

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.12.2020

DATE OF DECISION : 23.12.2020

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.533 of 2020 and A.No.2825 of 2020
and
O.P.No.562 of 2020 and A.No.2872 of 2020

O.P.No.533 of 2020 :

OPG Power Generation Private Limited,
represented by its Authorized Signatory,
Mr.P.Venkatasubramanian,
No.6, Sardar Patel Road,
Guindy,
Chennai-600 032, India .. Petitioner

Vs.

1.Enexio Power Cooling Solutions
India Private Limited,
represented by Mr.Krishna Kumar,
No.443, Anna Salai,
Teynampet, Chennai-600 018,
India.

2.Gita Power & Infrastructure
Private Limited,
represented by its Authorized
Signatory Mr.Kaushik Ganguly
No.6, Sardar Patel Road,
Guindy, Chennai-600 032, India.

.. Respondents

O.P.No.562 of 2020 :

Gita Power & Infrastructure Private
Limited,
represented by its Authorized Signatory
Mr.Kaushik Ganguly,
No.6, Sardar Patel Road,
Guindy, Chennai-600 032,
India.

.. Petitioner

Vs.

1.Enexio Power Cooling Solutions
India Private Limited,
represented by Mr.Krishna Kumar,
No.443, Anna Salai,
Teynampet, Chennai-600 018,
India.

2.OPG Power Generation Private Limited,
represented by its Authorized Signatory,
Mr.P.Venkatasubramanian,
No.6, Sardar Patel Road,
Guindy,
Chennai-600 032, India.

.. Respondents

O.P.Nos.533 and 562 of 2020 are filed under Section 34(2)(b)(ii) and (2-A) of the Arbitration and Conciliation Act, 1996 seeking to (i)set aside the impugned award dated 13.07.2020 passed in ICC Case No.24449/HTG and (ii) direct the respondent to pay the costs of this petition and pass such or further orders as this Court deems fit in the facts and circumstances of the case and thus render justice.

For Petitioners : Mr.AR.L.Sundaresan,
Senior Counsel
for Mr.S.Prasath
of M/s.Sarvabhauman Associates
in both O.Ps.

For Respondents : Mr.R.Parthasarathy
for Mr.P.Giridharan and
Mr.H.Siddarth for R-1
in both O.Ps.

Mr.T.Balaji for R-2 in O.P.No.533/2020
Mr.Praveenkumar for R-2
in O.P.No.562 of 2020

COMMON ORDER

This common order will govern both the captioned 'Original Petitions' ('O.Ps' in plural and 'O.P' in singular for the sake of brevity) and the applications therein.

2 In this order, 'O.P.No.533 of 2020' shall be referred to as 'Senior OP' and 'O.P.No.562 of 2020' shall be referred to as 'Junior OP' (based solely on the sequence in which numbers have been assigned to captioned two O.Ps) for the sake of convenience and clarity. Both captioned O.Ps are directed against an 'Arbitral Award dated 13.07.2020

bearing reference ICC Case No.24449/HTG' (hereinafter 'impugned award' for the sake of convenience and clarity) made by a three member Arbitral Tribunal qua International Chamber of Commerce (ICC), which shall hereinafter be referred to as 'AT' denoting 'Arbitral Tribunal' for the sake of brevity, convenience and clarity.

3 There was a sole claimant and two respondents before AT. While senior OP has been presented in this court by the 'first respondent before AT' (hereinafter 'OPG' for convenience), junior OP has been presented by 'second respondent before AT' (hereinafter 'Gita' for convenience). This court is informed that OPG is a subsidiary of Gita which means that it is the holding company qua OPG. To be noted, the sole 'claimant before AT' (hereinafter 'Enexio' for convenience) is first respondent in both captioned O.Ps. In senior OP presented by OPG, Gita is the second respondent and in the junior OP presented by Gita, OPG has been arrayed as second respondent.

4 As mentioned supra, both captioned O.Ps are directed against the same impugned award, therefore they were tagged and taken up together.

5 All the aforementioned parties in the captioned O.Ps were represented by counsel, with the consent of all counsel, captioned O.Ps were taken up for final disposal, heard out fully and this common order is being made.

6 'Design, manufacture, delivery to site, erection, testing and commissioning of an air-cooled condenser unit with auxiliaries (ACC Unit) for a thermal power plant at Gummidipoondi in Tamil Nadu' is the work which is the subject matter of lis between the adversaries (out of which captioned OPs arise) and this work shall hereinafter be referred to as 'said work' for the sake of convenience and clarity. To be noted, adversaries connotes Enxio on one side and Gita / OPG (together) on the other side.

