g) The CDS prepared by KPMG was receivable as an admission against both parties including GoI. The principle governing Section 20 of the Indian Evidence Act, 1872 ('IEA') would apply. Reference was made to the

decision in *Hira Chand Kothari v. State of Rajasthan 1985 Supp SCC 17*. Also, in terms of the principles informing Section 31 IEA, the said admission operated as estoppel and was generally conclusive.

(h) The CDS was prepared by auditors jointly selected by the parties and was therefore final and binding on them. In the circumstances, it was not necessary for Zuari to produce the author of the KPMG report as a witness. Reliance in this regard is placed on *Homepace Ltd. v. Sita South East Ltd.* (*supra*) wherein, an earlier judgment in *Dixons Group PLC v. Murray (1997) All ER (D) 34* was quoted with approval. It was held that it would not be permissible to join the expert as a party for the purpose of discovery. Further, in terms of the principles governing illustration (b) to Section 102 IEA, the burden of proof was on GoI which challenged the report of KPMG to prove that it was not prepared in accordance with the principles of accountancy. It is submitted that evidentiary admission, even though not conclusive proof, acts as an estoppel shifting the burden of proof upon the person making the allegations. Reliance in this regard is placed on *Avadh Kishore Dass v. Ramgopal & Ors. AIR 1979 SC 861* and *United India Insurance Company v. Samir Chand Chaudhary 2005 (5) SCC 784*.

(i) The majority Award was clearly ‘patently illegal’ as it could not have interpreted Article 3.4(b) of the SPA in a manner which no fair minded or a reasonable person could do. It also suffered from perversity / illegality that goes to the root of the matter. It is submitted that the majority Award is in contravention of the substantive and fundamental policy of Indian law and, therefore, ought to be set aside.

Submissions on behalf of GoI

29. Countering the above submissions, Mr P.P. Malhotra, learned Senior counsel appearing for GoI submitted that:

(i) The scope of interference by the Court with the Award in exercise of its powers under Section 34 of the Act was extremely limited. Reference in this respect is made to the decision in ***Renusagar Power Company Limited v. General Electric Company 1994 (1) Supp SCC 644***; ***ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705***; ***Associate Builders v. Delhi Development Authority 2015 (3) SCC 49***; and ***National Highway Authority of India v. ITD Cementation India Ltd. (2015) 14 SCC 21***. Reference is also made to the decision of this Court in ***Mariners Buildcon India Ltd. v. K.V. Makkar Contracts 2015 (1) Arb LR 289 (Del)***. The Court will not sit in appeal over the Award. Even if the Arbitrator committed an error in the construction of the contract, that would be an error within jurisdiction. Reliance is placed on ***D.D. Sharma v. Union of India 2004 (5) SCC 325***. It was not open to the Court to substitute its own view with that of the Arbitrator even if the two views were possible. Reliance is placed on the decision in ***Rashtriya Ispat Nigam Limited v. Diwan Chand Ram Saran 2012 (5) SCC 306***.

(ii) None of the grounds mentioned in Section 34 of the Act entail a review on merits of the dispute even if there is erroneous application of law or evidence. Reliance is placed on the decisions in ***Pure Helium (India) Pvt. Ltd. v. Oil & Natural Gas Commission 2003 (8) SCC 593*** and ***Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited (2010) 11 SCC 296***. Reliance is also placed on the decision in ***SAIL v.***

Gupta Brother Steel Tubes Limited (2008) 10 SCC 63. The factual findings given by the majority AT cannot be re-examined by the Court.

(iii) It was factually erroneous to contend that there was no consultation among the members of the AT. From the letter dated 13th February, 2010 written by M1 it was clear that he was only concerned with the Issue No. 11 and was in agreement with the majority Award on other issues. M2 had also agreed to the draft Award prepared by the PA. It is only six months after the letter dated 29th August, 2011 of the PA that M1 sent its dissenting Award on 11th February, 2012. The fact that M1's Award was incorporated in the final Award and thereafter there was endorsement by all the three members that without prejudice to the dissent given by M1, the majority made a Nil Award and this was also signed by all the three Arbitrators showed that "there was complete deliberation and consultation between the Arbitrators and it is not necessary in law that all the Arbitrators must agree." Reliance is placed on the decision in ***Reserve Bank of India v. S.S. Investments & Ors. (1992) 4 SCC 671***, State of Rajasthan v. Larsen & Toubro Ltd. MANU/DE/0302/1996 (in FAO (OS) No. 80 of 1994). Reference was also made to ***Bank Mellat v. GAA Development and Construction Co. 1988 (2) LL R 44.***

