

\$~12 (original side)

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

Reserved on : 10th August, 2020
Pronounced on : 4th January, 2021

+ O.M.P. (COMM.) 440/2020 and IAs 5999-6004/2020

EFS FACILITIES SERVICES (INDIA) PVT. LTD.
(FORMERLY KNOWN AS DAIKIA
INDIA PVT. LTD.)

... Petitioner

Through: Mr. Dayan Krishnan, Sr.
Advocate with Mr. Vasant Rajasekaran, Mr.
Saburabh Babulkar, Ms. Reshma Ravipati
and Mr. Sukrit Seth, Advs.

versus

INDEEN BIO POWER LIMITED

..... Respondent

Through: Mr. Hiroo Advani, Mr.
Navdeep Dahiya, Mr. Shashank Garg and
Mr. Tariq Khan, Advs.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

%

04.01.2021

(Video-Conferencing)

1. As noted in the order dated 28th July, 2020, this petition was heard finally, with consent of learned Counsel for the parties. It is, therefore, being disposed of, by the present judgement.

2. M/s EFS Facilities Services (India) Pvt. Ltd. (hereinafter referred to as "EFS") has invoked Section 34 of the Arbitration and Conciliation Act, 1996, to challenge the award dated 20th May, 2020,

whereby the learned Arbitral Tribunal has arbitrated on the dispute between EFS and M/s Indeen Bio Power Limited (hereinafter referred to as “Indeen”).

3. EFS was earlier known as M/s. Daikia India Pvt. Ltd. (hereinafter referred to as “DIPL”). DIPL, *vide* Share Purchase Agreement dated 29th March, 2012, sold its entire equity to EFS, which resulted in EFS stepping into the shoes of DIPL.

Facts

4. The controversy between EFS and Indeen revolves, essentially, around five agreements, *viz.*

- (i) a Project Development Agreement (hereinafter referred to as “PDA”) dated 2nd May, 2010,
- (ii) a Synchronization and Coordination Agreement (hereinafter referred to as “SCA”) dated 8th September, 2011,
- (iii) an undated Supply Contract Agreement,
- (iv) an undated Service Contract Agreement and
- (v) an undated Works Contract Agreement.

All agreements were between DIPL and Indeen.

5. The PDA was executed between DIPL and Indeen on 2nd May, 2010 for setting up an 8 MW Master residue Biomass Plant at Chandli, Tehsil Devli, Distt Tonk, Rajasthan. Article 1.1 of the PDA read thus:

“1.1 Daikia will engage in preparing and providing Indeen by August 2, 2010 with:

(i) a firm and binding financial proposal for an EPC Agreement pursuant to which Daikia would be retained to perform the detailed engineering, procurement and construction of the Plant and under which Daikia would undertake to procure that the Plant would be completed on the basis of a guaranteed cost, completion date, and performance standard substantially on the terms set out in the EPC Agreement term sheet attached hereto as Annex A;

(ii) a firm and binding financial proposal for an O & M Agreement pursuant to which Daikia would be retained to operate the Plant following its construction and under which Daikia would undertake to procure that the Plant meets certain agreed key technical performance indicators ("KPIs") including availability and heat rate, substantially on the terms set out in the O & M Agreement term sheet attached hereto as Annex B;'

(iii) a final business plan (the "Final Business Plan") built by replacing the indicative performance guarantees and budgetary EPC & O & M estimates of the Reference Business Plan, by the firm and binding prices and performances of the EPC and O & M Agreements, and giving as a result a final return on equity. calculated as an Internal Rate of Return (IRR) on the equity investment made by Indeen as compared to the free cash flow generated by the Project, in accordance with the assumptions and methodology used in the Reference Business Plan.”

As such, Article 1.1 of the PDA required DIPL and Indeen to execute an EPC Agreement and an O & M Agreement on or before 2nd August, 2010, extendable, under Article 1.2, by two months. Article 3.1 of the PDA provided that, unless the PDA was terminated earlier in point of time, it would remain in force till 2nd August, 2010 or till the execution of the EPC Agreement and the O & M Agreement, whichever was earlier.

6. EFS has sought to submit, in the present petition, that no Final Business Plan, as contemplated by Clause 1.1(iii) of the PDA, was ever finalized between DIPL and Indeen. It is also contended by EFS that the PDA expired by efflux of time on 2nd August, 2010, as neither the EPC contract nor the O & M Agreement had been executed till the said date.

7. On 18th January, 2011, the following e-mail was sent by Paramdeep, an employee of DIPL, to Mahesh Indru Manusukhani, Managing Director (MD) of Indeen:

“...I have accepted all the changes as per [the] last document sent by Kshitij. I have called this EPC agreement and no more a draft. Hope this is ok with you all.

This can be now given to [the] bank or any other FII.

All the best.....”

8. On 2nd March, 2011, DIPL and Indeen executed a confidential annexure, to be appended to the supply contract which was to be executed later. This annexure contained the terms and conditions governing supply and equipment by DIPL to Indeen. It also contained a clause enabling Indeen to claim liquidated damages, in the event of failure by DIPL to deliver the plant in time.

9. On 10th March, 2011, payment terms were forwarded by DIPL to the State Bank of India (SBI). The communication stated that the EPC was in the process of final vetting and that the estimated contract

value was ₹ 4385.71 crores. It was also stated, in the said communication, that the terms of payment had been finalized between DIPL and Indeen, the signed copy whereof was enclosed with the letter.

10. On 6th September, 2011, DIPL wrote to Indeen, stating that the SCA would be executed shortly. This document was signed by the representative of DIPL. The MD of Indeen acknowledged the communication by appending his signature thereon. The letter, however, stated that DIPL would execute the SCA only if Indeen confirmed the following in writing:

“1. That Indeen shall not issue a Notice to Proceed under the Service, Supply or Works Contracts nor make any payment to Daikia under the four agreements, until the expiry of a period equal to sixty days from the date of signature of the Synchronisation and Co-ordination Agreement.

2. Daikia has the option terminate all four agreements within the sixty day period referred to in item I should it be reasonably unable to execute the Project for a sum which is less than or equal to the Price.

3. Daikia and Indeen will during the sixty day period referred to in item I, negotiate the Service, Supply and Works contracts and in so doing will use all reasonable endeavours to revise the Price downwards in accordance with the Price Revision Principles set out below. Indeen shall then use all reasonable endeavours to approve the Service, Supply and Works contracts with its shareholders and financiers and Daikia and Indeen will accordingly revise the consolidated contract price in the Coordination and Synchronisation Agreement.”

11. On 8th September, 2011, the SCA was executed between DIPL and Indeen. Clauses 1.1, 1.2, 3.1, 7.1, 7.2, 7.5 and 13.4 of the SCA, which are relevant, may be reproduced thus:

“1.1 “Commencement Date” shall mean the date as indicated by Indeen in the notices to proceed to be issued under the Contract Agreements.

1.2 “Contract Agreements” shall mean Works Contract Agreement Service Contract Agreement and Supply Contract Agreement. proposed to be executed between Indeen and Daikia in a mutually agreed form.

3.1 On and from the Commencement Date, Daikia shall be responsible for coordinating and monitoring all the activities specifically forming part of the Contract Agreements.

7.1 The Parties expressly agree that the Contract Agreements form the entire scope of activities agreed between the Parties for setting up and developing the Power Plant.

7.2 The Contract Agreements shall be effective from the Commencement Date and the term of the Contract Agreements shall be co-extensive. Notwithstanding anything contained in the Contract Agreements, in the event either of the Contract Agreement is terminated for any reasons whatsoever, it shall automatically entail the termination of the other Contract Agreements and the consequences of termination, including but not limiting to liquidated damages and rejection (if applicable) of the Power Plant shall follow.

7.5 It is clarified that this Agreement and the Contract Agreements. taken together constitute the final agreement between the Parties. Wherever there is any conflict between this Agreement and the respective Contract Agreements for provisions mentioned herein, the provisions of this

Agreement are paramount and shall prevail over the Contract Agreements.

13.4 Entire Agreement: Contract Agreements along with this Agreement constitutes the entire agreement between the Parties and sets out a full statement of the contractual rights and liabilities of Indeen and Daikia.”

12. Relying on the afore-extracted clauses, EFS seeks to point out, in its petition, that

- (i) the obligations under the SCA would start only on the achievement of the “Commencement Date”,
- (ii) “Commencement Date” was specifically defined as the date on which Notice To Proceed (NTP) was issued under the Contract Agreements, i.e. the Supply Contract Agreement, Services Contract Agreement and the Works Contract Agreement and
- (iii) the SCA was not, therefore, a stand-alone contract, but was required to be read in conjunction with the Contract Agreements, and it was only thus that the rights and obligations, *inter se*, between DIPL (later EFS) and Indeen, could be determined.

13. On 16th March, 2012, the representatives of DIPL and Indeen initialed the draft Supply Contract Agreement, Services Contract Agreement and the Works Contract Agreement. According to EFS, these did not amount to finalized or executed Contract Agreements, and, in fact, many details, including the dates of the Agreements, were left blank. EFS emphasizes, in its petition, the fact that it is an

admitted position that no Contract Agreements, complete in all details, were ever executed between DIPL and Indeen.

14. The petition also asserts that Article 5, in these Contract Agreements, required the satisfaction of certain conditions, for the Contract Agreements, to “come into full force and effect”. These conditions, emphasizes EFS, were never fulfilled; resultantly, these Contract Agreements never came into effect. For ready reference, Article 5, which is identical in the three Contract Agreements, may be reproduced thus:

“5. The Contract Agreement shall come into full force and effect on the date when the following conditions are satisfied (“Conditions Precedent”):

- (a) Securing of the necessary financing by the Employer to undertake the Project and attainment of the conditions precedent under the financing documents for drawdown of funds by the Employer (in case such financing documents also stipulate effectiveness of the Contract Agreement as a condition precedent. then in such a case, other than effectiveness of Contract Agreement),
- (b) Execution of the Contract Agreement after obtaining all necessary internal approvals, consents and authorizations by the Employer and the Contractor,
- (c) Issuance of necessary permits and authorisations by the Employer (other than those to be obtained by the Contractor);
- (d) Payment of the Advance Amount by the Employer to the Contractor in accordance with the payment terms as set out in the Contract Agreement; and

(e) Handover of the Site by the Employer to the Contractor within 5 (five) days of the payment of the Advance Amount by the Employer to the Contractor for the purposes of this Contract Agreement.