7 Four Purchase Orders, all dated 04.03.2013, collectively and compendiously constitute the base documents out of which lis before AT arises, but for all practical purposes, there are two purchase orders, as one purchase order is for supply and the other is for erection. These two purchase orders issued by Gita have been replicated and issued by OPG. There is no disputation or disagreement before this court that these purchase orders and the Annexures thereto contain an arbitration clause

and the same serve as an arbitration agreement between the parties being 'arbitration agreement' within the meaning of section 2(1)(b) read with section 7 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity and convenience. These four purchase orders shall hereinafter be compendiously and collectively referred to as 'said contract' for the sake of convenience and clarity. When said contract was put in motion between the parties, disputes erupted inter-alia regarding (a) delay, (b) two debit notes raised by OPG on Enexio and (c) cost of what according to OPG/Gita is towards repair / replacement of gear box and fan modules owing to alleged defective supply, broadly stated constitute arbitrable disputes between adversaries. To be noted, there is also a claim for Rs.8 Crores towards damages made by Enexio.

8 As captioned O.Ps are challenge to an arbitral award, i.e., impugned award under section 34 of the A and C Act, short facts shorn of elaboration will suffice. To put it differently, essential facts imperative for appreciating this order will suffice. In the light of arbitral disputes between the parties having been broadly set out supra, claim of Enexio before AT and counter claim of Gita / OPG before AT are extracted /

reproduced infra as the same read with broad arbitrable disputes serve as factual matrix in a nutshell. Extracts as culled out from the impugned award and/or pleadings are as follows:

9 Claim made by Enexio before AT (as culled out from claim statement) is as follows:

'A.Directing the Respondents to pay the Claimant the outstanding principal amount of INR 6,75,15,631/- under the POs as per Exhibit C-21;

B.Declaring that the Debit Note Nos.076/2015-16 and 077/2015-16 both dated 24.08.2015 (Exhibit C-56) issued by Respondent No.1 claiming deduction of aggregate amount of INR 3,30,00,000/- towards LD for supply and erection under the said POs is unlawful and unsustainable;

C.Declaring that the Debit Note No.032/2015-16 dated 12.01.2016 issued by Respondent No.1 towards CD (including CVD and SAD) for INR 5,94,06,693/- (Exhibit C-57) is unlawful and unsustainable;

D.Directing the Respondents to pay the Claimant an amount of INR 3,51,43,446/- towards interest up to 31st March 2019 on outstanding principal amount calculated at the rate of 18% p.a. from respective due date(s) of payment as per

Exhibit C-90;

E.Directing the Respondents to pay the Claimant interest on outstanding principal amount calculated at the rate of 18% p.a. for further period starting from 1st April 2019 and ending with date of payment in accordance with the award;

F.Directing the Respondents to pay the Claimant an amount of INR 8,00,00,000/- towards damages under the said POs as per Exhibits C-83 to Exhibit C-89 (Collectively);

G.Directing the Respondents to pay the entire costs incurred in the present arbitration.

H.Grant such other reliefs as the Tribunal may deem fit in the fact and circumstances of the case.'

10 Counter claims made before AT by Gita and OPG (as culled out from the statement of counter claim) are as follows:

'a.An award in favour of OPG and against Enexio for the principal amount of Rs.3,02,43,090/- as per particulars given in paragraphs 4, 5 & 6.

b.Interest at the rate of 18% per annum till payment.

c.Costs for and in respect of the Arbitration Proceedings.

d.Such other and further reliefs as the Hon'ble Tribunal may deem fit in the facts and circumstances of the case.'

11 Counter claim (extracted and reproduced supra) refers to paragraphs 4, 5 and 6 of the statement of counter claim and those paragraphs read as follows:

'4.The total billed amount by Enexio was Rs.4,67,104,493 and the amount paid was Rs.3,95,919,529/-. After accounting for the recoveries made by OPG through debit(s) of the account of Enexio detailed in para 1 to 3 above, an amount of Rs.2,78,04,090/- is outstanding and payable by Enexio to OPG. This outstanding amount of Rs.2,78,04,090 from Enexio to OPG was confirmed by the respective Projects and Finance departments of Enexio and OPG at the meeting held on 19.04.2018, the minutes of this meeting are **Exhibit C-78**. This outstanding amount of Rs.2,78,04,090 in the Books of Accounts of OPG is also confirmed by the Auditor's Certificate dated 01.12.2019 **Exhibit R-28**. Enexio is bound and liable to pay the said amount of Rs.2,78,04,090/- and the same is being claimed by OPG by way of this counter claim.