(iv) On merits, it is submitted that the case of GoI in its preliminary objection was that none of the reports prepared by (i) PWC (ii) DTT (iii) Patro & Co; and (iv) KPMG were in accordance with Article 3.4(b) of the SPA. Therefore, there was no admission on the part of GoI that any amount was payable in terms of the report of DTT. All that GoI stated was that the

amount worked out by DDT as payable to Zuari was Rs.1,25,81,32,460/- and that Zuari failed to agree with the report of DTT. There was no admission as such by GoI that it was willing to pay the above amount to DTT. A wrong statement had been made to that effect by Zuari in its rejoinder. A fraud was played upon this Court and upon GoI by Zuari in making an assertion in para (C) of the grounds to the effect that GoI had made an admission that Rs. 1,25,81,32,460/- was payable to Zuari.

(v) It is submitted that:

“40. The claimant fraudulently changed the word "worked" to "worth" and fraudulently added "Though the Government was willing to pay this amount". This is not indicated in the Statement of Defence. Reproduction in paragraph 'C' at page 15 of OMP is totally wrong and misleading and conveys a wrong impression of an admission that the Government was willing to pay the said amount, on the other hand, submission was that OTT had prepared a report which indicated the amount payable worked out at Rs.125,81,32,460 and the claimant refused to agree with the report of DTT. It is not stated that this amount was offered and the claimant refused to receive the same. This misstatement in the pleading (has caused great prejudice and) is deliberate and misleading and the person responsible for the same is liable to be dealt with in accordance with law for this fabrication and perjury.”

(vi) The observation in the majority Award that no arguments were advanced by counsel for Zuari on Issue No. 11 was consistent with what transpired before the AT and is borne out by the following factors:

“(i) In the Written Submissions placed before the Arbitral Tribunal, there is no reference of any claim on alleged admission on the basis of the report of DTT;

(ii) In Section 34 Application before this Hon'ble Court, there is no rebuttal to what is stated at pages 86 and 87 in relation to issue No.11 particularly to the fact that no arguments were addressed on this issue No.11 and this issue was abandoned.

(iii) Even the dissenting opinion of (M1) does not say a whisper about this fact as to what is stated in regard to issue No.11 at pages 86 and 87. This position was before M1 when he gave his dissenting award dated 11.02.2012 but he does not say in his dissenting award that issue No.11 was argued. It is settled law that once issue though raised but not argued is deemed to be abandoned and no party can raise the same again.”

(vii) For there to be an admission, there must be a clear, unequivocal and unambiguous statement of GoI that some money is due and payable. There was no such admission in the present case. Reliance is placed on the decisions in *Gilbert v. Smith* (1876) 2 Ch D 686 (CA); *Hughes v. London, Edinburgh and Glasgow Assurance Co.* (1891) 8 TLR 81 (CA); *Koramall Ramballav v. Mongilal Dalimchand* (1918-19) 23 CWN 1017; *Jeevan Diesels and Electricals Limited v. Jasbir Singh Chadha* (HUF) & Anr. (2010) 6 SCC 601; *Union of India v. Feroze & Co.* AIR 1962 J&K 66; *Raj Kumar Chawla v. Lukas Indian Service* 2006 (89) DRJ 560; *NTPC v. Hindustan Construction Company* (decision dated 6th July, 2015 in FAO (OS) 154 of 2015); *Himani Alloys Ltd. v. Tata Steel Limited* (2011) 15 SCC 273; *Common Cause v. Union of India & Ors.* (2004) 5 SCC 222 and *GWL Properties Ltd. v. James Mackintosh & Co. Pvt. Ltd.* 2012 SCC Online Bombay 404.