The afore-stated Conditions Precedent have to be achieved within 90 days of the execution of the Contract Agreement. Failure to achieve the Conditions Precedent within the afore-stated time period shall attract such consequences as set out in the Conditions of Contract Agreement.”

EFS also emphasizes the fact that no Notice To Proceed was ever issued by Indeen under the aforesaid Contract Agreement.

15. Sometime in 2011-2012, DIPL evinced, to Indeen, its decision to sell its equity and exit operations in India.

16. This provoked Indeen to issue a legal notice to DIPL on 28th March, 2012, invoking arbitration, as envisaged by Clause 13.2 of the SCA, which read thus:

“13.2 Dispute Resolution: All disputes, controversies, claims or counter claims resulting from the Contract Agreement or relating to the Contract Agreement or to a breach of this Agreement, to its rescission or its invalidity, shall be settled by arbitration in accordance with the (Indian) Arbitration and Conciliation Act 1996 as amended from time to time. There shall be 3 arbitrators. The seat of arbitration shall be New Delhi, India. The language used for the arbitration procedures shall be English. The Contract Agreement shall be governed by the laws of India.”

It was alleged, in the said communication, that, while executing the SCA, there was a clear understanding, between DIPL and Indeen, that DIPL would be the investor and EPC contractor for the project, and that the requirement of internal approvals from the management of

DIPL therefore, was a mere formality. Apropos the proposal, of DIPL to sell its equity and exit India, Indeen asserted that it had contracted with DIPL, as DIPL was the part of the Veolin Group, which was a global industrial leader, and that it had no inclination to contract with any successor company. Reliance was also placed, in the said communication, on the Contract Agreements, which were, according to Indeen, finalized and initialled. As the proposal of DIPL, to exit operations in India, had resulted in an arbitrable dispute between DIPL and Indeen, Indeen intimated DIPL that, in exercise of the authority conferred by Clause 13.2 of the SCA, it was appointing a retired learned Judge of the High Court of Bombay as its arbitrator. Indeen, therefore, called upon DIPL to appoint its arbitrator within 30 days, so that the matter could be referred to a competently constituted Arbitral Tribunal. The communication concluded by pegging the losses of Indeen, as at that time, at ₹ 25 crores.

17. On the very next day, i.e. 29th March, 2012, as already noted hereinbefore, DIPL sold its entire equity to EFS *vide* a Share Purchase Agreement. EFS, thereby, stepped into the shoes of DIPL.

18. EFS responded to the aforesaid legal notice of DIPL, on 23rd April, 2012, asserting that

- (i) the PDA had expired, by efflux of time, on 2nd August, 2010,
- (ii) the SCA had never come into effect, for want of issuance of Notice To Proceed under the Contract Agreements,

- (iii) the Contract Agreements had merely been initialled, and had never been finalized or executed between DIPL and Indeen,
- (iv) the EPC Contract was still at the stage of negotiation,
- (v) EFS was not responsible for availment of loans by Indeen, or for any financial loss suffered by Indeen in the bargain, and
- (vi) there was, therefore, no effective agreement subsisting between EFS and Indeen.

In these circumstances, EFS maintained that there could be no question of referring any dispute to arbitration, as there was no enforceable agreement, containing any arbitration clause, between EFS and Indeen. The proposal of Indeen to appoint its arbitrator was, therefore, rejected by the EFS.

19. Indeen, in the circumstances, filed Arb. P. 184/2012 before this Court, under Section 11(6) of the 1996 Act, seeking appointment of an arbitrator. The petition was disposed of, by a learned Single Judge of this Court, *vide* order dated 21st January, 2013, constituting a single-member Arbitral Tribunal to arbitrate on the dispute between the parties, and reserving the issue of existence or non-existence of an arbitration agreement between DIPL and Indeen, for determination by the learned Arbitral Tribunal.

20. Consequent to commencement of proceedings before the learned Arbitral Tribunal, an application was preferred by DIPL under Section 16 of the 1996 Act, alleging that there was no valid and enforceable agreement between EFS/DIPL and Indeen. *Vide* order,

dated 15th September, 2016, the learned Arbitral Tribunal allowed the aforesaid application, accepting the stand of DIPL. It was held by the learned Arbitral Tribunal, in the said order, that

- (i) the terms and conditions of the SCA had not been fulfilled and it could not, therefore, be said that the SCA had come into effect,
- (ii) no finalized Contract Agreements had ever come into existence and
- (iii) the SCA was also ineffective for want of issuance of Notice To Proceed, as envisaged by Clause 1.1 thereof.

Accordingly, it was held by the learned Arbitral Tribunal that it had no jurisdiction to adjudicate on the dispute between the parties referred to it.

21. The aforesaid order dated 15th September, 2016, of the learned Arbitral Tribunal, was challenged, by Indeen, before this Court, by way of Arb. A. (Comm) 39/2016.

22. *Vide* judgment dated 24th July, 2019, a learned Single Judge of this Court allowed Arb. A. (Comm.) 39/2016. Having taken notice of the events that had transpired, till the filing of the said appeal by Indeen, this Court observed and held as under:

- (i) The moot question before this Court was whether there was, or was not, any enforceable arbitration agreement between EFS/DIPL and Indeen.

(ii) Great reliance was placed, by EFS, on the word “proposed”, as employed in Clause 1.2 of the SCA which, for ready reference may be reproduced at the cost of repetition, thus:

“1.2 "Contract Agreements" shall mean Works Contract Agreement, Service Contract Agreement and Supply Contract Agreement, proposed to be executed between Indeen and Daikia in a mutually agreed form.”

(iii) Apart from Clause 1.2, the following Clauses of the SCA evinced the intent of the parties :

“1.3 “Consolidated Contract Price” shall have the same meaning ascribed thereto in Clause 4.2.

4.1 The Parties agree that the consideration payable by Indeen to Daikia for executing the civil works, providing services in relation to the Project and supplying plant, equipment, machinery and materials for the Power Plant shall be as specifically mentioned in the respective Contract Agreements i.e. Works Contract Agreement. Service Contract Agreement and Supply Contract Agreement.

4.2 The consolidated contract price payable by Indeen to Daikia is Rs. 43,35,71,000 (Indian Rupees forty three crores thirty five lakhs seventy one thousand only) inclusive of all taxes and duties (“Consolidated Contract Price”). The Parties acknowledge that the Consolidated Contract Price is the aggregate of the consideration which shall be mentioned in the respective Contract Agreements.”

(iv) A conjoint reading of these Clauses indicated that DIPL and Indeen had agreed to segregate the services, to be provided by DIPL, into three components, to be executed later in a

“mutually agreed form”. This, apparently, was intended to bifurcate the consolidated contract price of ₹ 43,35,71,000/- over the three activities to be undertaken by DIPL. Reliance was placed, for this conclusion, on the following words, contained in Clause 4.2 of the SCA:

“... The parties acknowledge that the consolidated contract price is the aggregate of the consideration which shall be mentioned in the respective contract agreements ”

Following the above, this Court held, in paras 35.1, 35.2, 36, 36.2, 36.3 to 36.7, 36.9, 37.1 and 39 of its judgment, thus:

*“35. Therefore, the overall sense that one gets on reading the aforementioned documents is that with the execution of the SCA, the fundamental terms of the contract stood crystallized and what was required to be done was that parties had to formally execute the Contract Agreements (which, even according to the arbitral tribunal, had been initialled) after certain details with regard to the date of execution, the bifurcated contract price and guarantees were filled up. Therefore, what was required to be ascertained by the arbitral tribunal was, would the fundamental terms agreed to between the parties give an enforceable right to Indeen to claim performance from EFS. In my view, a formal execution of the contract agreement was in substance neither a condition precedent nor a term of the bargain between the parties but was a decision taken solely for the benefit of EFS to enable it to take certain tax benefits. The principle of law qua this aspect is enunciated pithily in the following judgment rendered by Parker, J in **Von Hatzfeldt-Wildenburg v. Alexander**, (1912) ICH 284 288. The judgment in **Von Hatzfeldt-Wildenburg** has been cited with approval by the Supreme Court in **Kollipara Sriramulu (Dead) By His Legal Representative (In Both The Appeals) v. T. Aswatha Narayana (dead) By His Legal Representatives & Ors.**, (1968) 3 SCR 387. As a matter of fact, in **Kollipara** case, the Supreme Court cited the judgment of Privy Council in **Currimbhoy & Co. Ltd. v. L.A. Creet & Ors.**, AIR 1933 PC 29 wherein it is held that the principle of English law which*

was summarized in **Parker J's** judgment was applicable in India. It is on that basis that in **Kollipara's** case, the Supreme Court examined the issue, along with connected issue, as to whether an oral agreement became ineffective because the mode of payment of consideration was not agreed upon. In this context, the Supreme Court made the following observations:

*"3 The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. As observed by the Lord Chancellor (Lord Cranworth) in **Ridgway v. Wharton** [6 HLC 238, 63], the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In **Von Hatzfeldt-Wildenburg v. Alexander** [(1912) 1 CH 284, 288] it was stated by Parker, J. as follows:*

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is fulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. "

4.... The question in the present appeals is whether the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be ignored. The evidence adduced on behalf of Respondent 1 does not show that the drawing up of a written agreement was a prerequisite to the coming into effect of the oral agreement. It is therefore not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed. We accordingly hold that Mr Gokhale is unable to make good his argument on this aspect of the case ... "

35.1 The arbitral tribunal while noticing the judgment of the Supreme Court in **Kollipara** has distinguished the same on the ground that Articles 3.1, 3.3 16 and 5.2 17 of the PDA speak about finalization of EPC and O & M agreements. Likewise, the arbitral tribunal has also referred to Article 1.2 of the SCA to distinguish the judgment once again on the ground that it speaks of formal execution of the Contract Agreements relating to supplies, services and civil works. In the same way, the arbitral tribunal adverts to Article 2.1 18 of the SCA. Furthermore, the arbitral tribunal goes on to state that it was not necessary to dwell on this aspect of the matter as it has been assumed that the Contract Agreements were executed.

35.2 To my mind, it was important for the arbitral tribunal to come to a conclusion, one way or the other, as to whether given the facts the parties had agreed to fundamental terms in the contract obtaining between them gave rise to an enforceable obligation. As noticed above, the main plank of the arbitral tribunal's reasoning instead was that the contract agreements had no force in law as Indeen had failed to issue the NTP. In a sense, in my opinion, after noticing the aforesaid aspect, the arbitral tribunal decided not to test

Indeen's stand on the Von Hatzfeldt principle, which in my view, was crucial.