5.COST OF REPAIR/REPLACEMENT OF GEAR BOX DUE TO DEFECTIVE SUPPLY

5.1 There are 21 fans in the ACC System and each

fan has an independent gear box which is an integral part of the fan. Out of the gear boxes supplied by Enexio, eight gear boxes were found to be defective with the diameter of the shaft being less than the diameter in the approved drawing. This was recorded in the Minutes of Meeting dated 24.08.2016 between Enexio and OPG (**Exhibit R-30**). Enexio by mail dated 01.09.2016 also lodged a complaint with its equipment supplier with regard to the eight defective gear boxes (**Exhibit R-31**).

5.2 By mail dated 20.01.2017, Enexio informed OPG that their equipment supplier was not responding properly to Enexio's complaint with regard to the eight defective gear boxes and to start the work, a spare gear box supplied by Enexio, could be used by OPG and the remaining seven gear boxes could be attended one or two at a time (**Exhibit R-32**). However, Enexio did not take any steps to remedy the said defective gear boxes. Consequently, OPG had to remedy the defects in the eight (8) gear boxes and incurred cost for such remedial/repair works. The Warranty Period as mentioned in the Commercial Conditions is inapplicable in the present case. The defect in the Gear Box is an operational defect, which could be discovered only upon making the same operational and running them for considerable time.

5.3 The remedial/repair work was done by changing the internal parts of Gear Box namely, Bearing, Gears, Pinions and Oil Seals. These parts were purchased

from different suppliers at a total cost of Rs.9,76,000/-. The Purchase Order are filed a **Exhibit R-33 (Colly)**. Enexio is bound and liable to pay the said amount of Rs.9,76,000/- to OPG and the same is being claimed by OPG by way of this counter claim.

6.COST OF REPAIR/REPLACEMENT OF FAN MODULES DUE TO DEFECTIVE SUPPLY

6.1 As stated in para 5.1 herein above, the gear boxes supplied by Enexio were defective with the diameter of the shaft being less than the diameter in the approved drawing. On account of undersize diameter of gear box output shaft, the ACC fan was loosely fitted to the gear box. Due to this looseness, after running for some days the hub lock bolts failed and the fan hub fell down damaging the blades of the fan. This was acknowledged by Enexio and informed about the same to its Vendor by mail dated 22.08.2016 (**Exhibit R-34**). However, no further action was taken either by Enexio or its Vendor. The damaged blades of the fan had to be got replaced by OPG at its expense.

6.2 Since the damage was caused due to the defective gear box supplied by Enexio, it was the responsibility and obligation of Enexio to replace the damaged fan blades. Enexio failed and neglected to replace the damaged fan blades. Consequently, OPG had to purchase the fan blades. The fan blades were purchased by OPG from the vendor, COFIMCO, Italy at a cost of USD 17,248 and OPG also paid custom duty on the import. OPG incurred a

total cost of Rs.14,80,802/-. In working out this cost in INR, OPG has applied an exchange rate of Rs.67.55 per USD on the USD invoice value, which was the exchange rate at the time of delivery when payment for the purchase was made by OPG to COFIMCO. The purchase order of COFIMCO is filed as **Exhibit R-35(Colly).**'

12 With regard to aforementioned eight heads of claim made by Enexio, regarding 'A' pertaining to what according to Enexio is outstanding principle amount of Rs.6,75,15,631.00, a sum of little over Rs.6.11 Crores (Rs.6,11,75,470.00 to be precise) was awarded vide impugned award, in other words, for all practical purposes claim head 'A' was acceded to. With regard to claim heads 'B' and 'C' pertaining to declaration qua debit notes, though AT held that prayers for declaration are time barred by applying Article 58 of 'The Limitation Act, 1963' (hereinafter 'Limitation Act' for the sake of convenience), in effect relief was granted to Enexio as the claim of a little over Rs.6.75 crores made by Enexio vide claim head 'A' was inclusive of monies sought to be debited vide the two debit notes impugned in claim heads 'B' and 'C'. This court notices that with regard to claim heads 'D' and 'E', as against 18% per annum interest claim, 10% per annum was awarded. This Court also

notices that with regard to claim head 'F', the claim of Enexio for a sum of Rs.8 Crores towards damages qua said contract (4 Purchase orders) was negated, with regard to claim head 'G', Gita and OPG were directed to bear the costs, claim head 'H' is the usual residuary limb of a claim and that really did not come into play.