(viii) KPMG did not prepare its report in terms of Article 3.4(b). It failed to consider any kind of objection raised by GoI to the draft report. There was

no CDS prepared by KPMG as was evident from KPMG's letter dated 27th July, 2005. It stated that the report was prepared only to enable the parties to prepare the CDS. There was no audited balance sheet available for the period ending 28th February, 2002. What was relied upon was simply a financial statement as on 28th February, 2002. KPMG's findings were based on an unaudited balance sheet of 11 months (1st April, 2001 to 28th February, 2002) prepared by PPL. The balance sheet prepared by PPL on 22nd July, 2002 for the period ending 28th February, 2002 was signed by Mr. K.K. Gupta, MD, Mr. U. Sircar, GM (Finance) and Mr. D. Mishra, Company Secretary. Zuari did not lead any evidence to prove any of the statements made in the balance sheet.

(ix) Article 3.4(b) of the SPA, which envisaged the exact mechanism of calculating the current and non-current assets and liabilities of PPL and preparing the CDS, had to be strictly construed. Reliance is placed on the decisions in *Polymat India Pvt. Ltd. v. National Insurance Co. Ltd.* AIR 2005 SC 286; *General Assurance Society Ltd. v Chandmull Jain* 1966 (3) SCR 500; *Food Corporation of India v. Chandu Construction & Anr.* (2007) 4 SCC 697; *Alopi Parshad & Sons Ltd. v. Union of India* AIR 1960 SC 588 and *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* AIR 1968 SC 522.

(x) It is submitted that where there is a material departure of instructions by an expert, his valuation report is not binding. Even if the expert had interpreted the Agreement wrongly, that would not be binding. Reference is made to the decisions in *Jones & Ors. v. Sherwood Computer Services*

(*supra*); *Jones v. Jones* (1971) 2 All ER 676; *Veba Oil v. Petrotrade* (*supra*); *British Ship Builders v. VSAL Consortium* (1997) 1 LL R 106; *G L Sultania & Anr. v. SEBI* 2007 (5) SCC 133; *Sutcliffe v. Thackrah* [1974] 1 All ER 859 and the opinion of Denning LJ in *Dean v. Prince* [1954] 1 All ER 749. Reference is also made to the decision in *Shell UK Ltd. Enterprise Oil Plc.,* [1999] 2 All ER (Comm) 87 and *National Grid Company Plc v. M 25 Group Ltd. Court of Appeal, (civil Division), 1998.* Since there was material departure from the instructions while KPMG prepared its report, it was not binding on the Respondent.

Scope of Section 34 of the Act

30. First, the Court would like to recapitulate the legal position regarding the limited scope of its powers under Section 34 of the Act to interfere with an arbitral Award. As rightly pointed out by Mr. Malhotra, the Court is not sitting in appeal over the majority Award of the AT. It is not expected to re-appreciate the evidence that was examined by the AT. As explained by the Supreme Court in *Associated Builders v. DDA* (*supra*), there has to be a judicious approach adopted by the AT and that has to be kept in view when examining the Award of the AT.

31. In *Mariners Buildcon India Ltd. v. K. V. Makkar Contracts* (*supra*), the Supreme Court explained:

"It must clearly be understood that when a court is applying 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. 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. Thus

an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."

32. As regards the interpretation that the AT may place on the provisions of a Contract, while it is true that the Court will normally not interfere with such interpretation, the exception carved out is where such interpretation is such that no reasonable person would adopt it, the Court would interfere. The relevant passage in *NHAI v. ITD Cementation India Ltd.* (*supra*) reads thus:

"25. It is thus well settled that construction of the terms of a Contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the Contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the Contract in such a way that no fair minded or reasonable person could do."

Failure by the members to meet before finalising Award

33. In examining whether the AT adopted a judicious approach, the first question that arises is whether there was a need for effective consultation amongst the members of the AT by meeting together and the effect of the failure to do so on the majority Award.

34. The correspondence exchanged between M1 and the PA have been set out in *extenso* earlier. Two issues that arise from these exchanges – (a) was there an effective consultation amongst the members of the AT before arriving at the final Award; and (b) if not, whether that vitiates the majority

Award?

35. That there was no effective consultation amongst all three members is evident from the exchange of correspondence between M1 and the PA. While M1 was insisting on a meeting, the PA was of the view that with him and M2 being in agreement over the draft Award prepared by the PA, nothing much would be achieved by the three of them meeting. Moreover, he was unable to find dates for the meeting convenient to both M1 and M2. Therefore, in the circumstances, only question (b) above requires to be considered.