36. Therefore, let me test the argument advanced on behalf of DIPL, something which the arbitral tribunal has accepted, that since NTP was not issued, the Contract Agreements had lost their efficacy. This argument, as noticed above, is pivoted on the definition of the Commencement Date contained in Clause 1.1 of the SCA and Clause 1.1.3.2 of Conditions of Contract Agreement which, to my mind, are more or less similar in all three agreements i.e. the Services Agreement, the Supply Agreement and the Civil Works Agreement.

36.2. A perusal of the definition of the Commencement Date both in the SCA and Conditions of Contract Agreement would show that while in the former i.e. SCA, it is the date indicated by Indeen in the NTP to be issued under the Contract Agreements, in the latter i.e. the Conditions of Contract Agreement, the date of issuance of NTP. Notably, Clause 1.1.3.10 of the Conditions of Contract Agreements provides that NTP is that notice whereby the employer, in this case, Indeen, would instruct the contractor i.e. DIPL, to commence performance of its obligations subject to achievement of the Conditions Precedent.

36.3. Clause 1.6.1 provides that the Contract Agreement shall come into force and effect on the date on which the Conditions Precedent are fulfilled.

36.4 The Conditions Precedent are set out in sub-clause 1.6.1(a) to (e). Clause 1.6.2 requires each party to inform in writing at regular intervals the progress made in satisfying the Conditions Precedent. This clause goes on to state explicitly that the employer i.e. Indeen, shall issue an NTP only on fulfillment of Conditions Precedent.

36.5 One of the conditions precedent provided in Clauses 1.6.1 (b) is the execution of the Contract Agreement after all necessary internal approvals, consent and authorization are obtained by both the contractor/DIPL and the employer/Indeen.

36.6 Furthermore, sub-clause 1.6.3 gives a 90(ninety) days leeway for attainment of Conditions Precedent after the execution of the Contract Agreements.

36.7 *Thus, clearly, in order of priority, fulfillment of Conditions Precedent was to precede the issuance of NTP. Besides this, as indicated above, the parties had a leeway of 90(ninety) days from the date of execution of the Contract Agreements for fulfillment of Conditions Precedent which could be further extended, albeit, automatically by a period of 45 days.*

36.9 *As correctly argued by Mr. Advani, Indeen had 90(ninety) days to fulfil the Conditions Precedent and therefore the obligation to issue NTP would arise only on fulfillment of the Conditions Precedent. The arbitral tribunal appears to have ruled otherwise, albeit, contrary to the plain terms of the provisions referred to hereinabove.*

37. There is a similar clause i.e. Clause 5, in the Service Agreement. In the proviso to Clause 5 of the Service Agreement, the parties have been given 90 (ninety) days from the date of execution of the Contract Agreements for fulfilment of the Conditions Precedent. Therefore, for the arbitral tribunal to rule that the NTP had not been issued which led to the contract agreements becoming inefficacious, to my mind, does not align with the provisions of the treaty to between the parties of the Assumption set up by the arbitral tribunal is stated to be correct, which is, that the Contract Agreements were in fact executed.

37.1 *In my opinion, the matter can be looked at from another angle, which is, that there is no dispute as regards the execution of the SCA and, therefore, as to whether issuance of NTP was necessary for the survival of the SCA. Given the fact that DIS had already indicated its intention to exit from India, it was a dispute which had to be tried on merits by taking recourse to the arbitration mechanism.*

39. *Therefore, for the foregoing reasons, I am unable to persuade myself to agree with the conclusion reached by the arbitral tribunal that Clause 13.2 of the SPA could not operate for the want of issuance of NTP. Thus I must respectfully disagree with by the arbitral tribunal's conclusion that it had no jurisdiction to adjudicate upon on the merits of the disputes obtaining between the parties. In view of what is stated hereinabove, I am inclined to allow the appeal. It is ordered accordingly. The impugned order is set aside. Parties will approach the arbitral tribunal for fixing an early date to take the matter further. Consequently, I.A. No. 14153/2016 shall stand closed. The parties shall, however, bear their own costs."*

(Emphasis supplied)

23. SLP 20167/2019, preferred by EFS against the aforesaid judgment dated 24th July, 2019 of this Court in Arb. A. (Comm.) 39/2016 was dismissed by the Supreme Court on 30th August, 2019. As such, the judgment attained finality.

24. This Court, in its judgment dated 24th July, 2019 in Arb. A. (Comm.) 39/2016 has clearly and unequivocally, returned the following findings:

(i) The fundamental terms of the Contract between DIPL and Indeen stood crystallised with the execution of the SCA. This resulted in conferment of an enforceable right, on Indeen, to claim performance from DIPL (later EFS).

(ii) The formal execution of the Contract Agreements was neither a condition precedent nor a term of the bargain between

DIPL/EFS and Indeen. It was a decision taken solely for the benefit of DIPL/EFS, to enable it to avail certain tax benefits.

(iii) The following principles of law, in this regard, stood authoritatively enunciated by the Supreme Court in its judgment in *Kollipara Sriramulu v. T. Aswatha Narayana*¹:

(a) Merely because the Contract between the parties referred to the preparation of a subsequent agreement, containing the terms agreed upon, in a more formal shape, that would not make the contract *per se* any less binding.

(b) There were, however, cases where the reference to the future contract/agreement, to be executed, was in such terms as to show that the parties did not intend to be bound until a formal contract was signed. The answer to the issue depended on the intention of the parties and the special circumstances of each particular case.

(c) The position in law was, therefore, that, “if the document or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further is a condition or term of the bargain or whether it is a mere expression of the desire of

¹ 1968 3 SCR 387

the parties as to the manner in which the transaction already agreed to will in fact go through”. In the former case there was no enforceable contract, whereas in the latter, there was a binding contract and the reference to a more formal document could be ignored.

(iv) A conjoint reading of Clauses 1.1.3.10, 1.6.1, 1.6.2 and 1.6.3 of the Contract Agreements clearly indicated that, in order of priority, fulfilment of the Conditions Precedent was to precede issuance of Notice to Proceed. 90 days, from the date of execution of the Contract Agreements, was available to the parties for fulfilment of the Conditions Precedent, which would extend automatically by a period of 45 days. Even *sans* such extension, the period of 90 days, from 16th March, 2012 when the Contract Agreements were initialled, came to an end on 15th July, 2012. The obligation to issue Notice To Proceed arose only on fulfilment of the Conditions Precedent. Clause 5, in the Service Contract Agreement, was to a similar effect. As such, the finding, of the learned Arbitral Tribunal, that, for want of issuance of Notice to Proceed, the Contract Agreements were ineffective, was contrary to the provisions of the Contract Agreements and the SCA. It was also contrary to the earlier finding, of the learned Arbitral Tribunal, that the Contract Agreements had, in fact, been executed.

(v) Even otherwise, the SCA had, undisputedly, been executed. Survival of the SCA was not dependent on issuance

of Notice to Proceed. The dispute between EFS and Indeen was, therefore, required to be decided by the arbitral mechanism envisaged in the SCA. The arbitration clause, in the duly executed SCA, stood apart, and did not perish with the SCA, merely because Indeen had not issued Notice to Proceed. There was no allegation that the SCA had been issued by fraud, duress, undue influence, or that it had been illegally obtained or was void *ab initio*.

(vi) The conclusion, of the learned Arbitral Tribunal, that Clause 13.2 of the SCA could not operate for want of issuance of Notice to Proceed by Indeen, was not, therefore, sustainable. The resultant finding, that the learned Arbitral Tribunal had no jurisdiction to arbitrate on the dispute between EFS and Indeen also, consequently, stood vitiated.

25. The matter thus stood remitted to the learned Arbitral Tribunal, and stands adjudicated by the impugned Award dated 20th May, 2020.

The Impugned Award

26. Before the learned Arbitral Tribunal, EFS once again sought to contend that the Contract Agreements had never been executed and that, therefore, the SCA was not enforceable at law. It was sought to be submitted, by EFS, that this Court had, in its judgment dated 24th July, 2019 *supra*, in Arb. A.(Comm.) 39/2016, merely decided the factum of existence of an arbitration agreement between EFS and

Indeen, and had not held that the SCA was otherwise enforceable or that the Contract Agreements had been duly executed.

27. In these circumstances, the learned Arbitral Tribunal delineated the first issue arising before it for consideration as whether, in its judgment dated 24th July, 2019, this Court “took cognizance of the arguments of the learned Counsel for the parties relating to the issue whether or not the EPC Agreement, the SCA and Contract Agreements were arrived at and whether it decided the issue or simply held that an Arbitration Agreement exist between the parties without deciding the aforesaid issue”.

28. Proceeding, thereafter, to reproduce para 35 of the judgment, dated 24th July, 2019 *supra* of this Court, the learned Arbitral Tribunal held, in para 35, 36 (i), 36 (ii), 37, 38, 41 and 43 of the impugned Award, thus:

“35. It is abundantly clear from the observations of the Court that it was of the view that with the execution of the SCA, the fundamental terms of the contract crystallized and a formal execution of the contract agreement was neither a condition precedent nor a term of the bargain between the parties. Therefore, the Court overruled the Tribunal’s view that the initialed Contract Agreements required further formalization and/or finalization. Thus, the Court concluded that the Contract Agreements had been arrived at between the parties and formal Agreements had been arrived at between the parties and formal execution thereof was not necessary. As regards, the question whether the contact agreements lost their efficacy since NTP was not issued, the court in para 37 concluded that “... for the Arbitral Tribunal to rule that the NTP had not been issued which led to the contract agreements becoming inefficacious”, “does not align with the provisions agreed to between the parties if the assumption set up by the

arbitral tribunal is taken to be correct, which is, that the Contract Agreements were in fact executed”.

36(i) The learned counsel for Respondent contended that the aforesaid observation of the Court was based on the assumption set up by the Tribunal that the Contract Agreements stood executed by the parties. Therefore, the question as to whether or not the execution of the Contract Agreements was a necessary requirement still needs to be adjudicated in these proceedings. He also contended that in the event the Tribunal answers the question in the negative then the question for decision would be whether issuance of NTP was necessary to effectuate Contract Agreements. The learned counsel in making the said contentions has overlooked the finding of the court in paragraph 35 of its Order. It will be advantageous to direct attention to the same for allaying the doubts, if any, of the Respondent. It has been categorically observed by the Court that with the execution of the SCA, the fundamental terms of the Contract agreements stood crystallized and formal execution of the contract agreements was neither a condition precedent nor a term of the bargain between the parties. In this view of the matter, the initialed Contract Agreements by the parties did not require formal execution and the finalized and initialed Contract Agreements were as good as formally executed ones.

