

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.08.2021

+ **O.M.P. (COMM) 418/2020**

**STEEL AUTHORITY OF INDIA LIMITED,
INDIA**

..... Petitioner

Versus

M/s. TATA PROJECTS LTD., INDIA & ANR. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Parag P. Tripathi, Senior Advocate and
Mr Joy Basu, Senior Advocate with Mr
Mahip Singh, Mr Srinivasan Ramaswami
and Mr Kanak Bose, Advocates.

For the Respondents : Mr Sameer Parekh, Mr Lalit Chauhan,
Mr Fanuj Agarwal, Ms Sonal Gupta and
Ms Swati Bharadwaj, Advocates for R-1.
Mr Suhail Dutt, Sr. Advocate with Mr
Abhixit Singh, Mr Kushagra Sah, Ms
Devika Chopra and Ms Shaurvi Kapur,
Advocates for R-2.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. Steel Authority of India Limited (hereinafter 'SAIL'), a company incorporated under the Companies Act, 1956, has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award

dated 20.11.2019 (hereinafter the ‘impugned award’). The impugned award was delivered by the Arbitral Tribunal comprising of three members constituted under the Rules of Arbitration of the International Chamber of Commerce (hereinafter the ‘ICC Rules’) pursuant to a request for arbitration filed by the respondents with the Secretariat of the International Court of Arbitration (hereinafter the ‘ICC Court’)

2. The impugned award was rendered in the context of disputes that had arisen between the parties in relation to a Contract Agreement dated 02.10.2008 (hereafter ‘the Agreement’).

3. The disputes center around issuance of a Final Acceptance Certificate (FAC) and the attendant payments due to the respondents on issuance of the FAC (FAC payments). SAIL had withheld FAC and FAC payments, as according to SAIL, the respondents had not completed their obligations under the Agreement. This was principally on account of failure to commission the wireless Fire Detection System.

4. By the impugned award, the Arbitral Tribunal has partly accepted the claims preferred by the respondents and has awarded an amount of ₹46,41,72,593/- along with interest at the rate of 10% per annum from 08.02.2017 till the date of payment, in their favour.

Factual context.

5. On 24.07.2007, SAIL invited tenders for setting up Blast Furnace No. 5 at the Rourkela Steel Plant.

6. Respondent no. 1, a company incorporated under the Companies Act, 1956 (hereinafter 'TPL') and respondent no. 2, a company incorporated under the laws of Netherlands (hereinafter 'DC'), formed a consortium to bid for the contract in question – to set up a blast furnace in the Steel Plant of SAIL at Rourkela, Odisha.

7. The respondents were awarded the contract by a Letter of Award dated 31.07.2008 (LoA) and thereafter, TPL, DC and SAIL entered into the Agreement (Contract Agreement dated 02.10.2008) to set up "*1 x 4060 CU. M. Blast Furnace No. 5 (Package no. 010) under 4.2 Mtpa Crude Steel Expansion Project at Rourkela Steel Plant*" on Engineering, Procurement and Construct (EPC) basis (hereinafter 'the Project') at a consideration of Euros €73,982,760/- and ₹1217,00,00,000/-. In terms of the Agreement, the Project was to be completed and handed over to SAIL on or before 01.04.2011. Further, Clause 11 of the General Conditions of Contract (GCC), which formed a part of the Agreement, envisaged a stage wise payment to the respondents.

8. In terms of Article 6 of the Agreement, Mecon Ltd. (hereinafter 'Mecon') was appointed as the Consultant for the execution of the Project and to perform functions delegated by SAIL.

9. On 25.11.2008 and 28.11.2008, meetings were held between SAIL, TPL, DC and Mecon to discuss the design basis for the engineering being taken up by DC.

10. On 21.10.2009, a Work Order was placed by TPL upon M/s ABB Ltd (ABB) for procurement of the Fire Detection Alarm (hereafter 'FDA').

11. On 17.12.2009, the 11th Progress Review Meeting was held between SAIL, Mecon, TPL and DC. At the said meeting, the status regarding placing of orders for some balance major packages including the status for Fire Detection Alarm & Fire Protection System (FDA & FPS) was discussed. The minutes of the said meeting recorded the status of FDA & FPS as "*Under technical valuation*".

12. On 05.02.2010, the 12th Progress Review Meeting was held between SAIL, Mecon, TPL and DC. The Minutes of Meeting for the aforesaid recorded that "*FDA ordered on ABB. Order for FPS will be completed by 15th Apr, 10.*"

13. Thereafter, in the 13th Progress Review Meeting held on 10.03.2010, SAIL had asked TPL to explore the possibility of a Wireless FDA System.

14. On 10.03.2011, TPL sent an email informing SAIL that the Agreement did not mention the possibility of providing a Wireless FDA System and therefore, they had selected vendors based on the conventional FDA System. Further, TPL also informed SAIL that

there were no suppliers with any past experience for supplying a Wireless FDA System in the steel industry. Accordingly, TPL requested SAIL to give its approval on drawings based on the conventional FDA System to Mecon.

15. On 16.03.2011, SAIL sent an email to TPL suggesting that M/s Diaonics Automation (P) Ltd. (hereinafter 'Diaonics') and M/s ECIL Ltd. could be contacted for the purpose of installing the Wireless FDA System.

16. Thereafter, on 23.04.2012, TPL placed an order with Diaonics for installing and commissioning of the Wireless FDA System for the Project.

17. On 16.07.2012, Mecon apprised TPL regarding the approval of the electrical drawings and the status of the same. The details regarding the FDA System were mentioned in the aforesaid transmittal.

18. By a letter dated 10.05.2013, TPL provided details of the changes made by SAIL under the terms of the Agreement with the additional cost implications, which included the financial implication of the Wireless FDA System. In the said letter, the cost difference between the conventional FDA System (from ABB) and Wireless FDA System (from Diaonics) was reflected as ₹97,08,730. TPL further requested SAIL to approve the amounts and issue the change order for increase in the Contract price by ₹14,63,42,768. However, SAIL claims that it never received the said letter.

19. On 29.05.2013, the respondents had installed the 'Above Burden Probe' (ABP) and 'In Burden Probe (IBP) Analyzer' and the same was recorded in the ABP/IBP Analyzer installation protocol, which was signed by SAIL, TPL and ABB. Further, the Furnace Profile Measurement Instruments were installed on 29.05.2013 and the same was recorded in the Profile Meter and Stock Line Recorder Installation Protocol for G1 area, which was signed by SAIL, TPL and ABB

20. Thereafter, a Trial Run Protocol dated 22.08.2013, was signed by ABB, SAIL and TPL on 28.08.2013, which recorded that ABP/IBP Analyzer and Furnace Profile Measurement Instrument had been successfully tested for readiness prior to the trial run of instruments. The Torpedo Level Recorder Erection protocol for Blast Furnace No. 5 dated 01.10.2013 and 03.10.2013 recorded that the Torpedo Level Sensors were successfully installed.