36. The legal position as regards consultation amongst arbitrators was discussed by the Supreme Court in *Reserve Bank of India v. S.S. Investments* (*supra*) where it was held as follows:

“16. In the present case it is not in dispute that Respondents 2 and 2 were present at all the meetings in the arbitration proceedings. It is urged that there had been no joint deliberation and application of mind by them so that it cannot be said that there was any disagreement between them and respondent 4 was, therefore, not entitled to enter upon the reference.

17. Regard must be had, in our view, to the ordinary course of conduct of judicial and arbitration proceedings, especially considering the fact that one of the arbitrators was a former Judge and the other was a member of the Bar. Discussions do ordinarily take place during the course of the arguments between counsel and the Judges or arbitrators. Questions are asked by the Judges or arbitrators which would indicate their minds to counsel and to each other. Discussions also, ordinarily, take place between the Judges or arbitrators inter se during the course of the hearings and immediately before or after the same. It is not, therefore, imperative that

arbitrators should meet upon the conclusion of the hearings to discuss the matter and agree to an award or agree to disagree in that behalf.”

37. This Court in *State of Rajasthan v. Larsen & Toubro Ltd.* (*supra*) observed:

11. Deliberations between all arbitrators need not be by sitting together at one place. In a case where attempts by two arbitrators for having a further joint meeting with the third arbitrator fail and the findings of one are sent to the other does. not respond, the said correspondence is, in our opinion, sufficient to say that there has been "discussion or negotiations" or "deliberations" and the said correspondence would, in our view, satisfy the legal requirements of deliberations between all the parties.

14.But so long as this governing principle is adhered to the arbitrators need not conduct the whole of their business in the physical presence of one another: arbitrators frequently have to communicate with one another by telephone, telex or letter"

38. In the treatise ‘Arbitration & Conciliation’ by Justice R.S. Bachawat, (5th Edition 2010 p. 1291), it is noted:

"The sole purpose of a further meeting of consultation would have been to enable the dissenting arbitrator to discuss with the majority the redrafting of their majority award. The dissenting arbitrator disagreed fundamentally and comprehensively with the majority award and its reasons and there was no reason why there should have been a further discussion with him. The evidence showed that the dissenting arbitrator's views were fully and fairly considered and, therefore, there was no breach of the governing principle.

39. In *Union of India v. Niko Resources Ltd.* (*supra*), this Court had the occasion to deal with the issue as to whether the failure amongst the members of an AT to consult each other would vitiate the Award itself. The Court in that case noted that the majority members declined to have a

meeting with the ‘dissenting member’ “although he was willing to have a meeting”. The majority AT discussed the point raised by the dissenting member in the impugned Award. However, there was no specific finding that the impugned Award in that case stood vitiated only on that score. While the Court was not satisfied with the reasons given by the majority AT, namely, that “on reading it we found that there were basic differences in approach and reasoning and it could hardly be expected that all would be able to agree upon a common Award”, the Court in that case did not set aside the impugned Award only on that score.

40. The Act is silent on the aspect as to how the Arbitrators should go about conducting their business. The Act by and large leaves it to the AT to determine its procedure. All that Section 31(1) requires is that the Award should be in writing and should be signed by the members of the AT. Section 31(2) makes it clear that where there is a three-member AT, then the signatures of all the majority of its members would be sufficient so long as the reason for any omitted signature is stated. Section 29 further states that the majority decision will become the Award of the AT. In terms of Section 29 (2) of the Act, in the absence of any agreed procedure, the PA is expected to determine it.

41. In the present case, it does not appear that the AT decided on any particular procedure to be followed after the arguments were concluded. It was not mandatory for the PA to have called for a meeting of the arbitrators to discuss the draft Award prepared by him. Also, from the draft and the dissenting Award, it is apparent that the differences may have remained as

such even if they had met.