36(ii). The finding of the Tribunal that since NTP was not issued as required by the SCA and the commencement date under the SCA was not triggered and hence it lost its efficacy was dealt with in detail in paras 36-36.9 of the Appellate order. The Court noted the definition of ‘Commencement Date’ both in the SCA and the Contract Agreements.

37. The learned counsel for the Respondent in its effort to show that initialed contract agreements were not concluded agreements had canvassed before the High Court that in the contract agreements there are blanks as to the crucial aspects of the matter. The Court, as already pointed out, held that Contract Agreements were arrived as their fundamental terms stood crystallized. Thus, the argument advanced on behalf of the Respondent stood negated.

38. Taking cue from the Appellate Order, it is clear that the agreements had been reached between the parties and Indeen

was well within its right to issue NTP by 15.06.2012 without availing the benefit of provision for automatic extension. As noticed in the Appellate Order the General Manager of DIPL informed the General Manager of Indeen that Daikia Group was pulling out of India. It is intriguing that on 16.03.2012 the parties arrived at the Contract Agreements and thereafter in four days or so, Daikia took a decision to quit India and sold its shareholding to EFS vide Sale Purchase Agreement dated 29.03.2012. Daikia made it impossible for the Claimant to issue NTP. Therefore, it cannot claim that the agreements did not trigger because NTP was not issued by the Claimant. It is well settled that no one can take advantage of its own wrong. DIPL exited India without caring to discharge its contractual obligations arising from the SCA and the Contract Agreements. This was an act of renunciation/repudiation. It was in breach of its contractual obligations under the SCA and the Contract Agreements. The following observations of the Tribunal found in the order dated 15.09.2016 have acquired a fresh dimension in view of the Appellate order:

“103.On the one hand, Daikia was negotiating with the Claimant and non the other hand extricating itself from the Respondent. On March 10, 2011 Daikia had written a letter to SBI stating that the legal draft of the EPC Contract is with the lawyers in Paris for final vetting before document could be signed. The letter also states that the estimated contract value had been finalized. It may be recalled that during the same time, Daikia International was negotiating with EFS, Mauritius for sale of 100% shares of Daikia to it without disclosing this to the Claimant. The factum of negotiations and sale of its total shareholding is evident from the Share Purchase Agreement dated March 29, 2012 between Daikia International SA, Cadrazur and Daikia India Pvt. Ltd. On the one hand and EFS Services Facilities Ltd., Mauritius on the other. The Share Purchase Agreement reveals that the process of negotiations between Daikia and EFS Mauritius started with the offer of the latter dated January 3, 2012. The three agreements were initialed on March 16, 2012. All this was going on without even giving any inkling of it to Claimant. Silence does not normally amount to misrepresentation but reticence must be considered as antithetic to fairness. Daikia’s conduct leaves much to

be desired. It's conduct ought to have been impeccable but unfortunately it was not so. ...

41. From a reading of the Appellate Order and the aforesaid discussion it can be concluded as under :

i. The fundamental terms of the Contract stood crystallized on being initialed by the parties. Formal execution of the contract was not a condition of the bargain.

ii. The SCA and the Contract Agreements came into existence giving rise to the rights and obligations of the parties.

iii. The Claimant had 90 days leeway for attainment of conditions precedent after execution of the Contract Agreements.

iv. The condition precedent were to precede the issuance of NTP

v. Since the Agreements were initialed on 16.03.2012, period of 90 days would have come to an end on 15.06.2012.

vi. Daikia abandoned the contract by its wrongful act and thereby prevented the claimant from issuing the NTP. Therefore, it cannot be allowed to take advantage of its own wrong by taking shelter behind the argument that the SCA and the Contract Agreements did not come into force without the issuance of NTP.

43. Thus, it stands determined that the SCA and the three Contract Agreements were executed. Their existence and effectiveness is no longer in dispute.”

29. Having thus returned its finding, based on the judgment dated 24th July, 2019 of this Court in Arb. A.(Comm.) 39/2016, that the SCA, as well as the three Contract Agreements were executed and effected, the learned Arbitral Tribunal went on to examine the merits of the claims of Indeen, thus:

30.1 Re. Claim for loss of revenue in power generation

30.1.1 Under this head, Indeen claimed ₹ 11.37 crores from EFS.

30.1.2 Qua this claim, Indeen submitted, before the learned Arbitral Tribunal, as under:

- (i) The EPC cost was reflected, in the PDA dated 2nd May, 2010, as ₹ 46.32 crores, which was revised, in the SCA dated 8th September, 2011, to ₹ 43.35 crores.
- (ii) DIPL represented that the project would be operational in September, 2012 and would yield the following net profit:

	2012-13	2013-14	2014-15	2015-16
Net profit after Tax	(-) 2.01	3.42	3.85	4.27
Depreciation	2.37	2.37	2.37	2.37
Total Cash Surplus	0.36	5.79	6.22	6.64

- (iii) Indeen had computed the loss suffered by it for 2½ years, as the relationship with DIPL continued from 12th March, 2010

till 2012, and six more months were taken to engage a new contractor.

(iv) Though, for 2½ years, the profitability indicated by DIPL was ₹ 12.37 crores, Indeen was making a conservative claim of only ₹ 11.37 crores. The Final Business Plan provided by DIPL computed the loss suffered, for the period in issue as ₹ 12.91 crores.

(v) The loss suffered by Indeen was proved by the statements of Mahesh Mansukhani and Sohan Lal Dutta. CW-1 Mahesh Mansukhani, in his affidavit, confirmed that, as per the representation of DIPL, the project was to be operational by September 2012. According to the said affidavit, cash surplus, after factoring in net profit after tax and depreciation for the years 2012-2013, 2013-2014, 2014-2015 and 2015-2016 would be 0.36, 5.79, 6.22 and 6.64 respectively.

(vi) The claim of Indeen was based on the profit and loss account of the project, which was part of the Reference Business Plan dated 2nd May, 2010, prepared and provided by Daikia. The Reference Business Plan found mention in recital 'E' of the PDA, which stated that "Daikia had prepared the same on the basis of DPR (Detailed Project report), a set of likely plant technical performance criteria and a budgetary EPS and O & M proposal on the basis of which a (Reference

Business Plan) has been prepared”. The Reference Business Plan constituted Annexure ‘C’ to the PDA.

(vii) Daikia had also provided a Final Business Plan, exhibited as Ex. C-96, on the basis of which the total loss of profit, for the above period, worked out to ₹ 12.91 crores.

(viii) The witnesses of Indeen were not cross-examined by EFS, on the quantum of loss suffered by Indeen owing to the exiting of Daikia, as set out in the Statement of Claim. This quantum had, therefore, to be treated as admitted and correct.

30.1.3 As against this, the submissions of EFS were as under:

(i) The alleged quantum of loss suffered, as set out in the Statement of Claim, and in the table extracted in para 34.1.2(ii) (*supra*), was unsupported by any material. These figures were derived from a document titled “Project-Profit and Loss Account”, which was allegedly part of the “Reference Business Plan”. The “Project-Profit and Loss Account” was, however, not exhibited in the arbitral proceedings, whereas the other two pages of the alleged “Reference Business Plan” were exhibited as Annexure C-25. As a result, no admission and denial of the “Project-Profit and Loss Account” could be undertaken by EFS. It was not open, therefore, to EFS, to rely on the “Project-Profit and Loss Account” to support the alleged loss suffered by it as a consequence of exiting of Daikia.

(ii) The Reference Business Plan had wrongly been attributed to Daikia. There was also discrepancy between the figures contained in the Reference Business Plan and Project-Profit and Loss Account. The Reference Business Plan, moreover, was unsigned. In any event, it was merely a reference document, and not a Final Business Plan. The Reference Business Plan was never replaced by a Final Business Plan, as envisaged by Article 1.1(iii) of the PDA. The figures in the alleged Reference Business Plan were, therefore, merely indicative and could not be relied upon for computing damages. Even the Return On Equity (ROE) mentioned in the Reference Business Plan was not finalized, and was dependent on the execution of the EPC and O & M Agreements, which were never executed. Article 5.3 of the PDA postulated that, in case the ROE based on the Final Business Plan was less than the ROE projected in the Reference Business Plan, the EPC Agreement and the O & M Agreement would be subject to further negotiations. The ROE was less than 23.43%, as projected in the alleged Reference Business Plan. As such, the EPC Agreement and the O & M Agreement were never finalized, but were in the process of negotiation. Reliance was placed on the cross-examination of CW-1 Mahesh Mansukhani, in which he had acknowledged that the Final Business Plan had not been finalized and that the ROE, which was based on the Reference Business Plan, was subject to replacement by the Final Business Plan in future.

(iii) The alleged Reference Business Plan was not part of the SCA and could not, therefore, be relied upon, as the SCA represented the entire agreement between DIPL and Indeen.

(iv) Assurances tendered during the course of negotiation were not binding and had no contractual force.

(v) The alleged project report was undated and unsigned. It had been denied by RW-1, the witness of DIPL.

(vi) Computation of loss of revenue from generation loss was a speculative and vague exercise, based on guess work. Indeen had led no evidence to establish that it had suffered any loss, or the extent of loss suffered. Without proof of actual loss, Indeen was not entitled to any claim. Reliance was placed on various judicial authorities for this proposition.

(vii) DIPL never represented to Indeen that the project would be functional by September, 2012. Even as per Indeen's own showing, the plan could not be made functional by the said date. CW-1 had, in his cross-examination, acknowledged that 18 months were required to complete the project and for it to become operational. The Contract Agreements were, according to Indeen, initialed by the parties on 16th March, 2012. 18 months, reckoned from the said date, would expire on 15th September, 2013. The manner in which loss of revenue from

power generation had been computed by Indeen in its Statement of Claim was, therefore, wholly incorrect.

30.1.4 Findings of the learned Arbitral Tribunal qua. Claim 1

Having thus set out the submissions of EFS and Indeen before it, the learned Arbitral Tribunal proceeded to observe and find thus:

(i) Paras 41 and 42 of the Statement of Claim referred to the factum of execution of the PDA, EPC Agreement and the cost of the project. Para 43 specifically referred to the representation, by DIPL, to the effect that the project would be operational by September, 2012, and that the net profit after accounting for taxes would be 0.36, 5.79, 6.22 and 6.64 for the years 2012-2013, 2013-2014, 2014-2015 and 2015-2016 respectively. Para 44 of the Statement of Claim alleged that, due to two years' deliberate delay attributable to DIPL and six more months required to engage another contractor, Indeen would, during the 2½ years period between 2012-2013 and 2014-2015, have lost ₹ 12.37 crores. Para 44 of the Statement of Claim referred to the Reference Business Plan annexed therewith, which contained projections and tabulations for the claim of ₹ 11.37 crores.