21. On 30.10.2013, Trial Run Protocol, which recorded the working condition of the Furnace Profile Measurement Instrument and commissioning of the Torpedo Level Sensors was signed by TPL, ABB and SAIL. Thereafter, on the same date, the Joint Protocol Instrumentation and Automation Sheet no. 15 was signed, which recorded completion of various activities.

22. The Joint Protocol Sheet dated 30.12.2013, which was signed by TPL and SAIL, recorded that the Air Conditioner in the Analyzer room had been commissioned.

23. On 15.04.2014, SAIL sent a facsimile informing TPL and DC regarding the incomplete state of balance critical facilities in the Project including the fire-fighting system. Thereafter, TPL vide a letter dated 16.04.2014, informed SAIL that it was awaiting a Service Engineer from Diaonics to commission the Wireless FDA System and the system was expected to be completed by 30.05.2014.

24. On 22.05.2014, a meeting was conducted between Diaonics, M/s ABB Ltd, TPL and SAIL regarding the testing and commissioning schedule of the Wireless FDA System. In the said meeting, it was recorded that Diaonics had confirmed the testing, commissioning and hook up of the FDA System with the FPS System. At the meeting Diaonics further confirmed that all ECRs shall be completed and demonstrated by 10.06.2014 in a phase wise manner as well as all connected Cable Tunnel and Main Charging Conveyor shall also be completed and demonstrated by 15.06.2014 in a phase wise manner.

25. On 27.06.2014, Torpedo Level Sensors were successfully commissioned and the Joint Protocol for Instrumentation and Automation sheet no. 21 was signed on 28.06.2014, which recorded the aforesaid.

26. TPL vide a letter dated 22.09.2014 informed SAIL regarding failure on the part of Diaonics to commission the FDA system and their repeated attempts to escalate the said issue. TPL reiterated their reservation on the selection of Diaonics as a vendor for the FDA

Wireless System and the technology provided by them. TPL further expressed that Diaonics was neither technically competent nor willing to commission the FDA System. Further, TPL requested SAIL to use its influence on the vendor to enable the commissioning of the Wireless FDA System.

27. On 30.09.2014, SAIL issued the Preliminary Acceptance Certificate (PAC). Thereafter, on 17.10.2014, a Commissioning Certificate was issued to the respondents by SAIL.

28. On 27.11.2014, TPL informed SAIL that the instruments related to the fire-fighting system (deluge valve panel), which was installed a year ago, could not be commissioned due to failure on the part of Diaonics to respond. TPL further informed SAIL that theft of electrical components in the deluge valve panels had taken place and if the same continued, TPL would not be able to commission the deluge valve with FDA interlocking, even if Diaonics responded to the same. TPL also informed SAIL that FF Pump House was already commissioned in auto-mode and other systems related to fire-fighting like MVWS, HVWS and GRP System were ready in manual mode.

29. On 02.02.2015, TPL once again, informed SAIL regarding Diaonics failure in commissioning the FDA system and its repeated attempts to escalate the said issue. TPL further requested SAIL's intervention to resolve the said issue.

30. Thereafter, by a letter dated 14.03.2016, DC requested SAIL to issue the FAC, as per Clause 28.1 of the Agreement. And, on

30.03.2016, TPL sent a letter requesting SAIL for full settlement of the pending contractual items.

31. SAIL responded by a letter dated 12.04.2016 informing TPL that the FAC and FAC linked payments shall be released after the closure of the contract.

32. On 27.07.2016, SAIL sent an email to TPL stating that the FAC invoices were submitted without the FAC certificate and therefore, TPL should take the invoices from their office. Thereafter, on 28.07.2016, TPL responded to the aforesaid email stating that it had submitted the FAC invoices in accordance with their contract and it had completed all pending issues/obligations under the Agreement. It further requested SAIL to provide specific requirements for release of the FAC linked payments.

33. By letters dated 11.08.2016 and 11.09.2016, DC requested SAIL to release its Performance Bank Guarantee.

34. On 10.09.2016, SAIL sent an email informing TPL that it had received a copy of the revised Bank Guarantee of ₹1 crore with their request for release of the original Bank Guarantee. Further, SAIL agreed to release the original Bank Guarantee upon TPL furnishing a fresh Bank Guarantee to the tune of ₹3.5 crores, *inter alia*, towards the Wireless FDA System, which was yet to be commissioned.

35. On 12.09.2016, TPL submitted invoices under various heads towards release of FAC payments. DC followed by submitting its FAC invoice amounting to €1,745,686.25, on 15.09.2016

36. On 19.09.2016, SAIL released the Bank Guarantees issued by DC.

37. Under the cover of its letter dated 23.09.2016, TPL submitted a fresh Bank Guarantee dated 15.09.2016 for an amount of ₹3.50 crores and the same was valid up to 15.09.2017. It further requested SAIL to release the existing Bank Guarantee.

38. Thereafter, on 30.09.2016, since various disputes had arisen between the parties, the respondents invoked the agreement to refer the disputes to arbitration. The same were subject matter of a separate arbitration (ICC Case no. 22326/PTA), which has culminated in an arbitral award. However, the issues of FAC, FAC related payments and the return of Bank Guarantees were not a subject matter of the aforesaid arbitration.

39. On 01.10.2016, SAIL addressed a letter to the respondents extending the period of the contract from 01.04.2011 to 12.01.2012 without liquidated damages and from 13.01.2012 till 15.08.2013 with liquidated damages.

40. Thereafter, on 20.12.2016, TPL pointed out certain discrepancies in the paperwork and SAIL's condonation was required in order to obtain the FAC from the Contract Labour Cell (CLC).

Further, TPL offered to furnish an unconditional undertaking indemnifying SAIL from all claims arising out of the condonation.

41. On 27.01.2017, TPL submitted a final proposal for getting the clearance from CLC and it further, reiterated its offer to furnish an indemnity for the liability that could arise from the aforesaid discrepancies. TPL proposed that alternatively, SAIL could deduct the entire sum of ₹32,87,134/-, in order to obtain the clearance as required from CLC.

42. On 08.02.2017, TPL submitted the FAC application as per the prescribed format. The annexures to the said FAC application indicated that the defects had been complied with and the pendency did not relate to the Preliminary Acceptance Test (PAT) or FAC.

43. Thereafter, during the period from 13.02.2017 to 03.03.2017, meetings were conducted between SAIL and the respondents at site to review the punch list points and completion of balance works before issuance of the FAC, which included the Wireless FDA System.

44. On 21.02.2017, TPL submitted service instruction manuals and a complete set of 'as built' drawings to SAIL. Thereafter, on 22.02.2017 and 02.03.2017, two protocols were jointly signed by SAIL and TPL with respect to instrumentation and 'as built drawings'.

45. On 03.03.2017, SAIL executed Annexures 1(a) and 1(b), which had been signed by SAIL and TPL. The said annexure contained 22

balance PAT Punch Points, in which 12 were related to FDA and the remainder were in relation to instrumentation.