13 With regard to counter claim under four heads by Gita and OPG, the same was held to be time barred, i.e., barred by limitation. Therefore, the counter claim never came to be examined on merits by AT.

14 This Court is informed by Enexio that it has not assailed the impugned award insofar as Enexio's heads of claims which were negated either in full or in part.

15 To be noted, both senior and junior OPs have been presented in this court on 12.10.2020 and therefore both O.Ps will stand governed by post 23.10.2015 regime of the A and C Act or in other words, both captioned O.Ps will be governed by A and C Act as amended by Act 3 of 2016 which kicked in with retrospective effect on and from 23.10.2015. This is in accordance with Ssangyong principle, i.e., dicta laid down by Hon'ble Supreme Court in **Ssangyong Engineering and**

Construction Company Limited Vs. National Highways Authority of India [(2019) 15 SCC 131].

16 Mr.AR.L.Sundaresan, learned senior counsel instructed by Mr.S.Prasath of M/s.Sarvabhauman Associates (Law Firm) appearing on behalf of Gita and OPG in both captioned O.Ps made submissions, summation of which is as follows:

(a) Enexio's claim is clearly time barred, the applicable Articles being Articles 14 and 18 of Limitation Act for supply and erection respectively. The commencement of arbitral proceedings on 02.05.2019 is beyond three years, both from the date on which said work had to be completed, i.e., 31.03.2014 as well as deemed date of completion (being finding returned by AT) namely 21.09.2015.

(b) AT had adopted a different yardstick for examining the counter claim of Gita and OPG and incorrectly held the counter claim to be time barred.

(c) Vital evidence have been ignored as the principal amount crystallised in minutes of the meeting

dated 19.04.2018 (Ex.C.78) has been ignored.

(d) AT has virtually extended the time qua 'Liquidated Damages' (hereinafter 'LD' for brevity) and negated the claim under debit notes qua LD. This is clearly impermissible besides being based on no evidence.

(e) The material evidence pertaining to debit note qua customs duty has been ignored and AT has come to the conclusion regarding economic coercion by ignoring the vital evidence before it.

17 Mr.R.Parthasarathy, learned counsel assisted by Mr.P.Giridharan, counsel on record for Enexio responded to the above submissions, summation of which is as follows:

(a) The findings of AT that starting point of limitation for Enexio's claim is only 26.05.2018 (Ex.C.79) when OPG/Gita offered to settle vide Ex.C.79 (at Rs.300 lacs as full and final settlement) pursuant to minutes dated 19.04.2018 (Ex.C.78) is correct. It was

emphasised that OPG/Gita even sent Rs.25 lakhs cheque towards part payment {vide Ex.C.80 dated 22.08.2018} qua Rs.300 lacs full / final settlement, but this cheque was returned by Enexio vide Ex.C.82 dated 29.10.2018. Said contract is governed by Article 113 of Limitation Act and therefore, claimant's claims are not time barred;

(b) With regard to counter claim made by Gita and OPG, there was no trigger qua arbitration agreement by them and therefore, the date on which counter claim was made vide pleadings, i.e., 19.12.2019 has to be taken as the arresting date and this is clearly time barred if the deemed date of completion, i.e., 21.09.2015 is taken as starting point of limitation as done by AT in the impugned award;

(c) It cannot be gainsaid that vital evidence has been ignored qua debit notes pertaining to liquidated damages and customs duty as with regard to liquidated damages, AT has given a clear fact finding based on evidence in paragraphs 13.13 of impugned award and

with regard to customs duty, AT has interpreted documents before it vide paragraph 14 of impugned award.

18 In reply submission, learned senior counsel reiterated that Articles 14 and 18 would be the appropriate articles qua Limitation Act and Enexio cannot take umbrage under Article 113 which is a residuary Article.