(ii) These assertions, as contained in the Statement of Claim, had not been specifically traversed in the Statement of Defence

by DIPL, which had contented itself with a general denial. There was no specific denial to the assertion, in para 43 of the Statement of Claim, that DIPL represented that the project would be operational by September, 2012 and would yield profits as described in the table set out in the said paragraph. Though, in paras 43 and 44 of the Statement of Defence, DIPL had sought to contend that, in the absence of any effective agreement between the parties, DIPL would not be held liable for the estimated net revenue/claims with projected ROE of 23.44%, the figures themselves had never been challenged. Neither was there any denial of, or dispute with respect to, the Reference Business Plan annexed to the Statement of Claim. The Statement of Defence did not seek, in any manner, to dispute the existence or the authenticity of the annexed Reference Business Plan.

(iii) The following facts, as set out in the Statement of Claim, had not been specifically denied by DIPL, in its Statement of Defence (as enumerated in the impugned Award):

- “i. PDA executed on 02.05.2010
- ii. Cost of the project and ROE as per PDA: Rs.46.32 Crores with projected ROE of 23.44%.
- iii. SCA executed on 08.09.2011.
- iv. Cost of the project as per EPC: Rs.43.35 Crores.
- v. Reason for scaling down the cost: shifting some part of scope of work from EPC to the Claimant.

vi. The Cost of the Project communicated to SBI in October 2011 for securing loan: Rs.51 crores, inclusive of a sum of Rs.7.5 crores which accounts for cost of components not within the Scope of EPC Contract.

vii. Respondent made representations to the Claimant that the project would be operational by September, 2012 and will give net profit as mentioned above.

viii. The projected delayed by two and half years due to the Respondent.

ix. Claimant suffered Net Project Revenue loss from generation loss:

Rs. 12.37 Crores (0.36+5.79+6.22) but confines it to Rs.11.37 crores

x. Reference Business plan filed with the SOC containing the projections and tabulations for the subject claim.”

(iv) Assertions contained in pleadings and not specifically denied by the opposite party, were deemed to be admitted, by virtue of Order VIII Rules 3, 4 and 5 of the Code of the Civil Procedure, 1908 (CPC). Though arbitral proceedings were not bound by the strict confines of the CPC and the Evidence Act, 1872, prescriptions and proscriptions, contained therein, which furthered adherence to the principle of natural justice and equity, and the requirement of acting judicially, deserved implicit compliance. Viewed this, allegations and assertions, contained in the Statement of Claim and not specifically traversed in the Statement of Defence, were deemed to have been admitted. Moreover, Indeen had also relied, to support the above assertions on the evidence of CW-1 Mr. Mahesh

Mansukhani and CW-2 Mr. Sohan Lal Dutta, who affirmed the contents of the Statement of Claim.

(v) At the same time, no such deemed admission could be said to have taken place qua the quantum of damages contained in para 65 of the Statement of Claim.

(vi) Para 15 of the affidavit in evidence of CW-1 Mr. Mahesh Mansukhani asserted thus:

“I say that as per the Respondent’s representation, the project would be operational by September, 2012, the subsequent net profit would be

	2012-13	2013-14	2014-15	2015-16
Net profit after Tax	- 2.01	3.42	3.85	4.27
Depreciation	2.37	2.37	2.37	2.37
Total Cash Surplus	0.36	5.79	6.22	6.64”

(vii) CW-1 had also testified that the delay of 2½ years was attributable to DIPL asking for splitting of the single EPC Agreement into three Contract Agreements in September, 2011. It was further deposed by CW-1 that, as commercial operation would start only by April, 2014, with an implementation period of 18 months, Indeen would lose the entire net project revenue from generation of power during the period of 2½ years from 2012-2013 and 2014-2015. CW-1 further confirmed that the loss of profit, claimed by Indeen, was based on the Reference Business Plan annexed with the Statement of Claim.

(viii) The evidence of CW-1 read with para 43 of the Statement of Claim, therefore, indicated that DIPL had not only represented regarding the extent of profitability of the project but had also represented that the project would be operational by September, 2012. The testimony of CW1 further revealed that, on the basis of the Reference Business Plan, Indeen had raised a claim of ₹ 11.37 crores, though the actual figure, based on the said business plan, for 2½ years, would be ₹ 12.37 crores.

(ix) The Reference Business Plan was brought on record and exhibited as Annexure C-22 during the course of examination-in-chief of CW-1. There was no objection by EFS thereto. Undoubtedly, though, it was necessary for Indeen to prove the Reference Business Plan.

(x) Apropos the requirement of proof of the Reference Business Plan, CW-1 had stated, in his testimony, that the Reference Business Plan was prepared by Daikia. CW-1 was the person, in Indeen, who was negotiating with Daikia. No question, regarding the figures contained in the Reference Business Plan, was put, to CW-1, by EFS. Neither did EFS question CW-1 regarding the quantum of the claim or the documents filed by Indeen, namely the extract from the Reference Business Plan, the budgetary proposal, the summary of estimated cost for the plant and Project-Profit And Loss

Account. As such, the correctness of these documents, and the figures contained therein, stood established.

(xi) Even otherwise, the testimony of CW-1, regarding the Reference Business Plan and budgetary proposal, was corroborated by recital 'E' in the PDA, to the effect that "Daikia had prepared on the basis of Detailed Project Report, a set of likely Plant Technical Performance Criteria and a budgetary EPC and O & M proposal on the basis of which a Reference Business Plan has been prepared and attached hereto as Annexure C".

(xii) DIPL had also sought to question the authenticity of the Reference Business Plan and the fact that the exhibited document was incomplete. This argument, too, could not sustain. Exhibit C-22 was an extract from the Reference Business Plan, and it had been clearly so mentioned by Indeen in the title of the document in the Statement of Claim. This extract consisted of the budgetary proposal, Project Profit and Loss Account and the estimated cost of the project. Had there been any doubt regarding the authenticity or correctness of these documents, EFS could have placed, on record, the complete signed version of the PDA along with its annexures. EFS did not do so. In these circumstances, the learned Arbitral Tribunal directed EFS on 22nd July, 2014 to produce the original signed version of the PDA with annexures (during the cross-examination of RW-1 Sebastian Bernard). The signed version

of the PDA was, however, not produced on the next date, i.e. 8th December, 2014. The learned Arbitral Tribunal has extracted, in the impugned Award, the following exchange of questions and answers with RW-1 Sebastian Bernard, during cross-examination:

“Q. 154 Kindly see question number 105. You were to bring signed version of PDA along with the annexures. Have you got the same?

A. No, I do not have.

Q. 155 You do not have it now or it was not available in your office?

A. It was not available in my office.

Q. 156 Are you suggesting that nobody in Daikia had the signed version of PDA along with the Annexures?

A. I could not find one.

Q. 157 Did you make any enquiry with the officers of the Daikia regarding this document?

A. With some of them.

Q. 158 Can you tell us their names?

A. Fadi Oubari and Mathias Hasdey.

Q. 159 Are you suggesting that nobody in Daikia knows whether PDA was signed with or without annexures?

A. It is long time ago and it seems nobody recalls.”

The justification adduced by RW-1 Sebastian Bernard, for failing to produce the signed version of the PDA alongwith

annexures, did not inspire confidence. The effect of failure to produce the said document was that DIPL had been unable to disprove the authenticity and completeness of the Budgetary Proposal, Project-Profit and Loss Account and Estimated Cost of the Project, filed by Indeen.

(xiv) RW-1, in his testimony, had not equivocally and explicitly, denied the Reference Business Plan has been other than the one which was part of the PDA, or not prepared by Daikia. In this context, the learned Arbitral Tribunal extracted the query put to RW-1, and his response thereto, as under:

“Q. 70 Shown Exhibit C-100. Were you aware that these were the three Annexures A, B & C to the PDA at pages 151 to 171 of Vol.3 of the SOC equivalent to pages 272 to 292 of Vol.III of the Exhibits filed by the Claimant?

A. I do not remember.”

The answer of RW-1, to the query put to him, clearly conveyed that he did not remember whether the annexures filed by Indeen were annexures to the PDA. That they were, was not, therefore, denied by RW-1. The assertion, by Indeen, that Annexures A, B and C, as annexed to the Statement of Claim were part of the PDA, remained untraversed.

(xv) The learned Arbitral Tribunal also relied, in this context, on the following exchange of question and answers, between the representative of Indeen and RW-1:

“Q.72 Please see paragraph 4 of your affidavit. Can you tell us whether the PDA referred in the paragraph is with or without annexures?

Ans. I do not know.

Q.73. Could you tell us before preparing the affidavit whether you did or you did not read the PDA?

Ans. Yes. But there were no attachments with PDA.

Q.74. Are you suggesting that your read the signed copy of the PDA from your office record and the signed copy did not have any attachments?

Ans. Yes, as far as I recall.

Q.279 On the last occasion, you were to produce a signed copy of the Project Development agreement’

Ans. I do not have the same.”

The learned Tribunal found it unsettling that, while asserting, in his answer to Question No.72, that he was unaware whether the PDA was with or without annexures, the memory of RW-1 suddenly “bounced back”, when put Question No. 73, in response to which he stated that there were no attachments to the PDA. Again, in his response to Question No. 74, he stated that as far as he recalled, the PDA did not have annexures. The manner in which RW-1 was responding to the queries put to him, felt the learned Arbitral Tribunal, was “cavalier” in nature. While, in answer to Question Nos. 73 and 74, RW-1 admitted that the signed version of the PDA was available in his office record and that he had perused the same before preparing his affidavit, in response to Question Nos. 279 and 280, he stated

that he neither had the signed version of the PDA with him, nor had he been able to find the signed version from any person in his organisation. Again, in response to Questions 156 to 159, RW-1 stated that he had made enquiries with certain officers of Daikia, regarding the PDA, but that nobody recalled whether the PDA was signed with or without annexures. The learned Arbitral Tribunal found it “absurd”, on the part of RW-1, to deny the availability of a signed version of the PDA after admitting that it was in his office record, and that he had read the same before preparing his affidavit. Significantly, the affidavit of RW-1, which was dated 8th January, 2014, was tendered in evidence on 2nd July, 2014 and, on the very same day, RW-1 admitted, in cross examination, that the signed copy of the PDA was in his office record and that he had read the same, backtracking on this assertion a few months later in further cross examination. The learned Arbitral Tribunal also observed that it was unbelievable that a large company would not preserve the PDA.