46. On 20.03.2017, Final Acceptance Certificate (FAC) in respect of Blast Furnace No. 5 was signed by SAIL.

47. Thereafter on 21.03.2017, an inter-office Memo was issued by General Manager, BF Operation Team of SAIL to General Manager, Project of SAIL stating that the FAC for Blast Furnace no. 5 had been signed and the balance PAT points reflected in Annexure 1(a) and 1(b), were not completed. It was further stated that a necessary commercial settlement must be arrived at before the release of FAC payment.

48. On 17.04.2017, the FAC document was signed by Mecon and the said document was forwarded to the Projects Team of SAIL.

49. On 20.05.2017, SAIL sent an email informing TPL about the list of outstanding PAC points contained in the document dated 03.03.2017 and, requested TPL to finish the balance works before the issue of FAC.

50. On 31.05.2017, TPL vide an email informed SAIL that it could liquidate the balance punch points and deduct the said value from TPL after mutual commercial settlement on value of the work.

51. Thereafter, TPL vide an email dated 20.07.2017, made a proposal to SAIL that a sum of ₹25 lakhs could be debited towards open ended agreed punch points so that the FAC could be issued.

52. On 28.08.2017, the Bank Guarantee was extended for a further period from 15.09.2017 to 15.03.2018 and, the claim period stood extended till 15.06.2018.

53. Since the impasse relating to the issuance of FAC continued, the respondents sent a legal notice dated 13.09.2017, calling upon SAIL to issue the FAC and FAC linked payments along with interest from 18.03.2016. The respondents further stated that they had fully executed the contract including the punch points and the reasons of delay in completion of the pending points were not attributable to them. The respondents further informed SAIL that in light of the circumstances stated therein, they had withdrawn their consent to settle the matter by reaching a commercial settlement and signature on the PAT Punch Points dated 03.03.2017 stood withdrawn as well. They, accordingly, requested SAIL to release the FAC and FAC linked payments.

54. SAIL responded to the legal notice dated 13.09.2017 sent by the respondents on 09.10.2017 and declined to release the FAC and FAC related payments, in favour of the respondents.

55. On 15.09.2017, SAIL was informed by Corporation Bank that at the request of TPL, it had extended their liability towards the Bank Guarantee to the tune of ₹3.5 crores for a further period from 15.09.2017 to 15.03.2018 and, extended the claim period up to 15.06.2018.

56. Various disputes arose between the parties regarding the Project and the same were submitted to arbitration in a separate case –ICC Case no. 22326/PTA – and an award dated 16.05.2018 has been rendered in respect of those disputes. However, the respondents now sought adjudication on the issuance of FAC, payments related to FAC and return of the Bank Guarantee.

57. On 11.10.2017, SAIL and TPL sought conciliation pursuant to Clause 6 of GCC. Upon failure of the conciliation proceedings, the respondents initiated arbitration proceedings as per Clause 6 of the GCC by filing their request dated 20.02.2018 with the Secretariat of the ICC Court to resolve their disputes arising from the issuance of FAC and the payments related to FAC.

58. The Arbitral proceedings culminated in the impugned award.

Claims/Counter claims

59. The claims made by the respondents in their Statement of Claims are summarized as under:-

Claim No. 1	Direct SAIL to issue Final Acceptance Certificate in favour of the Consortium
Claim No. 2	In the alternative, declare that the FAC certificate is deemed to have been issued to the Consortium.
Claim No. 3	Declare that the Contract stands completed and there are no further liabilities by the parties against each other except as in

	the present arbitration and the earlier arbitration
Claim No. 4	Award a sum of Rs. 26,61,35,000 and Euro 1,30,750 in favour of TPL and Euro 1,745,686.25 in favour of DC towards payment due under FAC
Claim No. 5	Award interest on the above payments with effect from 19.9.2015.
Claim No. 6	Award pendente-lite and post award interest in favour of Consortium
Claim No. 7	Award cost of the present Arbitration proceedings in favour of Consortium
Claim No. 8	Award any other or further reliefs to Consortium, as this Tribunal feels just and appropriate in the facts of the case
Claim No. 9	Declare that Bank Guarantee Number 2016/204 dated 15.09.2016 is liable to be returned to TPL;
Claim No. 10	Direct SAIL to return the Bank Guarantee Number 2016/204 dated 15.09.2016 presently valid up to 15.09.2018 for a sum of Rs. 3.5 Crores

60. SAIL filed its Statement of Defiance disputing the claims and also raised counter-claims. The same are summarized as under:-

Counter Claim No. 1	To set aside the fresh reference to arbitration from a continuing cause of action
Counter Claim No. 2	To set aside the prayers of the Claimant for foregoing reasons, fact and arguments
Counter Claim No. 3	Award cost of the present arbitration proceedings in favour of the Respondent
Counter Claim No. 4	Award any other or further reliefs to the Respondent as this tribunal feels just and appropriate in the facts of the case

61. Thereafter, the Arbitral Tribunal rendered the impugned award and awarded a sum of ₹266,135,000/- and €130,750/- in favour of TPL. In addition, it entered an award of a sum of €1,745,686.25/-, in favour of DC. The Tribunal further awarded interest at the rate of 10% per annum from 08.02.2017 till the date of payment. Further, the Arbitral Tribunal directed that the Bank Guarantee dated 23.09.2016 for ₹3.5 crores be returned to TPL. The Tribunal also awarded administrative costs and fees of the Arbitral Tribunal amounting to ₹2,45,55,787/- and legal fees and expenses amounting to ₹88,37,128/- in favour of TPL; and the legal fees and expenses quantified at €29,975/- and \$22,755.48/- respectively in favour of DC.

62. Aggrieved by the impugned award, SAIL has filed the present petition.

Submissions

63. Mr Tripathi, learned senior counsel appearing on behalf of SAIL, assailed the impugned award, mainly, on two fronts. First, he submitted that the claims made by the respondents were not maintainable and were covered by the principles of constructive *res judicata*. He submitted that the respondents had referred the disputes to arbitration. However, the same did not include any dispute regarding non-furnishing of the FAC, even though the time for furnishing the FAC had expired. He submitted that admittedly the cause of action had arisen on 18.03.2016. The respondents had stated in the Statement of Claims that the entire FAC payments ought to have been released without the BG on 18.03.2016, that is, within six months of completion of the PG Test on 19.09.2015. He also pointed out that even according to the Arbitral Tribunal, the cause of action had arisen on 08.02.2017. He submitted that according to Article 23(4) of the ICC Rules, a claimant was entitled to raise new claims till the stage of signing the Terms of Reference. He stated that the Terms of Reference, which in this case, was signed by the Arbitral Tribunal on 20.02.2017 and therefore, the respondents were entitled to raise their claim in the first arbitration. However, they had failed to do so. He stated that the Statement of Claims, filed in the first arbitration proceedings (ICC case 22326/PTA), also contained a paragraph whereby the respondents had sought to reserve their rights to make a claim regarding the issuance of the Final Acceptance Certificate as well as FAC payments. He submitted that this clearly indicated that

the cause of action for the disputes sought to be raised by the respondents had arisen prior to the respondents filing their Statement of Claims in the first arbitration, which was invoked on 30.09.2016.