19 In the aforesaid backdrop, this court deems it appropriate to set out undisputed dates (chronology of events) as this is very significant for testing limitation. The undisputed dates are as follows:

<i>Date</i>	<i>Events</i>
31.03.2014	Said work ought to have been completed by Enexio
24.08.2015	Debit note pertaining to liquidated damages was raised by Gita and OPG
21.09.2015	Deemed date of completion of said work
12.01.2016	Debit note regarding customs duty was raised by Gita and OPG
19.04.2018	Talks between adversaries namely Enexio on one side and Gita / OPG on the other side culminated in minutes of meeting (Ex.C.78)
26.05.2018	Gita/OPG offered to settle at Rs.300 lacs as full and final settlement (Ex.C.79)
22.08.2018	Gita / OPG sent communication enclosing cheque for Rs.25 lakhs as part of Rs.3 Crores in full quit (Ex.C.80)
29.10.2018	Enexio returned Rs.25 lakhs cheque (Ex.C.82)

02.05.2019	Arbitral institution, namely ICC received request for arbitration (to be noted, both parties agreed that this is the date of commencement of arbitration within the meaning of section 21 of A and C Act)
19.12.2019	Gita / OPG made counter claim vide its pleadings before AT

20 Before proceedings further, it is to be noted that law of limitation is based on public policy and therefore, any infarct qua limitation in an arbitral award will clearly attract section 34(2)(b)(ii) read with clause (ii) of Explanation 1 of A and C Act.

21 As already alluded to supra, AT has taken dates of two debit notes as reckoning date qua claim heads B and C alone, applied Article 58 of Limitation Act, held that the prayer for declaration qua two debit notes are barred by limitation, but has granted relief to Enexio in the light of the findings returned on liquidated damages and customs duty. Conscious of the fact that this court is not sitting on appeal qua impugned award, this court is of the considered view that the approach of dealing with two declaratory reliefs separately holding them to be time barred and granting relief is clearly a implausible view, as the only possible approach is to examine if the claim of little over Rs.6.75 Crores made by Enexio is time barred or not. The reason for this is simple as Rs.6.75 odd crores claim made by Enexio vide claim head A includes the

amounts covered under the two debit notes assailed vide claim heads B and C. Limitation being founded on public policy and that being clearly an important ground available for challenge to an arbitral award, this court deems it appropriate to adopt this approach.

22 Interestingly, with regard to declaratory reliefs, while AT has referred to the applicable article of Limitation Act, i.e., Article 58, the impugned award is completely silent about the applicable article in Limitation Act with regard to Rs.6.75 crores vide claim head 'A'. It is in this context that this court put it to counsel to spell out the applicable articles. As already alluded to supra, while learned counsel for petitioner in captioned O.Ps (Gita/OPG) submitted that it is Articles 14 and 18 for supply and erection respectively, learned counsel for Enexio submitted that the residuary article namely Article 113 applies. The interesting feature is in all these articles, the prescribed period of limitation is three years, but the starting point of limitation is different. This court deems it appropriate to extract / reproduce infra these articles as available in the chart in the Limitation Act (for ease of reference) and the same read as follows:

<i>Description of suit</i>	<i>Period of Limitation</i>	<i>Time from which period begins to run</i>
1. For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.
14. For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Three years	The date of the delivery of the goods.
18. For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years	When the work is done.
113. Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

23 To be noted, AT has not referred to applicable Article except Article 58 qua declaratory reliefs which is of no consequence owing to discussion thus far.

24 Paragraph 16 consisting of 16.01 to 16.04 of the impugned award deals with limitation aspect and the same reads as follows:

'16.01 There are two distinct issues relating to the Limitation Act, 1963. Firstly, the Respondents assert that the Claimant's claims are time barred and secondly the Claimant asserts that the Respondents' claims for the cost of repair / replacement of gearboxes and fan modules are time

barred. The Tribunal will consider the applicability of a time bar to each of these issues in this section of the Award.

16.02 The Claimant's claims are for:

A. An alleged outstanding principal amount due under the Purchase Orders;

B. A declaration that the debit note towards liquidated damages Purchase Orders is unlawful and unsustainable;

C. A declaration that the debit note towards customs duty is unlawful and unsustainable;

D. An alleged amount towards interest on the alleged outstanding principal amount up to 31st March 2019;

E. An alleged amount towards interest on the alleged outstanding principal from 1st April 2019 up to the date of payment in accordance with the Award; and

F. An amount towards alleged damages under the Purchase Orders.

These claims fall into two categories. Namely, Items B and C are for declarations and Items A, D, E and F are for payments of money.

16.03 Declarations

(a) Declarations are covered by Article 58 of the Schedule, framed under Section 2(j) and 3 of the Limitation

Act, 1963 which states that the period of limitation is three years from “when the right to sue first accrued”. The Tribunal finds that the right to sue accrued when the respective debit notes were received by the Claimant.