42. The delay in arriving at the final Award also contributed to this situation. Arguments concluded on 29th August, 2009. The draft Award was prepared by the PA and dispatched to M1 and M2 on 11th June, 2010. It took M1 six months to respond in writing to that draft Award. In between he did converse with the PA for fixing a date for a meeting but that could not materialize. In his letter dated 13th December, 2010, M1 adverted to Issue No. 11 and the need to answer that issue one way or the other. It appears, therefore, that Issue No. 11 was something that the AT was particularly interested in answering even before the final Award could be finalized. It took the PA again more than 9 months to respond to the above letter dated 13th December, 2010. It was only on 29th August, 2011 that he wrote to M1 stating that it was not possible to find a date that would suit both M1 and M2. At this stage, the PA disclosed that M2 had already agreed with the Draft Award circulated on 11th June, 2010. Meanwhile, Zuari filed its application on 11th July, 2011 praying for an interim Award on Issue No. 11.

43. In the circumstances, it is not possible to conclude that the failure by the members of the AT to meet before finalising the Award would only on that score vitiate the majority Award. There is no mandatory requirement either in the Act or any procedure devised by the AT that before finalizing the Award there must be a meeting amongst the members of the AT. While a judicious approach might require an application of mind by the majority AT to the views of the dissenting member and vice versa, how this should take

place is something to be left to the AT itself. Had there been any agreed procedure in this regard, it can possibly be said that the failure to adhere to such procedure may have vitiated the majority Award.

44. It must be recalled at this stage that when they did finally meet on 9th May, 2012 to sign the Award, both the dissenting member as well as the majority members were aware of each other Awards. The dissenting member's Award got incorporated into the final Award thereby making it explicit that the majority AT was fully conscious of the view taken by the dissenting member and vice versa and, therefore, agreed to disagree. This is perfectly consistent with the judicious approach that is expected of an AT. As long as the dissenting member was aware of the majority Award and had time to respond to it and the majority AT was also aware of the dissenting Award, as is the case here, it cannot be said that the requirement of Section 29 read with Section 31 of the Act was contravened.

Zuari's application on Issue No. 11

45. But that by itself does not bring an end to the discussion on the 'judicious approach' of the AT. How it dealt with the application filed by Zuari requires to be examined next.

46. By his email dated 29th August, 2011, the PA informed M1 that he was treating the application filed by Zuari as '*misconceived*'. He added, "This is for your kind information". In other words, the PA unilaterally decided to reject the application filed by Zuari. He does not say that this view was shared by M2. Further, when an application is filed by one of the parties, it cannot obviously be decided without a meeting, or exchange of views,

amongst the members of the AT. It is possible that the application may be decided by circulation. But even for that there has to be an agreed procedure.

47. There is a difference between a kind of consultation which is required for finalising an Award and the collective consideration for the first time of a fresh application filed by one of the parties. A decision had to be taken collectively by the AT by listing that application for hearing or by circulation if a hearing was not feasible. It was not open to the PA to unilaterally decide that the said application was 'misconceived'. Merely because the draft Award was already prepared, which fact could not have been known to the parties, the application could not be said to be 'misconceived'. M1 was right in pointing this out and lodging a protest. M1 specifically adverted to this when he stated, "So far as the application filed by the Claimant is concerned, if you are planning to dismiss it without fixing a hearing, I do not think it proper to do so. At least you may note my reservation". While AT is not bound to follow the CPC or the IEA, and can devise its own procedure in terms of Section 19 of the Act, it could not have dismissed Zuari's application without affording it an opportunity of being heard.

48. However, the discussion cannot stop at this point. The further question that arises is whether Zuari could be said to be prejudiced as a result of the rejection of its application in the manner aforesaid. With the application being filed nearly two years after the final hearing concluded and with the majority Award having been pronounced thereafter, the merits of the

application can well be examined by this Court to determine if the said application ought to have been allowed. This would be a better course than requiring such application to be considered afresh by an AT that has already been rendered *functus officio*.

Issue No. 11: Was there an 'admission'?

49. The subject matter of Zuari's application was Issue No. 11 viz., whether there was an 'admission' by GoI that a sum of over Rs. 125.81 crores was in fact owed by it to Zuari in terms of the report of DTT.