64. Second, Mr Tripathi submitted that the impugned award is patently erroneous. It is also opposed to the basic notions of morality and justice, which would shock the conscience of the Court. He submitted that, therefore, the impugned award was liable to be set aside on the grounds as set out in Section 34(2)(b)(ii) of the A&C Act. He further submitted that the impugned award is also patently illegal and liable to be set aside in terms of Section 34(2A) of the A&C Act. He submitted that the arbitration before the Arbitral Tribunal could not be considered as an International Commercial Arbitration because the Consortium constituted by the respondents included a foreign entity (DC). He submitted that the respondents were acting as a Consortium with TPL being a leader. He stated that in terms of Clause 2 of the Special Conditions of the Contract (SCC) read with Clause 3.9.1 of the General Conditions of the Contract (GCC), TPL, as a leader of the Consortium, had the overall responsibility for execution of the Contract. Thus, the central management and control of the Consortium vested with TPL and the same was exercised in India. Thus, for all practical purposes, the Consortium of the respondents were required to be considered as a party located in India and therefore, the arbitration could not be considered as an International Commercial Arbitration within the definition of Section 2(1)(f) of the A&C Act. He referred to the decisions of the Supreme Court in *Larsen and Toubro Limited*

Scomi Engineering BHD v. Mumbai Metropolitan Region Development Authority: (2019) 2 SCC 271 and Perkins Eastman Architects DPC and Ors. v. HSCC (India) Ltd.: (2019) SCC OnLine SC 1517, in support of his contention.

65. Mr. Tripathi further assailed the impugned award on the ground that the Arbitral Tribunal had made the award by reading in the concept of “deemed FAC”, which was alien to the contract between the parties. He submitted that the Arbitral Tribunal had unilaterally altered the terms of the Agreement, while granting an award in favour of the respondents.

66. Second, he submitted that the passing of the impugned award by the Arbitral Tribunal is solely based on an erroneous finding that the FAC was deemed to have been issued on a date anterior in point of time.

67. He contended that the Arbitral Tribunal had unilaterally altered the terms of the contract between the parties and made an award in favour of the respondents on the said basis. He made a reference to the decision of the Supreme Court of India in ***Ssangyong Engineerings & Construction Co. Ltd. vs NHAI: 2019 SCC Online SC 677***, and contended that a unilateral addition or alteration of a contract can neither be imposed upon an unwilling party nor can a party to an agreement be liable to perform a bargain not entered into with the other party. Such a course of conduct would be contrary to the fundamental principles of justice, as followed in this country

68. He submitted that one of the major components of the Project was the installation and operationalization of the FDA System, however, the same was never operationalized though payments were made to the respondents. He further submitted that the Arbitral Tribunal accepted that the FDA was not operationalized, however, the Arbitral Tribunal had “*implied deemed completion and deemed issuance of the final completion certificate*” in order to hold that the respondents were entitled to the FAC payments. He further submitted that the respondent had admitted that the Wireless FDA was only installed by them and not commissioned, however, since the Project was a turnkey project, it required commissioning as well. Further, there is no term or provision in either the tender or the Agreement that contemplates the possibility of a ‘Deemed Final Completion Certificate’, especially in the present case where there is an admission of outstanding works.

69. He contended that it is well settled law that Arbitral Tribunals and courts cannot imply terms into a commercial agreement, or a tender document, which carries higher sanctity and measures of scrutiny. He relied on the decision of the Supreme Court in ***Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Another: (2018) 11 SCC 508***, in support of his contention.

70. He submitted that the Arbitral Tribunal had completely disregarded an email dated 31.05.2017 sent by TPL. In the aforesaid

email, TPL had asked SAIL to liquidate the balance punch points and the same was evidence of the monetary liability towards SAIL.

71. Next, he submitted that the return of the Bank Guarantee, payment of the complete sums for installation and commissioning of the FDA System, and payment for the FAC, as awarded by the Tribunal is grossly erroneous and against the terms of the Agreement. Further, the Bank Guarantee was the only security with SAIL for any default on part of the respondents in not commissioning the FDA System.

72. Lastly, he submitted that the learned Arbitral Tribunal disregarded the expert evidence provided by Mr. Binu Pillai (M/s Lotus Wireless Technologies) on 12.03.2019 regarding operationalization of the FDA System, which would establish that the respondents had failed in curing/preventing the defects.

73. Mr. Dutt, learned Senior Counsel appearing on behalf of DC, countered the aforesaid submissions.

74. He submitted that the impugned award was based on finding of facts that TPL and DC had completed all the works and were duly entitled to the FAC and payments related to FAC and thus, there are no grounds to challenge the impugned award.

75. He submitted that the present award has been passed in an International Commercial Arbitration and therefore, the scope of challenge for such an award, is narrow. He relied on the decision of

the Supreme Court in *HRD Corporation v GAIL: (2018) 12 SCC 471*, in support of his contention.

76. He submitted that the claim for the FAC arose after the first arbitration was invoked and therefore, the respondents were not precluded in invoking another arbitration on this issue. He referred to the decision of the Supreme Court in *Dolphin Drilling Ltd. v ONGC: (2010) 3 SCC 267*, which was also referred by the Tribunal.

77. He submitted that the respondents were not liable for the failure of the FDA system, as the Agreement did not contain any requirement/specification for providing a Wireless FDA System. Diaonics had been engaged to supply the same and the said vendor was not proposed by the respondents. Further, the respondents had informed SAIL on multiple occasions that the Wireless FDA System is not reliable.

78. He submitted that the learned Arbitral Tribunal had held that the respondents obligation was to provide a list of spares, which had been provided and accepted by SAIL.

79. He submitted that the Arbitral Tribunal had held that the Engineer had approved the manual valve to be installed in Blast Furnace No. 5 and SAIL's contention that the respondents had not performed their obligation as manual valves had been installed instead of motorised valves, deserves to be rejected. He submitted that SAIL's contention that the respondents had not supplied all the "as built"

drawings and had not obtained clearance from SAIL's internal body, CLC, was also rejected by the Arbitral Tribunal.

Reasons and Conclusion

80. The first and foremost question to be addressed is whether the arbitration between the parties was an “international commercial arbitration” within the meaning of Section 2(1)(f) of the A&C Act. The said question is relevant as an arbitral award cannot be set aside on the ground of patent illegality – as available under Section 34(2A) of the A&C Act – if the same is the culmination of an “international commercial arbitration”.

81. Section 2(1)(f) of the A&C Act is set out below:

“(f) “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- (i) an individual who is a national of, or habitually resident in, any country other than India; or
- (ii) a body corporate which is incorporated in any country other than India; or
- (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;”

82. It is apparent from a plain reading of the above quoted clause that in a case where at least one of the parties is a foreign entity or in case of an individual, who is a habitual resident outside of India, the arbitration in respect of disputes arising out of such a commercial relationship would fall within the definition of an “international commercial arbitration”.