(xvi) In these circumstances, the learned Arbitral Tribunal drew an adverse inference against EFS, that the signed version of the PDA had been withheld by it, as disclosure thereof would reveal that the Reference Business Plan, the extract of which was exhibited as Exhibit C-22 in the proceedings, was the same as that which was contained in the signed version of the PDA.

(xvii) In the circumstances, the learned Arbitral Tribunal held that the Reference Business Plan, the extract of which was exhibited as Exhibit C-22, was part of the PDA. The submission, of DIPL, that the authenticity of the extract of the Reference Business Plan, as filed with the Statement of Claim and exhibited as Exhibit C-22, was suspect, was rejected.

(xviii) Apropos the submission of DIPL that no Final Business Plan had been drawn up, Indeen submitted that Daikia did provide the Final Business Plan as part of its project report, which was exhibited as Exhibit C-96. EFS contended, *per contra*, that no such project report or Final Business Plan had been prepared or provided by Daikia. Reliance was placed, by EFS, for this purpose, on the fact that the Project Report did not bear the date, signature or logo of Daikia.

(xix) This submission, of EFS, stood demolished by the cross examination of RW-1, during which RW-1 admitted that Daikia Energy Services Limited (DESL) was a Daikia entity. The Project Report (Exhibit C-96) specifically recorded thus:

“Indeen has completed a feasibility and detailed project report, including the viewer assessment study”

These studies were carried out by Daikia Energy Services Ltd.(DESL) (formerly DSCL Energy Services). This indicated that the Project Report was actually a study carried out by DESL, which was a Daikia entity. The query, to this effect, put to RW-1, was parried by him, by stating that he was not in a

position to comment on the content of a denied document. Clearly, therefore, the study, with regard to the feasibility of the project and the resultant project report were prepared by a Daikia entity.

(xx) Moreover, the logo of a tree, contained on the project report, was similar to the logo contained in Page No.1 of Volume II of the compilation of exhibits, which was admitted, by RW-1, in cross examination, to have been issued by Daikia. He also acknowledged the fact that the said documents contained the same logo of a tree at the bottom, as was contained in the project report.

(xxi) The discrepancy in the figures contained in the Project Profit and Loss account (part of Exhibit C-96) and Exhibit C-22 (the extract from the Reference Business Plan), on the basis of which loss of profit had been assessed by Indeen, was not “appreciable”. This difference was clearly attributable to the fact that the Project-Profit and Loss Account, which was part of the project report Exhibit C-96, was the final profit and loss account as envisaged in the PDA, prepared after the Reference Business Plan (Exhibit C-22).

(xxii) The further contention, of EFS, that Indeen had not led any evidence to establish that it had suffered actual loss, which was necessary in order for Indeen to pay damages, was also found to be devoid of substance. The learned Arbitral Tribunal

found the Reference Business Plan and the Project-Profit and Loss Report to be the best evidence, which it had already held to be part of the PDA and prepared by Daikia, the authenticity of which could not be disproved by EFS. The figures relating to loss and profit have been computed by Indeen on the basis of the Reference Business Plan. According to the Final Business Plan, for the period of for the period 2012-2013 to 2014-2015, the total loss of profit worked out to ₹ 12.19 crores. As against this, Indeen was claiming only ₹ 11.37 crores as loss of profit on account of generation loss. This figure, as contained in the Statement of Claim was not disputed in the Statement of Defence nor challenged in the cross examination of the witnesses of Indeen. As such, the claim of Indeen, based on the Reference Business Plan, was genuine.

(xxiii) Besides, in *Dwarkadas v. State of M.P.*², the Supreme Court had held that though, the measure of profit was dependent on the facts and circumstances of each case, a reasonable expectation of profit was implicit in a works contract. The following passages, from the said judgment were specifically relied upon, by the learned Arbitral Tribunal:

“9. The claim of the petitioner for payment of Rs 20,000 as damages on account of breach of contract committed by the respondent-State was disallowed by the High Court as the appellant was found to have not placed the material on record to show that he had actually suffered any loss on account of the breach of contract. In this regard, the appellate court observed:

² (1999) 3 SCC 500

“It is not his case that for due compliance of the contract he had advanced money to the labourers or that he had purchased materials or that he had incurred any obligations and on account of breach of contract by the defendants he had to suffer loss on the above and other heads. Even in regard to the percentage of profit he did not place any material on record but relied upon assessment of the profits by the Income Tax Officer while assessing the income of the contractors from building contracts.”

Such a finding of the appellate court appears to be based on wrong assumptions. The appellant had never claimed Rs 20,000 on account of alleged actual loss suffered by him. He had preferred his claim on the ground that had he carried out the contract, he would have earned profit of 10% on Rs 2 lakhs which was the value of the contract. This Court in ***A.T. Brij Paul Singh v. State of Gujarat, (1984) 4 SCC 59*** while interpreting the provisions of Section 73 of the Contract Act, 1872 has held that damages can be claimed by a contractor where the Government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed: (SCC pp. 64-65, paras 10-11)

“What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be

gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.

Now if it is well established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the works contract, the damages for loss of profit can be measured.”

To the same effect is the judgment in *Mohd. Salamatullah v. Govt. of A.P.* [(1977) 3 SCC 590 : AIR 1977 SC 1481] After approving the grant of damages in case of breach of contract, the Court further held that the appellate court was not justified in interfering with the finding of fact given by the trial court regarding quantification of the damages even if it was based upon guesswork. In both the cases referred to hereinabove, 15% of the contract price was granted as damages to the contractor. In the instant case however, the trial court had granted only 10% of the contract price which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial court regarding breach of contract by specifically holding that “we, therefore, see no reason to interfere with the finding recorded by the trial court that the defendants by rescinding the agreement committed breach of contract”. It follows, therefore, as and when the breach of contract is held to have been proved being contrary

to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate court was, therefore, not justified in disallowing the claim of the appellant for Rs 20,000 on account of damages as expected profit out of the contract which was found to have been illegally rescinded.”

That which applied to a works contract would also apply to other contracts.

(xxiv) By its act of renunciation, DIPL had abandoned the contract. It, thereby, became liable to pay damages to Indeen.

(xxv) As the claim of Indeen was less than the actual amount which worked out for 2½ years on the basis of the Project-Profit and Loss Report and the Reference Business Plan, Indeen was entitled to receive ₹ 11.37 crores as loss of profit from EFS.

30.1.5 As a result, Claim No. 1 of Indeen for ₹ 11.37 crores damages from EFS, towards loss of profit, was allowed.

31. Re Claim No.2 - For escalation cost of the new contractor

31.1 Indeen claimed, in this claim, escalation in cost on account of having had to engage a new contractor. It was contended that, even going by the lowest of the three bids received in response to the notice issued by it inviting tenders for the project, there was an escalation of ₹ 12 crores. Indeen contended that the bids had been placed on record, and that the credentials of the bidders, who were contractors of

repute, had not been disputed by EFS. It was also submitted, by Indeen, that it had taken fresh extension of time from the Government of Rajasthan to complete the project, for which an amount of ₹ 87.51 lakhs was paid between August, 2012 and November, 2018. Extension of time had been granted, by the Government of Rajasthan, till 31st December, 2020.

31.2 Indeen further contended that it had taken genuine steps to mitigate its losses, as was evidenced by the fact that it had examined three budgetary offers, none of which had a guaranteed output and could not, therefore, be pursued. The offers in the comparative chart, in that regard, it was contended, had been proved by Indeen's witnesses.

31.3 As against this, EFS contended that the budgetary offer of M/s ISGEC Heavy Engineering Ltd. (hereinafter referred to as "ISGEC"), filed by Indeen, on the basis whereof a claim of ₹ 12 crores had been raised, was an incomplete document, lacking evidentiary value. Moreover, it was contended that this was only a budgetary offer and was not final or binding. It was further submitted, by EFS, that there was no evidence of any formal contract having been executed between Indeen and any new contractor, any work having been performed on the project or any payment having been made to any new contractor. It was reiterated that taking of reasonable steps, to mitigate losses, was an essential *sine qua non*, before damages could be claimed.

31.4 Addressing these arguments, the learned Arbitral Tribunal found/held as under:

- (i) Indeen was claiming escalation on the basis of the earliest budgetary offers received from ISGEC, within three months of service of notice invoking arbitration, on EFS.
- (ii) Indeen was not claiming escalation of price beyond the date of obtaining of the first budgetary offer from ISGEC. It was not claiming escalation in price at the current rate.
- (iii) The fact that offers were obtained had been proved by the deposition of witnesses of Indeen.
- (iv) Escalation of cost, owing to delay in completion of a project, was a matter of common knowledge, and was well understood in the execution of commercial contracts.
- (v) In the present case, the delay in the project was owing to breach of the contract by DIPL.
- (vi) The fact that Indeen had paid ₹ 87.51 lakhs to the Government of Rajasthan, for obtaining extension of time till 31st December, 2020 to complete the project, indicated that Indeen was making efforts to launch the project. DIPL had unjustifiably abandoned the project, leaving Indeen in the lurch and compelling Indeen to look for another service provider.

31.5 Having noted these facts, the learned Arbitral Tribunal proceeded to conclude, *qua* Claim 2 of Indeen, thus:

“105. The question is whether escalation should be granted on the basis of the offers received by the Claimant. *The Tribunal is not inclined to go by the offers obtained by the Claimant. They do not inspire confidence. But at the same time the Claimant is entitled to receive reasonable escalation in cost.* It needs to be noted that the consolidated cost of the abandoned project was pegged at Rs.43357100/- by the agreement of the parties dated 06.09.2011. As per the International Monetary Fund figures, the inflation rate was about 10% in the year 2012, when offers were received by the Claimant. Therefore the Claimant would be entitled to receive from the Respondent a sum of Rs.43357100 (433571000 x 1.10-inflation rate for 2012) as extra cost towards inflation.

Accordingly, the claim is accepted to the extent indicated above.”

(Emphasis supplied)

31.6 As such, the learned Arbitral Tribunal awarded ₹ 4,33,57,100/ towards Claim No.2 of Indeen.

32. Re Claim No.3 – Pre-operative expenses

32.1 This claim was rejected by the learned Arbitral Tribunal and does not, therefore, need to burden the present judgment.