(b) The debit note for liquidated damages was issued on 24th August 2015 and the Claimant acknowledges receipt by its letter to the Respondents dated 28th August 2015. The limitation period for a declaration in respect of these debit notes expired on or before 28th March 2018 and the Request for Arbitration was received by the ICC Secretariat 2nd May 2019. Accordingly, the Tribunal finds that the declaration is time barred. However, in light of the Tribunal's finding in Section 13.15 above that the Claimant has no liability to pay liquidated damages, the 'time bar' finding in this paragraph has no practical significance. The finding that the declaration is time barred responds to Relief CB.

(c) The debit note for customs duty was issued on 12th January 2016. It is not recorded when the Claimant received this debit note but, in the normal course of business, it would have been received by 19th January 2016. The limitation period for a declaration in respect of this debit note expired on or about 19th January 2019 and the Request for Arbitration was received by the ICC Secretariat on 2nd May 2019. Accordingly, the Tribunal finds that the declaration is time barred. However, in light of Tribunal's finding in Section 14.04 above that the Claimant does not

have to reimburse Respondent No 1 for customs duty, the 'time bar' finding in this paragraph has no practical significance. The finding that the declaration is time barred responds to Relief CC.

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

16.04 Time Bar in Relation to the Respondents' counterclaims for the cost of repair / replacement of gearboxes and fan modules

There is no evidence that these counterclaims were included in the ongoing negotiations. The Tribunal has found that the Taking Over Certificate is deemed to have been issued on 21st September 2015. (See Section 13.13 above) On that date the Claimant is deemed to have completed its

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

25 There is a clear dichotomy in impugned award regarding the legal drill of testing limitation. AT has taken 26.05.2018 as the reckoning date, that being the date on which written offer to settle the matter was made by Gita/OPG vide Ex.C.79, but for testing the counter claim of Gita/OPG, AT has taken 21.09.2015 as the reckoning date or starting point of limitation, that being the date of deemed completion of said work. This Court is constrained to observe that this dichotomy is akin to classical division between science and mysticism. Therefore, this Court unhesitatingly holds that this is patently illegal and an implausible view. To be noted, this dichotomy is not a mere erroneous application of law and it needs no reappreciation of evidence. It is also an infarct of section 18 of A and C Act which provides for equal treatment of parties. More importantly, the law of limitation being based on public policy, as already delineated supra, infarct of the same would clearly vitiate the

impugned award as one being in conflict with public policy of India.

26 As would be evident from the narrative and discussion thus far, claimant Enexio had made claims under eight heads (A to H) and Gita / OPG have made claims under four heads (A to D). As the counter claim has not been decided on merits, this court examined the possibility of segregating the heads of claim / counter claim by applying *J.G. Engineers* principle laid down by Hon'ble Supreme Court in ***J.G. Engineers (P) Ltd. v. Union of India*** reported in (2011) 5 SCC 758.

27 From the narrative thus far, it is clear that the counter claim and interse heads of claim are so intertwined with one another that the same cannot be disentangled and segregated. Though it can be only on an application, this Court also examined the possibility of sub-section (4) of section 34 option in the light of the counter claim which has not been decided on merits, but heads of claim and counter claim being inextricably intertwined and interwoven, this also will not work in this case. In this regard, learned counsel for Enexio attempted to say that paragraph 4 of pleadings of Gita / OPG which talks about minutes of the meeting dated 19.04.2018 (Ex.C.78), talks only about two debit notes,

there is no reference about the alleged defective gear box or alleged defective fan module, but learned senior counsel for Gita/OPG contended that paragraphs 4,5 and 6 of the counter claim pleadings are such that they are constituted by a little over Rs.2.78 Crores (278 lakhs) vide Ex.C.78 minutes, around Rs.9.76 lakhs towards gear box repair / replacement and amount in the region of Rs.14.80 lakhs towards defective fan module. According to learned senior counsel, these three components add up to the counter claim of a little over Rs.3.02 Crores. This court is disinclined to go into such details in a section 34 legal drill. Suffice to say that paragraph 4 of the counter claim pleadings clearly refers to Ex.C.78 minutes of the meeting dated 19.4.2018. This court is informed that Ex.C.78 is more in the nature of a serial number as it is serialized as No.78 in the list of documents filed along with claim statement. However, what is of significance is, there is no disputation or disagreement before me that this Ex.C.78 referred to in paragraph 4 is minutes dated 19.04.2018. If the counter claim is examined on merits and either allowed in entirety or in part, that would directly impact the quantum of relief granted to Enexio vide claim head 'A'. Therefore, what follows as a sequititer is that the impugned award has to be dislodged in

its entirety to facilitate re-arbitration if that be so. In this view of the matter, examining the other submissions and returning findings will be an exercise in futility, besides causing avoidable complexities if parties choose to accept this order and if there is re-arbitration in the light of the impugned award being set aside. Therefore, this court deems it appropriate to not to examine the other grounds of challenge qua campaign against impugned award and leaves those questions open.