83. In the present case, the Agreement was entered into between SAIL and a consortium comprising of TPL and DC (the respondents herein). The Agreement was signed on behalf of the consortium by both the respondents. A plain reading of the contract documents indicate that the scope of work to be performed by TPL and DC was separate and distinct. Clause 5 of the SCC also specifies that the obligations of TPL include clearing such equipment and components at the port in India, as required by DC, for executing its scope of work. Clause 2 of the SCC expressly provides that the leader of the consortium would be responsible for overall execution of the contract. However, it also clarifies that the members of the consortium would be liable for damages in proportion to their respective scope of facilities. Clause 2.0 of the SCC is set out below:

“2.0 Consortium (Reference GCC Sub-Clause 3.9.1)

Leaders of the Consortium shall be overall responsible for the execution of the contract. The Leader and other members of the

consortium shall be jointly responsible for execution of the contract, but will be liable for damages in proportion to the respective Scope of Facilities.”

84. Thus, in the facts of the present case, this Court finds it difficult to accept that DC cannot be considered as a separate party to the Agreement. Specific payments were required to be made to DC and, as noted above, its scope of work under the Agreement, was also well defined.

85. It is also relevant to refer to Article 10 of the Agreement, which embodies the Arbitration Clause. The said Arbitration Clause is set out below:

“Article 10.

Arbitration 10.1 Arbitration (Reference GCC Clause 6)

Any disputes or differences, whatsoever, arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Contract shall be settled between the Employer and the Contractor amicably through Conciliation. The applicable rules for Conciliation proceedings shall be that of “SCOPE Forum of Conciliation and Arbitration.” (SCFA).

If, however, the Employer and the Contractor are not able to resolve their disputes / differences amicably as aforesaid or through Conciliation also, the said disputes / differences shall be settled by Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the

award made in pursuance thereof shall be binding on the parties.

For all Contracts, whose value is Rupees 5 crores (for both Indian and Foreign Contractors) and below, shall go for Ad hoc Arbitration, where an Impartial Arbitrator shall be appointed by the Managing Director of Rourkela Steel Plant, and the arbitration shall be governed and regulated in all respect according to the laws of India and the Arbitration proceedings shall be regulated and governed by Indian Arbitration and Conciliation Act 1996 or such modifications or re-enactment thereof. The venue for proceedings shall be Rourkela, Orissa.

For all Contracts, whose value is more than Rupees 5 crores and the contracts with Foreign parties for value of more than Rupees 5 crores and up to Rupees 20 crores, the arbitration shall be governed and regulated in all respect according to the laws of India and the Arbitration proceedings shall be regulated and governed by the Rules of Indian Council of Arbitration (ICA)/ "SCOPE" Forum of Conciliation and Arbitration" (SCFA). The venue of Arbitration shall be New Delhi, India.

Arbitration with Foreign Contractor or in Consortium contracts (including foreign contractor), where the contract value is more than Rupees 20 crores shall be governed by the Rules of Arbitration of International Chamber of Commerce (ICC), Paris. The venue of the arbitral proceedings shall be New Delhi.

During the pendency of the Conciliation or Arbitration proceedings both the Parties shall continue to perform their contractual obligations.”

86. It is clear from the above that it was agreed the disputes relating to contracts between SAIL and Indian parties, where the value of the contract exceeds ₹5 crores, would be referred to arbitration under the Rules of the Indian Council of Arbitration (ICA) or Scope Forum of Conciliation and Arbitration (SCFA). However, in case of contracts with foreign contractors or a consortium (including foreign contractors) where the contract exceeded ₹20 crores, the disputes would be referred to arbitration under the Rules of ICC. Since there is no controversy that the disputes were rightly referred to arbitration under the Rules of ICC, it follows that SAIL also understood that the Agreement in question included a foreign contractor. In fact, DC has been referred to as a “Consortium Member and Contractor” in the Agreement. In the aforesaid circumstances, it is clear that SAIL had recognised that the Agreement included obligations that were required to be specifically performed by DC, which is a foreign incorporated entity.

87. In the given circumstances, this Court is unable to accept that the arbitration between the parties was not an International Commercial Arbitration within the meaning of Section 2(1)(f) of the A&C Act. Thus, the impugned award cannot be assailed on the ground, as specified under Section 34(2A) of the A&C Act. In other

words, the ground of patent illegality is not available to SAIL for assailing the impugned award.

88. The decisions of the Supreme Court in *Larsen and Toubro Limited SCOMI Engineering BHD* (*supra*) and *Perkins Eastman Architects DPC* (*supra*) are inapplicable in the facts of this case. In *Larsen and Toubro Limited SCOMI Engineering BHD's* case the petitioners had filed the petition under Section 11 of the A&C Act in the Supreme Court on the assumption that the arbitration between the parties would be an international commercial arbitration. The Supreme Court dismissed the petition as it found that the Consortium of Larsen and Toubro Limited (an Indian company) and SCOMI Engineering BHD (an entity incorporated in Malaysia) was an unincorporated association, whose central management and control was exercised in India. In that case, it was not open for SCOMI Engineering BHD to assert that it was a party to the contract with Mumbai Metropolitan Region Development Authority (MMRDA). This was so because an arbitral tribunal had, in an interim award dated 18.08.2016 qua other disputes, held that the claim against MMRDA could be made only as a Consortium and not as two separate entities. The said interim award was subject matter of challenge in the Bombay High Court and was upheld by the Court in *Larsen & Toubro Ltd and Anr. vs Mumbai Metropolitan Region Development Authority: 2016 SCC OnLine Bom 13348*. The Supreme Court noted that the said order had become final and was binding between the parties. Having concluded that MMRDA had entered the contract with the unincorporated association

and its constituent companies could not claim under the contract separately, the Supreme Court also found that the central management and the office of the unincorporated association was in Mumbai. The relevant extract of the said decision is set out below:

“18. This being the case, coupled with the fact, as correctly argued by Shri Divan, that the Indian company is the lead partner, and that the Supervisory Board constituted under the consortium agreement makes it clear that the lead partner really has the determining voice in that it appoints the Chairman of the said Board (undoubtedly, with the consent of other members); and the fact that the Consortium's office is in Wadala, Mumbai as also that the lead member shall lead the arbitration proceedings, would all point to the fact that the central management and control of this Consortium appears to be exercised in India and not in any foreign nation.”

89. The facts in the present case are materially different. The Agreement describes TPL as “Consortium leader and Contractor” and DC as “Consortium Member and Contractor”. As noticed hereinbefore, the rights and obligations of TPL and DC under the Agreement are separate and specific. There is no material to indicate that there was a common or central management of the Consortium of TPL and DC. Thus, it is apparent from the Agreement, that TPL and DC were parties to the Agreement.

90. In *Perkins Eastman Architects DPC* (*supra*) the Supreme Court referred to the decision in *Larsen and Toubro Limited SCOMI Engineering BHD* (*supra*) and held that “the lead member of the

Consortium company i.e. Applicant No. 1 being an Architectural Firm having its registered office in New York, requirements of Section 2(1)(f) of the Act are satisfied and the arbitration in the present case would be an International Commercial Arbitration”. This decision is clearly not applicable in cases – like the present one – where it is evident that a foreign incorporated entity is a party to the contract as it clearly specifies the obligations to be performed by that foreign entity and creates corresponding rights in favour of the other party. In such cases, it must be accepted that a contract exists with the foreign incorporated entity and an arbitration in respect of the contract would undoubtedly be an international commercial arbitration by virtue of sub-clause (ii) of clause (f) of Section 2(1) of the A&C Act.