33. In the circumstances, *vide* para 107, the learned Arbitral Tribunal proceeded to pass the impugned Award, in the following terms:

“107. Having regard to the aforesaid discussions, the following Award is hereby passed:-

i) The Claimant is awarded a sum of Rs.11.37 crores as against the Respondent in respect of Claim No.1.

ii) The Claimant is awarded a sum of Rs.43357100/- as against the Respondent in respect of Claim No.2.

iii) Claim No. 3 is rejected.

iv) The aforesaid amounts awarded in favour of the Claimant as against the Respondent shall carry interest @ 8% per annum from the date of filing of the Statement of Claim i.e. 28.03.2012 to the date of passing of the Award.

v) The Claimant shall be also entitled to interest @ 9% per annum from the date the Claimant files e-stamp of the requisite value till its realisation of the sums awarded.”

Analysis

Scope of Section 34

34. Before adverting to the grounds on which EFS has sought to challenge the impugned award, it would be appropriate to examine the scope of Section 34 of the 1996 Act.

35. Sub-sections (1) and (2) of Section 34, as amended by the Arbitration and Conciliation (Amendment) Act, 2019, reads thus:

“34. Application for setting aside arbitral award. –

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

(2) An arbitral award may be set aside by a Court only if –

(a) the party making the application establishes on the basis of the record of arbitral tribunal that –

(i) a party was under some incapacity, or

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

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

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

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

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that –

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

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

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

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

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

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

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

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

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

36. Considerable clarity has been infused into the otherwise ambiguous expressions “public policy of India”, “fundamental policy of Indian Law”, “most basic notions of morality or justice” and “patent illegality”, by pronouncements of the Supreme Court over a period of time, of which *Ssangyong Engineering and Construction*

*Co. Ltd v. N.H.A.I.*³ may justifiably be regarded as the high watermark, after the amendment of Section 34. Without burdening this judgement with the reproduction, verbatim, of the relevant paragraphs from the said decision, the principles enunciated therein may be enumerated thus:

- (i) The expression “public policy of India” would have to be understood as the “fundamental policy of Indian Law”, as explained in paras 18 and 27 of the earlier decision in *Associate Builders v. D.D.A.*⁴, which read thus:

“18. In *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644, the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

“7. Conditions for enforcement of foreign awards.—(1) A foreign award may not be enforced under this Act—

- (b) if the Court dealing with the case is satisfied that—

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

In construing the expression “public policy” in the context of a foreign award, the Court held that an award contrary to

- (i) the fundamental policy of Indian law,
(ii) the interest of India,
(iii) Justice or morality,

³ (2019) 15 SCC 131

⁴ (2015) 3 SCC 49

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (*see* SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (*see* SCC pp. 689 & 693, paras 85 & 95).

Fundamental Policy of Indian Law

27. Coming to each of the heads contained in ***Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629]*** judgment, we will first deal with the head “fundamental policy of Indian law”. It has already been seen from ***Renusagar*** judgment that *violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.*”

(Emphasis supplied)

- (ii) The Court cannot interfere with an Award on the ground that the arbitrator has not adopted a judicial approach, as that would amount to intervention on the merits of the award, which was not permissible post the amendment of Section 34.

(iii) Violation of the principles of natural justice constitutes a legitimate ground to challenge an award.

(iv) In understanding whether an award was in conflict with the “most basic notions of morality or justice”, the Court would have to be guided by paras 36 to 39 of *Associate Builders*⁴:

“Justice

36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. *An award can be said to be against justice only when it shocks the conscience of the court.* An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to “justice”.

Morality

37. The other ground is of “morality”. Just as the expression “public policy” also occurs in Section 23 of the Contract Act, 1872 so does the expression “morality”. Two illustrations to the said section are interesting for they explain to us the scope of the expression “morality”:

“(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

“(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code, 1860.”

38. In *Gherulal Parakh v. Mahadeodas Maiya* [1959 Supp (2) SCR 406 : AIR 1959 SC 781], this Court explained the concept of “morality” thus : (SCR pp. 445-46 : AIR pp. 797-98)

“*Re. Point 3 — Immorality* : The argument under this head is rather broadly stated by the learned counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu law considers to be immoral in that context may appropriately be applied to a case under Section 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu law into the domain of contracts. Section 23 of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English law than to the Hindu law texts dealing with a different matter. Anson in his Law of Contracts states at p. 222 thus:

‘The only aspect of immorality with which courts of law have dealt is sexual immorality....’

Halsbury in his Laws of England, 3rd Edn., Vol. 8, makes a similar statement, at p. 138:

‘A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality.’

In the Law of Contract by Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:

‘Although Lord Mansfield laid it down that a contract *contra bonos mores* is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible.’

In the book on the Indian Contract Act by Pollock and Mulla it is stated at p. 157:

‘The epithet “immoral” points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment.’

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by courts. The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances : settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

The word ‘immoral’ is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilisation of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of Section 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its

juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative textbook writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, 'the court regards it as immoral', brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognised and settled by courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold."

39. This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, *interference on this ground would also be only if something shocks the court's conscience.*"

(Emphasis supplied)

Thus, only such arbitral awards which shocks the conscience of the court, can be set aside on the ground of being in conflict with the "most basic notions of morality or justice".

(v) “Patent illegality” appearing on the face of the award refers to such illegality as goes to the root of the matter, but which does not amount to be erroneous application of the law. As such, contravention of a statute not linked to public policy or public interest, cannot be said to amount to “patent illegality”. Mere contravention of the substantive law of India is no longer a ground available to set aside an arbitral award.

(vi) A Section 34 court cannot re-appreciate evidence, even on the ground of patent illegality.

(vii) Absence of reasons is, however, a ground to set aside an award, as it would violate Section 31(3) of the 1996 Act.

(viii) Construction of the terms of the contract is primarily for the arbitrator to decide. Unless the arbitrator construes the contract “in a manner that no fair-minded or reasonable person would; in short, the view of the arbitrator is not even a possible view to take”, interference is not warranted.

(ix) If the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction, on which ground the award could be set aside under Section 34 (2-A). “Where an Arbitral Tribunal has rendered an award which decides matters either beyond the scope of the arbitration agreement or beyond the disputes referred to the Arbitral Tribunal, as understood in paras 10 and

11 of *State of Goa v. Praveen Enterprises*⁵, the arbitral award could be said to have dealt with decisions on matters beyond the scope of submission to arbitration”. Paras 10 and 11 of *Praveen Enterprises*⁵ read as under:

“10. “Reference to arbitration” describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate:

(a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the “reference” contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(b) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the “reference” contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(c) Where the parties fail to concur in the appointment of the arbitrator(s) as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes

⁵ (2012) 12 SCC 581

between the parties stand referred to such arbitrator in terms of the arbitration agreement.

11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where “all disputes” are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counterclaims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.”

If an arbitrator wandered outside the contract and dealt with matters not allotted to him, it would constitute a jurisdictional error, correctable on the ground of “patent illegality”, but would not amount to dealing with matters beyond the scope of the arbitration agreement.

(x) Perversity in an award, though not a ground to challenge the award as being contrary to the “public policy of India”, certainly amounts to a patent illegality appearing on the face of the award. “Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.” “A finding based on documents taken behind the back of the parties by the arbitrator would also

qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

(xi) Failure, by an Arbitral Tribunal to deal with every issue referred to it will not ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute. The following passage, from Redfern and Hunter was cited, with approval, in this regard:

“The significance of the issues that were not dealt with has to be considered in relation to the award as a whole. For example, it is not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different.”

(Emphasis supplied)

This principle, though not directly forming part of the enunciation of the law by the Supreme Court in *Ssangyong Engineering and Construction Co. Ltd*³, finds place in the ruling of the Court of Appeal of Singapore in *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*⁶, which has been reproduced in para 61 of the report in *Ssangyong Engineering and Construction Co. Ltd*³, obviously with approval.

⁶ 2011 SGCA 33

37. These principles stand, *inter alia*, reiterated in the recent decision of the Supreme Court in *Anglo American Metallurgical Coal Pty Ltd v. MMTC Ltd.*⁷, paras 51 and 52 of which read thus:

“51. The judgment in *Associate Builders* (*supra*) examined each of the heads set out in *Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644*, together with the addition of the fourth head of “patent illegality” laid down in *ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705*. Since we are concerned with the “perversity principle”, the relevant paragraphs of this judgment are set out as follows:

“29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.” (page 75)

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312*, it was held : (SCC p. 317, para 7)

“7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration

⁷ 2020 SCC OnLine SC 1030

irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In **Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10**, it was held : (SCC p. 14, para 10)

“10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In **P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594]**, this Court held : (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the

second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.” (pages 75-77)

“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. This again is really a contravention of Section 28(1) (a) of the Act, which reads as under:

“28. Rules applicable to substance of dispute. — (1) Where the place of arbitration is situated in India —

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance

with the substantive law for the time being in force in India;”

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.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute –

(1)-(2)***

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

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.” (page 81)

52. This judgment has been consistently followed in a plethora of subsequent judgments, including:

“a. *National Highways Authority of India v. ITD Cementation India Ltd.*, (2015) 14 SCC 21 at paragraph 24 (page 38);

- b. *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228 at paragraph 45 (page 252);
- c. *Venture Global Engg. LLC v. Tech Mahindra Ltd.*, (2018) 1 SCC 656 at paragraph 85 (page 687);
- d. *Sutlej Construction Ltd. v. State (UT of Chandigarh)*, (2018) 1 SCC 718 at paragraph 11 (page 722);
- e. *Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.*, (2018) 3 SCC 133 at paragraph 51 (page 169);
- f. *HRD Corpn. v. GAIL (India) Ltd.*, (2018) 12 SCC 471 at paragraphs 18-19 (page 493);
- g. *M.P. Power Generation Co. Ltd. v. ANSALDO Energia SpA*, (2018) 16 SCC 661 at paragraph 25 (page 679);
- h. *Shriram EPC Ltd. v. Rioglass Solar Sa*, (2018) 18 SCC 313 at paragraph 34 (page 328);
- i. *State of Jharkhand v. HSS Integrated Sdn*, (2019) 9 SCC 798 at paragraph 7 (page 804); and
- j. *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 at paragraphs 20, 34-36 (pages 154, 169-170).”
- (Emphasis as in original)

38. In addition to the propositions emanating from the above decisions, and partly by way of repetition thereof, the following basic principles may be said to permeate the exercise of jurisdiction, under section 34:

(i) The Arbitral tribunal is the final arbiter of the facts and the law. **Ordinarily**, conclusions of fact, or law, at which the arbitral tribunal arrives, are not amenable to interference under Section 34.