28 The case laws placed before me also need not be gone into. Case laws pertaining to issue as to whether mere negotiations would keep a claim alive are also otiose owing to the approach that has been taken by this court.

29 In and by Section 43 of A and C Act, Limitation Act has been made applicable to arbitrations as it applies to proceedings in Court, that limitation is founded on public policy and that the same is traceable to fundamental policy of Indian Law is an indefeasible proposition / principle. The moment a section 34 Court in the legal drill under section 34 finds limitation to have been erroneously decided in the impugned award by adopting an implausible view qua test and when there is only one possible view, it is necessary that the only possible view is set out

clearly with specificity and clarity while dislodging the impugned award. More often than less, limitation is a mixed question of fact and law. In the instant case, facts pertaining to limitation, i.e., (chronology) dates are not disputed and undisputed dates in chronological order has also been set out supra. It is in this view of the matter that this court, for the purpose of articulating in its dispositive reasoning as to how the approach of AT is an implausible view, is setting out the only possible view for computing / testing limitation on the basis of undisputed dates.

30 The only possible view on the facts and surrounding circumstances of the case on hand qua test is by taking the date of commencement of prescribed period to be the same for both claim and counter claim, because AT has proceeded on the basis of Ex.C.78, which is minutes of joint meeting signed by both parties and the offer to settle vide Ex.C.79 dated 26.05.2018 as the starting point for limitation. AT has proceeded on the basis that pursuant to Ex.C.78, OPG/Gita wrote to Enexio vide Ex.C.79 dated 26.05.2018 offering Rs.300 lacs as full and final settlement. On this basis, AT has taken 26.05.2018 (Ex.C.79) as the starting point of limitation or in other words, the date from which limitation starts to run. This is clearly set out in paragraph 16.03(d) of the

impugned award which has been extracted and reproduced supra. To be noted, the entire paragraph 16 of the impugned award has been extracted and reproduced supra. AT has taken the joint minutes of the meeting of both parties and an offer of settlement 26.05.2018 as the date from which limitation starts to run, therefore, it follows as an indisputable sequiter that it obviously has to start running for both parties from that date, more because it is a joint meeting / settlement. After taking this 26.05.2018 as the date on which limitation starts to run for Enexio, AT taking a completely different date, namely 21.09.2015 (date of deemed completion of said work) as the starting point (date from which limitation starts to run) for OPG /Gita for testing their counter claim is clearly implausible. If AT had taken 21.09.2015 (date of completion of said work) as starting point and applied to both sides, it may well have been a different scenario, but this court refrains itself from expressing any view on the same as that will impact rearbitration if that be so. To be noted, only the date on which limitation gets arrested is different for Enexio and Gita/OPG. While it gets arrested on 02.05.2019 for Enexio as Enexio triggered arbitration and 02.05.2019 which is the admitted date of commencement of arbitration within the meaning of section 21 of the A

and C Act, it gets arrested only on 19.12.2019 for Gita/OPG as Gita/OPG did not trigger arbitration and arresting date is the date on which counter claim pleadings was filed, i.e., 19.12.2019. In this view of the matter, if 21.09.2015 (deemed date of completion of said work) is taken as the date from which limitation starts to run, both claim and counter claim are beyond three years. To be noted, for all the aforementioned Articles in the Limitation Act, it was adverted to that the prescribed period of limitation is three years though the starting points are different and this court refrains itself from expressing any opinion on the applicable article as this would also impact re-arbitration if that be so. If 26.05.2018 being the date on which settlement offer was made is taken as the common date on which limitation starts to run for both parties, both claim and counter claim are within three years though the dates on which they get arrested are different. As already alluded to supra, it gets arrested on 02.05.2019 (arbitration trigger date) for Enexio and gets arrested on 19.12.2019 (counter claim date). To be noted, counter claim was never tested on merits and this Court has already observed that various heads of claim (interse claim / counter claim heads as well as claim of Enexio as a whole on one side and counter claims of Gita/OPG on the other) are

inextricably intertwined and they cannot be disentangled or segregated.