91. The next question to be examined is whether the claims made by the respondents are barred by the principles of constructive *res judicata*. It was SAIL’s case that since the claimants had referred certain disputes arising from the Agreement to arbitration on a previous occasion (ICC Case No. 22326/PTA also referred to as “the first arbitration”), it was not open for the claimants to once again invoke the Arbitration Clause in respect of the disputes that had arisen prior to the settlement of the Terms of Reference of the first arbitration.

92. Concededly, recourse to arbitration under an agreement is not restricted to a one-time measure. The arbitration is merely an alternate dispute resolution mechanism and thus, if otherwise an action is maintainable, recourse to arbitration would be available. Concededly,

recourse to arbitration is neither precluded nor exhausted because parties had referred certain disputes arising from a contractual relationship, to arbitration previously. Disputes that arise subsequently or at a later point of time are also required to be referred to arbitration, provided, the same fall within the scope of the arbitration agreement. In the present case, it is SAIL's contention that since the disputes between the parties regarding FAC payments and issuance of FAC existed prior to the Terms of Reference being settled under the first arbitration, the failure on the part of the respondents to include the said disputes within the said Terms of Reference effectively preclude the respondents from raising such disputes.

93. At this stage, it is also necessary to note that although before the Arbitral Tribunal, it was urged that the arbitral award rendered in the first arbitration (ICC Case No. 22326/PTA) was also deemed to cover the subject disputes, no such contentions was advanced before this Court. Mr Tripathi had restricted SAIL's case to assailing the maintainability of the claims on the ground that the respondents were precluded from raising the claims since the same had not been raised in the first arbitration. According to him, the claims were barred by the principles of constructive *res judicata*.

94. At this stage, it is relevant to refer to certain claims. The blast furnace was "blowing – in" on 05.08.2013 and SAIL issued a Provisional Acceptance Certificate (PAC) on 30.09.2014. Thereafter, on 17.10.2014, SAIL issued the Completion Certificate and the entire works were taken over. On 28.10.2015, SAIL issued the Performance

Guarantee Test (PGT) Certificate with effect from 19.09.2015. The respondents invoked the Arbitration Clause leading to arbitration in ICC Case No. 22326/PTA – the first arbitration – on 30.09.2016. The request for arbitration was received by ICC on 06.10.2016. Prior to that, on 30.06.2016, the respondents had submitted the FAC invoice. However, the FAC Certificate had not been issued by the Engineer. There is no dispute that the time for issuing of the FAC had expired and this was also mentioned by the respondents in the Statement of Claims filed before the arbitral tribunal in the first arbitration. However, it is apparent that the disputes had not matured. The Arbitral Tribunal had also examined the facts and come to a similar conclusion. This is evident from the fact that the respondents, on subsequent occasions, had further requested for issuance of the FAC Certificate. The Arbitral Tribunal found that the FAC Certificate was signed by the Engineer after 08.02.2017. However, it was not handed over to the respondents.

95. The Arbitral Tribunal had found that TPL had submitted the FAC application as per the prescribed format on 08.02.2017. The Arbitral Tribunal also noted that the annexures to this application stated that defects had been complied with and the further pending points did not relate either to the Preliminary Acceptance Tests (PAT) or FAC. The Arbitral Tribunal concluded that this was the final submission of the FAC application by the claimants.

96. Since this was much after the invocation of the first arbitration, the Arbitral Tribunal concluded that at the time of commencement of

the first arbitration in ICC Case No. 22326/PTA, the disputes relating to FAC Certificates and FAC payments had “not fully matured”. This Court concurs with the aforesaid view. The contention that the claimants could have, at a later stage, amended their Statement of Claims and raised further claims prior to signing of the Terms of Reference under the first arbitration, is of little relevance. The request for arbitration, which led to the institution of ICC Case No. 22326/PTA (the first arbitration), clearly did not include the disputes relating to the FAC Certificate; FAC payments; and the return of the residuary Bank Guarantees. Thus, even if it is accepted that such disputes could have been raised subsequently, the same does not lead to the conclusion that the respondents were precluded from doing so by issuing a fresh request for arbitration. The contention that the claims are barred under the principles of constructive *res judicata*, are unmerited. The Arbitral Tribunal had considered the aforesaid contention and rejected the same. This Court finds no infirmity with the decision of the Arbitral Tribunal in this regard.

97. The remaining question to be addressed is whether the impugned award is liable to be set aside as it falls foul of the fundamental policy of Indian law. According to SAIL, the impugned award is opposed to the most basic notions of morality and justice. It was earnestly contended on behalf of SAIL that the Arbitral Tribunal, has in effect, altered the contract entered into between the parties. It had effectively absolved the respondents from performance of their obligations of ensuring due commissioning of the Wireless FDA

System and for rectifying the agreed defects (PAT Punch Points). It is submitted that the Agreement required the respondents to ensure that the FDA system was installed and commissioned. Since it is an admitted case that the said system was not commissioned, the question of proceeding on the basis that SAIL was obliged to issue the FAC Certificate and pay the balance Contract Price is contrary to the terms of the Agreement. According to SAIL, this falls foul of the fundamental policy of Indian law as an Arbitral Tribunal is bound by the terms of the contract and, cannot alter the same.

98. Mr Tripathi had further submitted that the respondents had charged an additional amount of ₹66 lacs for the Wireless FDA System and thus, were fully bound by the terms of the Agreement to duly provide and commission the same. He submitted that the Arbitral Tribunal had proceeded on an erroneous premise that because SAIL had suggested a vendor for the said system, TPL was absolved of its responsibility for ensuring due performance of the Agreement by installation and commissioning the FDA system. He submitted that the Arbitral Tribunal had erred in proceeding on the basis that SAIL had issued a directive to TPL to place the order for providing a Wireless FDA System on Diaonics. He submitted that by an email dated 16.03.2011, SAIL had suggested the name of two vendors and it was for TPL to choose any vendor to supply the Wireless FDA System. He states that there was no directive to TPL to place the contract for supply of the Wireless FDA System with Diaonics. He stated that in fact, TPL had not only engaged Diaonics but also

engaged one M/s ABB for installation and operation of the Wireless FDA System and further, retained the overall responsibility for installation and commissioning of the said System. He also submitted that there was evidence on record to indicate that TPL had directed testing, commissioning and hook-up of the Wireless FDA System by Diaonics and M/s ABB by 15.06.2014 (as per Minutes of the Meeting dated 22.05.2014). TPL had further threatened that if the same was not done, it would initiate penal action against the Sub-contractors. He submitted that this also clearly indicated that the parties were *ad idem* that TPL was fully responsible for commissioning of the Wireless FDA System in terms of the Agreement. He pointed out that the Arbitral Tribunal had also accepted that the contract was technology neutral and wireless technology could have been adopted instead of wired technology, as originally quoted by TPL.