50. The following facts required to be noticed:

(i) Issue No. 11 was framed in view of the averments in the pleadings. The majority's reading of the pleadings containing such an alleged admission is evident from page 6 of the impugned Award where it is stated as under:

“The said DTT indicated that the post closure adjustment would work out 161.86 crores and therefore the amount payable by the respondent to the Claimant would work out at Rs. 125,81,32,460. **Though the Government was willing to pay this amount**, but the Claimant refused to agree with the report of DTT. The Government, therefore, had no other option to request the statutory auditor of PPL before disinvestment, M/s Patro & Co. to examine the amounts of PPL in the context of the report submitted by Price Water House.” (emphasis supplied)

(ii) Again, at pages 9/10 of the majority Award, it was noted as under:

“It would be appropriate also to notice that though DTT was appointed as Advisor by the inter-Ministerial Group to advise the Government to go ahead with the disinvestment of PPL and on receipt of report of Price Water House the Government wanted said DTT to re-examine the report and on the basis of the computation made by DTT 125,81,32,460 was found payable to the Claimant, but

the Claimant did not accept the same. **In course of arguments when the Learned Additional Solicitor General was asked whether Government was willing to pay the amount or not, the Learned Additional Solicitor General denied.**" (emphasis supplied)

(iii) The above two passages contradict what the majority notes while later on discussing Issue No.11. It states that "neither the Claimant has pleaded for Award of any quantified amount on the basis of alleged admission" nor did their Learned Sr. Counsel make any arguments on that basis. This appears to be contrary to even the pleadings before the learned Arbitrator which led to framing the above issue.

(iv) In its reply before the AT, GoI made the following statement:

"The amount indicated by DTT as Post Closure Adjustment was Rs. 168.86 Crores and the amount payable by Respondent to the Claimant was worked at Rs. 1,25,81,32,460/-. However, the claimant refused to agree with the report of M/s. DTT."

(v) In the rejoinder filed by Zuari, it was stated as under:

"A copy of the report of DTT was never given to the claimant and therefore, the question of the claimant reacting to the contents of the said report one way or the other did not arise. Even if the said Report was shared with the claimant, it is submitted that the Respondent having unilaterally and in complete breach of the terms of the SPA referred the report prepared by PWH for discussions by their Advisor namely, DTT, it is submitted that the report prepared by DTT is of no consequence much less of legal/contractual significance. Hence, the claimant had objected, in principle, to the respondent having taken the said step. Without prejudice to the same it is submitted that on a bare perusal of the report of M/s. DTT (which has now been filed by the respondent) it is clear that the amount of Rs. 168.86 Crores indicated by DTT as Post Closure Adjustment is not only towards the lower side but

more significantly the said report is not accordance with Article 3.4 of SPA and the relevant/required accounting principles. The claimant reserves it rights to demonstrate in detail the said position, if required, at subsequent stages of the present proceedings.”

"In any event and without prejudice to the above, and the present claim of Rs.1,41,32,31,280/- along with interest, it is submitted that in view of the clear admission on part of the Respondent in the present para under reply namely, that the respondent was willing to pay Rs.1,25,81,32,460/- (on the basis of the report of DTT to the claimant, the claimant prays that this Hon'ble Tribunal may be pleased to exercise its jurisdiction under Section 31(6) of the Act and make an interim award for a said sum of Rs.1,25,81,32,460/- in favour of the Claimant. The Claimant craves leave to make an appropriate application, if desired, for the said purpose. It is further clarified that the Claimant shall thereafter be pursuing their claim for the balance original and the interest amounts as well as costs."

51. The question that arises is whether any ‘clear admission’ was in fact made by GoI that it was willing to pay Rs. 125.81 crores? That is in fact what led to framing of the issue in the first place. It does appear that the majority Award has chosen to quote the stand taken by Zuari in its rejoinder without realising that there was no categorical 'admission' by GoI in its reply to the above effect. This has led the majority to incorrectly conclude that, on its part, GoI may have paid the said sum but for the fact that “the claimant refused to agree with the report of DTT”. If the paragraph in question is read carefully, it would appear that it is not only because Zuari refused to agree with the report of DTT that the sum worked out by DTT was not paid to it, GoI, too, did not find the report of DTT acceptable. That is why it proceeded to ask Patro & Co to examine it and thereafter accepted

the suggestion of Zuari that KPMG be appointed as auditors for that purpose. Consistent with this position taken by it, GoI informed the AT during the course of the hearing that it was not willing to make payment of the sum found payable to Zuari in terms of the report of DTT.