31 As already alluded to supra, taking two different dates as starting points of limitation for two parties, while the starting point is based on a settlement / joint minutes of both parties and offer flowing from the same is clearly patently illegal. After all, Sauce to Goose is Sauce to Gander too. To be noted, this is not merely erroneous application of law and this requires no reappreciation of evidence. Therefore, the impugned award is vitiated and is liable to be set aside under section 34(2A). Deciding limitation which is based on public policy of India by taking two different dates for two adversaries as the starting point (though the arrest date is different) (while starting point is joint settlement minutes and settlement offer flowing from the same) clearly leaves the impugned award in conflict with public policy of India and in contravention with fundamental policy of Indian law. Therefore, the impugned award is liable to be dislodged / set aside under section 34(2)(b)(ii) read with clause (ii) of Explanation 1 also. Besides these two provisions, impugned award is also vitiated by equal treatment to both parties not being given, i.e., not giving equal treatment to the adversaries. It is a clear infarct of the sanctus principle ingrained in section 18 of the

A and C Act and the law is well settled that infarct of such a provision of the A and C Act sounds the death knell of an arbitral award. In saying that this sounds the death knell of an arbitral award, this Court draws inspiration from oft quoted Associate Builders case law {**Associate Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49**}, relevant portion is contained in paragraph 42 and the same reads as follows:

“42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature.....

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.’

32 Before concluding, this Court also deems it appropriate to set out paragraph 52 of McDermott case of Hon'ble Supreme Court being **McDermott International Inc. Vs. Burn Standard Co. Ltd. and others** reported in **(2006) 11 SCC 181** which reads as follows:

'52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.'

33 Owing to all that have been set out thus far, both captioned O.Ps are allowed and the impugned award is set aside. There shall be no order as to costs. Consequently, connected applications are closed.

23.12.2020

Speaking order

Index : Yes

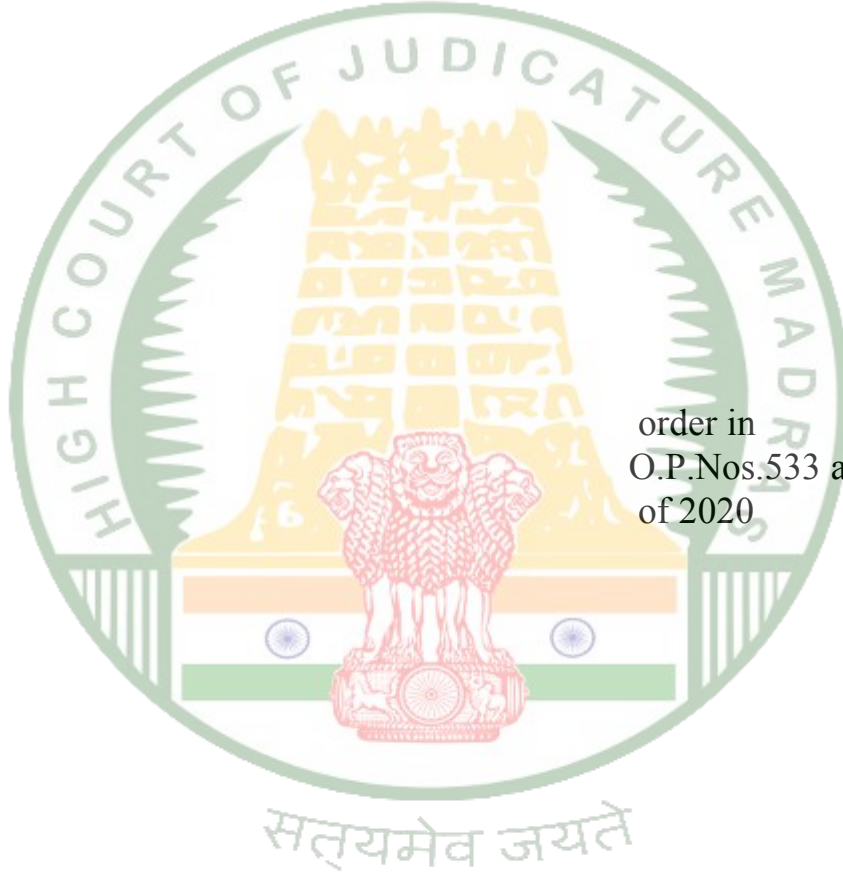
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O.P.Nos.533 and 562 of 2020

M.SUNDAR, J.

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order in
O.P.Nos.533 and 562
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