99. Essentially, SAIL seeks to assail the finding of the Arbitral Tribunal that failure in commissioning of the Wireless FDA System would not amount to non-performance of the contractual obligations on the part of the respondents.

100. The principal dispute between the parties relates to the payment of balance 2.5% of the consideration for execution of the contract. It is not seriously disputed that SAIL was obliged to release the said payment upon issuance of the FAC. According to SAIL, the FAC could not be granted as several defects pointed out by SAIL had not been remedied by the respondents. SAIL further claimed that the respondents were obliged to install and operationalize the FDA

System, which they had failed to do. Thus, according to SAIL, the respondents were not entitled to the balance 2.5% of the agreed consideration.

101. The respondents claim that TPL had agreed to provide a Conventional FDA System, however, during the course of execution, SAIL insisted that the Wireless FDA System (which was not contemplated in terms of the Agreement) be installed. TPL claims that it was skeptical about the wireless technology and states that it had expressed its reservations regarding the same. Nonetheless, on the insistence of SAIL, it had proceeded to place an order for supply and installation of the Wireless FDA System with the vendor (Diaonics) nominated by SAIL. The respondents claimed that they could not be held responsible for due performance of the said Wireless System, which was installed at the instance of SAIL. The respondents further claim that SAIL was duly informed about lack of available expertise in regard to a Wireless FDA System.

102. The respondents also claimed that in any event, the final payments could not be withheld on account of non-commissioning of the Wireless FDA System as the same did not form a substantial portion of the contract. They contended that in the event, if any small component of the Plant was defective or not functioning, SAIL was entitled to deduct the cost of repairs of the same but it could not withhold the milestone payments. According to the respondents, the contract in question was a lump sum contract and the milestones under the Agreement were only for the purpose of convenience. In addition,

it was pointed out that the plant had been handed over to SAIL. It was duly taken over by SAIL and was functional. It had also met all the parameters that were guaranteed.

103. The Arbitral Tribunal had found in favour of the respondents. It also concluded that the respondents were not responsible for any failure on the part of Diaonics to commission the Wireless FDA System. The Arbitral Tribunal also noted that the Plant had been functional for considerable period of time and SAIL had taken no steps to remedy the dysfunctional Wireless FDA System. The Arbitral Tribunal held that the Agreement could be fully satisfied by installation of a conventional FDA System. The Arbitral Tribunal found that the change in the work to be executed under the Agreement was effected in terms of post contractual discussions. Whilst, TPL had reservations regarding implementation of a Wireless FDA System, SAIL had suggested that TPL could contact one of the two vendors (including Diaonics) for installation of a Wireless FDA System. The Arbitral Tribunal found that the suggestion of SAIL to TPL to contact one of the two specified vendors for installation of a Wireless FDA System in fact amounted to directing TPL to do so and to install a Wireless FDA System, despite TPL expressing its disinclination.

104. After evaluating the evidence and material on record, the Arbitral Tribunal concluded that the respondents could not be held responsible for failure on the part of Diaonics to commission the Wireless FDA System. It held that the respondents had sufficiently

disclaimed the reliability of a Wireless FDA System and thereby, had not provided any functional guarantee to SAIL.

105. As noticed above, the principal dispute between the parties centers around the balance 2.5% of the consideration that was to be released on issuance of the FAC Certificate. Clause 2.1.3 of Appendix 3 to the Agreement expressly provides that 2.5% of the price specified shall be released upon issuance of the FAC. It is clear from the above that issuance of the FAC would trigger the release of the final payment. However, this Clause cannot be construed to mean that SAIL would be entitled to damages equivalent to 2.5% of the agreed consideration on account of any default on the part of TPL/DC without quantification of the actual damage suffered by SAIL in event of a default. Whilst, the issuance of FAC is a trigger for release of the milestone payment, the non-issuance of FAC cannot be construed as entitling SAIL to reduce the price by an amount equivalent to the milestone payment payable on the issuance of FAC.

106. However, before the Arbitral Tribunal both the parties had confined the issues to the question whether the FAC could be withheld by SAIL.

107. Clause 28.1 of the GCC provides for the Final Acceptance of the Facilities. The said Clause is relevant and is set out below:-

“Final Acceptance shall occur in respect of Facilities when:

- a) The performance guarantee tests have been successfully completed and the guaranteed out and other parameters are met by the Contractor, or the amount of Liquidated Damages specified in Sub-Clause 27.4 & 27.4.1 hereof, if recoverable, had been recovered by the Employer from the Contractor.
- b) Items mentioned in Sub-Clause 24.5 hereof relevant to the Facilities or that part thereof have been completed.
- c) The Contractor has fulfilled all the obligations under the Contract.”

108. It is SAIL's case that since it is not disputed that the FDA System installed by Diaonics was not functional, it could not be held that the respondents have performed the Contract. Therefore, in terms of Sub-clause (b) of Clause 28.1 of the GCC, the respondents were not entitled to the FAC and consequently, to the FAC linked payments. In terms of Sub-Clause (c) of Clause 28.1 of the GCC, a Final Acceptance would occur only after the Contractor [the respondents] had fulfilled the obligations under the Contract.

109. The contention that the Arbitral Tribunal's decision that the Final Acceptance was deemed to have occurred amounts to rewriting the Contract, is unmerited. A plain reading of the impugned award indicates that the Arbitral Tribunal had concluded that there was no breach on the part of the respondents in performing their obligations on account of the FDA System not being commissioned successfully. SAIL's contention that the Arbitral Tribunal has rendered the impugned award contrary to the express terms of the Contract is

premised on the assumption that there is an admitted default on the part of the respondents in performing their obligations. This assumption is plainly erroneous as it is TPL's case that it is not responsible for functional guarantees of the Wireless FDA System as it had neither proposed the same nor held out any warranties regarding the same. On the contrary, TPL had established before the Arbitral Tribunal that it had expressed its reservations not only regarding the Wireless FDA technology but also regarding the competence of the vendors to successfully implement the same.

110. It was TPL's case that order was placed on Diaonics for supply and commissioning for the Wireless FDA System at the insistence of SAIL despite TPL expressing its reservations regarding the same. The Arbitral Tribunal accepted that the respondents could not be held responsible for the failure to commission the FDA System. Consequently, the respondents were entitled to the FAC.

111. The fact that TPL had demanded further payments for the Wireless FDA System did not conclusively establish that it had also held out any warranty regarding the functionality of the said system/technology. It is SAIL's case – which was accepted by the Arbitral Tribunal – that the Agreement between the parties was technology neutral and the Agreement did not specify any particular technology for the FDA System. The Arbitral Tribunal reasoned that it followed from the same that TPL could install, and Commission an FDA system based on wired technology and that would discharge its obligations under the Agreement. But since, SAIL had directed TPL to

install a Wireless technology based FDA System – a technology regarding which TPL had reservations – TPL could not be held responsible if the vendor (Dianoics) had defaulted in initializing the same.