52. What is the result of the above discussion? Notwithstanding that the AT may not have been right in the manner of dealing with the application of Zuari, and in recording that Zuari gave up Issue No. 11, the majority erred in observing at page 6 that GoI had made an 'admission' that over Rs. 125.38 crores was payable to Zuari in terms of the report of DTT. There was in fact no such admission by GoI. Consequently, the ultimate decision by the majority AT that there was no clear admission on part of GoI to make payment of the amount determined by DTT cannot be faulted.

53. The well settled legal position is that an admission to be binding on the party making it has to be clear and categorical In *Jeevan Diesels and Electricals Limited v. Jasbir Singh Chadha (HUF)) & Anr.* (*supra*), the Supreme Court summarised the case law as under:

“11. In *Uttam Singh Duggal & Co. Ltd. v. United Bank of India* the provision of Order 12 Rule 6 came up for consideration before this Court. This Court on a detailed consideration of the provisions of Order 12 Rule 6 made it clear "wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed" the principle will apply...”

...

“13. In this connection reference may be made to an old decision of the a Court of Appeal between *Gilbert v. Smith*. Dealing with the principles of. Order 40 Rule 11, which was a similar provision in English Law, James, L.J held: (Ch D p,

687)

" ... if there was anything clearly admitted upon which something ought to be done, the plaintiff might come to the court at once to have that thing done, without any further delay or expense."

14. Mellish, L.J. expressing the same opinion in *Gilbert case* made the position further clear by saying:

"it must, however, be such an admission of facts as would show that the plaintiff is clearly entitled to the order asked for".

The learned Judge made it further clear by holding: (*Gilbert case*, Ch D p. 689)

" ... The rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleadings which clearly entitles the plaintiff to an order, then the intention was that he should not have to wait, but might at once obtain any order... "

..

18. In *J.C. Galifaun v. E.D. Sassoon & Co. Ltd.*, a Bench of the Calcutta High Court presided over by the Hon'ble Sir Asutosh Mookerjee, J sitting with Rankin, J. while construing the provisions of Order 12 Rule 6 of the Code followed the aforesaid decision in *Hughes* and also the view of Lopes, L.J. in *Landergan* and held that these provisions are attracted

"where the other party has made a plain admission entitling the former to a succeed. This rule applies wherever there is a clear admission of the facts on the face of which it is impossible for the party making it to succeed."

19. Similar view has been expressed by Broadway, CJ. in *Abdul Rahman and Bros. v. Parbati Devi*. The learned Chief Justice held that before a court can act under Order 12 Rule 6

CPC the admission must be clear and unambiguous.”

54. Consequently, the Court is unable to accept the plea of Zuari that in view of the 'admission' by GoI of its liability to make payment of the amount determined payable to Zuari by DTT, the said amount should be awarded to Zuari. The impugned majority Award in respect of Issue No. 11 calls for no interference.

Was the report of KPMG binding on GoI?

55. That brings up the next question whether it could be said that the majority AT erred in holding that no amount was payable since the report of KPMG was not in conformity with the principle of accounting as mandated under Article 3.4(b) read with Article 3.4(c) of the SPA?

56. The majority held that the mechanism of accounting principles mentioned in Article 3.4(b) was a fundamental term of the Contract and that the liability to pay in terms of Article 3.4(c) would arise only when CDS was prepared in accordance with the mechanism mentioned therein and not otherwise. In this context, the majority referred to a large number of decisions of the English Courts and came to the conclusion that “if a valuer did something for which it was not appointed to do, he was acting outside his scope of its reference” and that such determination would not bind the AT.

57. Did KPMG depart from the accepted principles of accounting? The following findings of the majority AT in this regard are significant:

“The Learned Solicitor General is right in his submission that KPMG has not done anything independently and has merely

given a stamp to the balance sheet prepared by the company and has calculated the liability of the Government on that basis. The report of KPMG further indicates that while preparing the so called closing date statement it has relied upon the various documents and had various discussions with the company, but unfortunately there is no iota of materials to sustain the same before this Tribunal. Apart from deviations in the matter of preparation of balance sheet for the relevant year noticed earlier, it is established that there has been deviations while identification of damaged goods; identification of unrecoverable stock; identification of raw material; change in bulk density during the year under consideration; abnormal shortage in finished goods and raw materials and change in the physical verification during the year under consideration; with which the KPMG in its report agreed and yet relied on the same; Incorrect Classification of Sound, Cut and Torn and Damaged Stock; Under Valuation of Imported Urea; Huge Loss on account of Disposal NPK; Standardization Loss of Pool NPK; Shortage of Stores and Spares; making provision for Doubtful Subsidy as well as provision for Doubtful Debts and Pay Revision for employees. We are entirely in agreement with the submission of Learned Additional Solicitor General on being satisfied about the above mentioned deficiencies that the Expert KPMG did not follow the mechanism and principle of computation and preparation of Closing Date Statement stipulated in Article 3.4 (b) of the SPA and therefore such a report could not be relied upon nor this Tribunal can make an award on that basis notwithstanding the finality clause contained in Article 3.4 (c) of the SPA.”

58. The question really is whether the above factual determination by the majority AT can be said to be so perverse as to the oppose the fundamental policy of Indian law? In the first place, the majority AT noted that in the KPMG report it was stated that CDS had been prepared on the basis of the ‘Audited Financial Statement’ when in fact there was no audited balance sheet. The majority concluded that this showed “total non-application of

mind by the auditor to discharge the obligation and the job he was required to do...” This finding cannot be said to be perverse at all.

59. Next, the majority noted that Zuari did not examine the author of CDS, who must have been a person belonging to KPMG in order to show that it was in fact prepared in accordance with the terms of the Agreement. This obviously was not done. It was sought to be contended by Mr. Ramesh Singh, learned counsel for Zuari, that the burden of disproving the report of KPMG shifted to GoI. It was in fact the case of Zuari that the KPMG report was in accordance with the requirements of Article 3.4(c) of the SPA. That case had to be made good by Zuari and not GoI. From the point of view of GoI, the evidence of Mr. Ashok Chordia who had indicated the infirmities in the report of KPMG was sufficient. Also, GoI was also able to cross-examine Mr. D. Mishra, the Company Secretary examined by Zuari to drive home the point that the balance sheet for the period ending 28th February, 2002 had not been proved by Zuari. This was sufficient discharge of the burden placed on GoI to show that KPMG’s report was inconsistent with the requirement of Article 3.4(b) of the SPA.

60. Turning to the case law extensively relied upon by Mr Rakesh Singh, the decision in *Jones & Ors. v. Sherwood Computer Services* (*supra*) was his lynchpin. That decision holds that generally the view of an Accountant or the expert should be taken to be conclusive and final. It, however, need not be final and binding if it involves “a determination of an issue of law or a mixed facts in law” in which case it is binding only in case the Court agrees with it. While the Court may not substitute its own opinion, it can

certainly examine whether the report was prepared in the manner envisaged in the Agreement between the parties. The Indian position is explained in ***G.L. Sultania & Anr. v. SEBI*** (*supra*) that an expert report would not be binding not only where it is based on fraud but even where it is premised on a mistake.

61. While KPMG's report simply states that they have assessed the accounting principles used during the period under consideration, what appears to have thrown doubts is their reference to the audited financial statement for the period ending 28th February, 2002 when in fact there was no such audited balance sheet or financial statement. The view taken by the majority AT that since the report of the KPMG was not in accordance with Article 3.4(b), it cannot said to be final, binding and conclusive is not contrary to the settled legal position as explained in ***Jones & Ors. v. Sherwood Computer Services*** (*supra*) which has been followed in ***Homepace Ltd. v. Sita South East Ltd.*** (*supra*) and ***Veba Oil v. Petrotrade*** (*supra*).

62. The question is not about bad faith of the auditors but about their acting consistent with the requirement of the Agreement between the parties. Ultimately what has to be examined by this Court is whether the view taken by the majority was a plausible one? The Court is not persuaded to hold that the view of the majority was perverse or opposed to the fundamental policy of Indian Law.

Conclusion

63. The Court is not satisfied that the Petitioner has made out any ground

for interference with the impugned majority Award dated 9th May, 2012 under Section 34 (2) of the Act. The petition is, accordingly, dismissed with costs of Rs. 50,000/- which should be paid by the Petitioner to the Respondent within a period of four weeks.

S. MURALIDHAR, J

APRIL 21, 2017
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