112. It was contended on behalf of SAIL that it had not issued any directions to TPL for installing a Wireless FDA System. Even though TPL had initially expressed reservations regarding the Wireless FDA technology and the availability of suppliers, it had proceeded to place orders for the Wireless FDA System without any reservations. TPL had not disagreed or declined to procure and commission the Wireless FDA System and therefore, was not absolved of performing its obligations under the Agreement.

113. The Arbitral Tribunal had not accepted the aforesaid contention as it found that the communication exchanged between the parties did indicate that SAIL had, in fact, directed TPL to install a Wireless FDA System. Although, there is no letter or communication issuing an express directive to the aforesaid effect, the reading of the communications exchanged between the parties and the other material available on record does indicate that it is not unreasonable to accept that SAIL had insisted on a Wireless FDA System and despite its reservations, TPL had complied and placed an order for the same.

114. The Arbitral Tribunal noted that SAIL had called upon TPL to explore the installation of a Wireless FDA System. TPL had explored

the possibility of doing so and, had sent a letter dated 10.03.2011, which reads as under:-

“(i) In the Contract Technical Specification, it is no where mentioned that wireless FDA system is to be provided for RSP BF#5. We have selected our vendors based on the conventional FDA system, as mentioned in the contract.

(ii) We have explored with different suppliers as per your request for

wireless FDA. However, we have found that there are no suppliers

who have any past experience for supplying of the wireless FDA

system in any steel sector before.

(iii) We have prepared the design basis of FDA system based on the

conventional one, as per the contract and submitted to MECON for

approval. MECON however is not approving the drgs and asking for RSP clearance first for supply of conventional FDA. As you are aware that the construction of ECRs are in progress at site some ECRs needs to be completed urgently for which the FDA system and layouts are needed to be finalized immediately for construction of false ceiling, etc.

Based on the aforementioned points, we kindly request you to give your consent to MECON for approval of drawings based on

Conventional Type Wired FDA System so we can proceed further in the area.”

115. The Arbitral Tribunal held that the aforesaid communication clearly established that TPL was not convinced about the expertise of the vendors and therefore, had in unequivocal terms communicated to SAIL that installation of the conventional FDA System should be approved. Despite the above, SAIL had sent a letter dated 16.03.2011 to TPL which reads as under:-

“Dear Sir,

You may contact M/s Diaonics Atomation (P) Ltd. & M/s ECIL for the Wireless FDA as per preferred make list of RSP.”

116. The Arbitral Tribunal had examined the communications between the parties including the ones as set out above and had concluded that the letter dated 16.03.2011 was in the nature of a directive for TPL to contact the named suppliers for procuring a Wireless FDA System. The Arbitral Tribunal interpreted the word ‘may’ used in the letter dated 16.03.2011 and held that although the same appears to be permissive, it amounted to SAIL’s decision that the two vendors mentioned in the said letter had the experience in supplying Wireless FDA Systems. The Arbitral Tribunal in effect held that by the said communication, SAIL had repelled the reservations expressed by TPL regarding the Wireless FDA System and the lack of experienced vendors for the same. Notwithstanding the above, TPL had once again by its letter dated 01.03.2011, expressed its reservations and called upon SAIL to look into the matter and “see

whether we can proceed with the conventional FDA system with a view to time, cost and reliability”. The Arbitral Tribunal had highlighted the aforesaid words and concluded that the same clearly indicated that TPL did not wish to proceed with a Wireless FDA System but had been instructed by SAIL to do so.

117. The Arbitral Tribunal held that in the given circumstances, SAIL’s insistence on installation of a Wireless FDA System amounted to a ‘change’ in the facilities within the meaning as contemplated under Clause 41 of the GCC. The Arbitral Tribunal noted that even though the procedure as agreed was not followed by the parties; it was apparent that insistence for a Wireless FDA System was a ‘change’ as contemplated under Clause 41 of the GCC. A proposal for such a change was also required to include the effect of “Functional Guarantees” in terms of Clause 41.3(d) of the GCC. In this context, the Arbitral Tribunal held that TPL had not extended any functional guarantees for the change to a Wireless FDA System.

118. In view of the above, the Arbitral Tribunal concluded that installation of a Wireless FDA System did not fall within the sphere of responsibility of the respondents and they had sufficiently declared the unreliability of the Wireless FDA System and, had not provided any functional guarantee with regard to the same to SAIL.

119. It is apparent that the Arbitral Tribunal’s decision is based on material on record and its interpretation of the contemporaneous communications. This Court is unable to accept that such

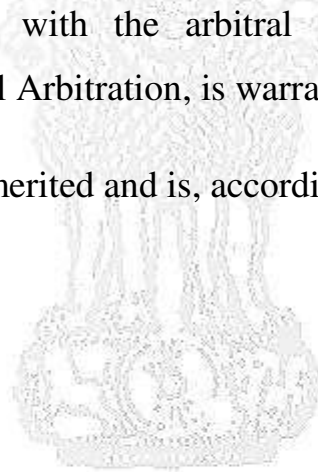
interpretation is opposed to the fundamental policy of Indian law or conflicts with the most basic notions of morality and justice. The Arbitral Tribunal's view is a plausible one and, warrants no interference in these proceedings.

120. Mr. Tripathi had also contended that it was an admitted position that certain balance 'PAT' punch points remained to be cured and therefore, the respondents were not entitled to FAC till the said PAT points were addressed. He submitted that TPL had also offered a sum of ₹25 lakhs as damages towards the commercial settlement of the outstanding PAT Punch Points. Thus, it was implicit that there was no dispute that the respondents had not addressed the PAT Punch Points, which pertain to various defects. The respondents contended before the Arbitral Tribunal that the PAT Punch Points were drawn up for the purposes of a commercial settlement. They claimed that they had further addressed all the PAT Punch Points/defect deficiencies as and when pointed out. The Arbitral Tribunal found that the PAT punch list dated 03.07.2017 relied upon by SAIL listed out certain punch points which did not find mention in the pre-hearing written submissions filed on behalf of SAIL. The same indicated that there had been a further reduction in the outstanding issues. The Arbitral Tribunal examined the evidence and material on record, and accepted the appellant's contention that the PAT punch list was made on the pretext of a commercial settlement and therefore, had little evidentiary value in supporting SAIL's case. In the circumstances, it was incumbent

upon SAIL to provide evidence in support of each of the deficiencies. This Court finds no ground to interfere with this decision.

121. The Arbitral Tribunal's evaluation as to the evidentiary value of any material is a matter within the jurisdiction of the Arbitral Tribunal. It is well settled that this Court while examining the petition under Section 34 of the A&C Act does not act as a Court of First Appeal for re-appreciation and re-evaluation of evidence/material on merits. Unless, the conclusion of the Arbitral Tribunal shocks the conscience of this Court as being opposed to most basic notions of morality and justice, no interference with the arbitral award rendered in an International Commercial Arbitration, is warranted.

122. The petition is unmerited and is, accordingly, dismissed.



VIBHU BAKHRU, J

AUGUST 24, 2021
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