(ii) This principle is, however, not absolute, but is subject to the following exceptions/caveats:

(a) Where the conclusion of the arbitral tribunal, whether on facts or on law is perverse, it merits interference. Perversity, in such a case must be of such a degree that no reasonable man, conversant with the facts and the law, would arrive at such a decision.

(b) If the findings of the arbitral tribunal are contrary to the contract between the parties, the court is bound to interfere. This is, essentially, because the arbitral tribunal draws its jurisdiction from the contract, and is a creature thereof. The arbitral tribunal, cannot, therefore, arrive at a conclusion which militates against the terms of the contract between the parties, merely to do equity, or for any other reason.

(c) Similarly, if the conclusion of the arbitral tribunal is contrary to the law laid down by the Supreme Court, or any other binding judicial precedent, the court can interfere. This is because any conclusion, by the arbitral

tribunal, which is contrary to the extant law, is treated as violative of public policy, which is a well settled ground for interference with the award.

(iii) In other cases, as already noted above, ordinarily, interference with the arbitral award is to be scrupulously eschewed. Having elected to resolve their disputes by arbitration, the parties are ordinarily expected to defer to the decision of the arbitrator. Awards of arbitral tribunals cannot be likened with judgments of courts, which are susceptible to appeal. Else, the very *raison d'etre* of the establishment of the arbitral institution would stand defeated.

(iv) The court is not, therefore, entitled to sit in appeal over the decision of the arbitral tribunal. Neither can the court re-appreciate the evidence, which has been appreciated by the arbitral tribunal. If, however, the arbitral tribunal ignores material evidence, that would amount to “perversity”, which would invite interference under Section 34. If all the evidence has been examined by the arbitral tribunal, the court cannot interfere on the ground that the examination of the evidence, as undertaken by the arbitral tribunal, is not, to its mind, satisfactory or sufficient. Nor can the court substitute its own view for the view of the arbitral tribunal, on the ground that, in its perception, the view of the court is “better” or “more appropriate”.

39. These principles, however, it may be clarified, pertain to the scope of interference with arbitral awards, by courts, on merits. These are apart from the other well established grounds on which the court may interfere, such as misconduct by the arbitrator, bias or prejudice or conducting of the arbitral proceedings in violation of the principles of natural justice, to refer to a few.

40. The challenge by EFS to the impugned award of the learned arbitral tribunal has, therefore, to be examined in the light of the above principles.

Grounds of Challenge, and Analysis thereof

41. I deem it appropriate to consider the grounds of challenge, by EFS, to the impugned award, seriatim, after setting out the rival contentions, *qua* each ground, where necessary.

Re. Enforceability of the SCA and the Contract Agreements

42. EFS has, at the outset, sought to urge, yet again, the preliminary contention that the SCA had not come into force and that the contract agreements had not been finally executed, but were still at the draft stage and were, therefore, unenforceable.

43. As is apparent from a reading of the impugned award, as well as the discussion in that regard hereinabove, it is clear that the learned arbitral tribunal proceeded on the ground that this court, in its earlier

decision dated 24th July 2019, in Arb. A. (Comm) 39/2016, had effectively held the SCA and the three contract agreements, to have been validly executed and to be effective.

44. The findings of the learned Arbitral Tribunal, as contained in paras 35, 36 (i), 36 (ii), 37, 38, 41 and 43 of the impugned award stand extracted in para 28 *supra*. I am entirely in agreement to the findings of the learned arbitral tribunal, as contained in the afore-extracted paragraphs, which, in turn, correctly rely on the earlier judgment of this court dated 24th July, 2019, in Arb. A. (Comm) 39/2016. The submission as advanced by Mr. Dayan Krishnan, is, essentially, a fourth bite at the cherry. The spectre of this submission stood effectively exorcised by this court in its judgment dated 24th July, 2019, in Arb. A. (Comm) 39/2016, and cannot, in my view, be revived.

45. I, therefore, entirely concur with the finding of the learned arbitral tribunal that the SCA, as well as the contract agreements, were executed and were valid and enforceable at law.

Re. Clauses 11.2 to 11.4 of the SCA – arguments regarding limitation of liability

46. The first submission advanced by Mr. Dayan Krishnan, on the merits of the impugned award, was that, in awarding ₹ 11.37 crores and ₹ 4,33,57,100/- to Indeen, in respect of the Claim No. 1 and Claim No. 2, the learned Arbitral Tribunal had acted in violation of Clauses

11.2 of the SCA, which capped the liability of DIPL, even in the case of default on its part. Clause 11.2 of the SCA read as under:

“The total liability of Daikia to Indeen in respect of the Power Plant, under or, in connection with the Contract Agreements shall not exceed 10% of Consolidated Contract Price save and except in case of rejection of the Power Plant by Indeen (as per the conditions stipulated herein) in which case Indeen shall be entitled to draw the 20% bank guarantees as mentioned in Clause 6.6.”

47. Mr. Dayan Krishnan acknowledges the fact that Clause 11.4 of the SCA carved out certain exceptions to Clause 11.2. Clause 11.4 of the SCA read thus:

“This Sub-Clause shall not limit liability in any case of fraud, deliberate default or reckless misconduct by the defaulting party.”

Mr. Dayan Krishnan’s submission is that Clause 11.4 of the SCA does not apply in the present case at all, as there is no specific finding of fraud, deliberate fraud or reckless misconduct by DIPL. He submits that isolated and stray criticisms, by the learned Arbitral Tribunal, cannot suffice to make out the case of “fraud, deliberate default or reckless misconduct”. The absence of any specific finding of *mens rea*, against DIPL, by the learned Arbitral Tribunal, according to Mr. Krishnan, is sufficient to discountenance the applicability of Clause 11.4. Mr. Krishnan points out that the applicability of Clause 11.4, *vis-à-vis* Clause 11.2 had been specifically raised, by Indeen, in para 21 of its statement of claim, to which EFS duly responded, in the corresponding paragraph of its statement of defence. Para 21 of the statement of claim of Indeen and corresponding paragraph 21 of the statement of defence of EFS may be reproduced thus:

Para 21 of Statement of Claim of Indeen:

“21. In normal circumstances the Claimant submits that the delay clause set out in Clause 8 would apply alongwith the limitation of liability set out in Clause 11. The Claimant submits that the Clause 11 squarely does not apply in view of Clause 11.4. The Claimant submits that by any standards the Respondents conduct of continuing to negotiate agreements with the Claimant over a long period of time when in fact they had no intention of fulfilling their obligations would be covered under fraud/deliberate default/reckless misconduct as characterized in Clause 11.4. The Claimant submits that infact their(sic) can be no other explanation for the respondents conduct in simply walking out of the Claimants project. The Claimant submits that in the event the Respondent provides any explanation the Claimant craves liberty to reply to the same in rejoinder as both under the Sec. 9 and 11 proceedings in the Hon'ble Delhi High Court, the Respondent has not offered any explanation regarding its conduct.”

Para 21 of Statement of Defence of EFS:

“21. That the contents of para 21 of the Statement of Claim are wrong and vehemently denied. It is specifically denied that the Respondents had no intention of fulfilling their obligations and their conduct amounted to fraud/deliberate, default/reckless misconduct as characterised under Clause 11.4 of the SCA. It is submitted that Respondent reserves its right to sue for appropriate damages against the Claimant before the appropriate forum for making such defamatory remarks without any basis whatsoever. It is submitted that the SCA is not an effective and binding contract between the Claimant and the Respondent. Further, without prejudice to this, it is submitted that even otherwise the Claimant has miserably failed to prove its allegations of any fraud or misconduct by the Respondent and hence the Claimant is precluded from relying upon Clause 11.4 of the SCA. Despite sincere efforts made by the Respondent, parties could not achieve concurrence/agreement over all the terms and

conditions of the proposed Contract Agreements and therefore the negotiations never materialised into a contract leave alone an effective and binding contract. It is humbly submitted that the Respondent was always willing to participate in the Claimant's project and perform its obligations under the draft agreements, however, because of the pressure tactics adopted by the Claimant and stubborn attitude of the Claimant, the same could not materialise. Further, it is well settled law that no one can be forced to enter into a contract. To constitute a valid contract, free consent is required. At the cost of repetition it is reiterated that in the present case there is no agreement between the Parties.”

Awarding of ₹11.37 crores being in excess of the cap on liability, as envisaged by Clause 11.2 of the SCA, Mr. Krishnan submits that it merits interference, by this Court, under Section 34 of the 1996 Act.

48. Mr. Hiroo Advani, learned counsel for Indeen, advances the following submissions by way of response to the contentions of Mr. Dayan Krishnan:

(i) There was a clear finding, both by this Court in its judgment dated 24th July, 2019 in Arb. A. (Comm) 39/2016, as well as by the learned Arbitral Tribunal, of infraction, by DIPL, of the terms of the PDA and the SCA. Mr. Advani points out that Clause 5.1 of the SCA specifically proscribed assignment of the agreement, by DIPL, without the consent of Indeen. By assigning the contract to EFS, therefore, DIPL clearly violated the SCA. This amounted to repudiation of the contract. Mr. Advani points out that, in para 4 of the notice invoking arbitration dated 28th March, 2012, Indeen had specifically

informed DIPL that it had contracted with DIPL as DIPL was part of the Veolin Group, which was a global industrial leader, and that Indeen was not interested in contracting with any successor company. In these circumstances, the assignment of the contract, by DIPL to EFS, submits Mr. Advani, amounted to “deliberate default”, as well as “reckless misconduct”, within the meaning of Clause 11.4 of the SCA. He submits that the expressions “deliberate default” and “reckless misconduct” are required to be construed *ejusdem generis* and *noscitur a sociis*.

(ii) To support his submissions, Mr. Advani relies on the findings of this Court in para 38.2 of its judgment dated 24th July, 2019 (*supra*) in Arb. A. (Comm) 39/2016. However, as, in my view, the said paragraph does not return any finding on deliberate infraction, by DIPL, of any covenant in the PDA or the SCA, it is not necessary to refer thereto. Mr. Advani, however, also relies on the following findings, of the learned Arbitral Tribunal, contained in paras 41(vi), 42 and 43 of the impugned award:

“41(vi) Daikia abandoned the contract by its wrongful act and thereby prevented the claimant from issuing the NTP. Therefore, it cannot be allowed take advantage of its own wrong by taking shelter behind the argument that the SCA and the Contract Agreements did not come into force without the issuance of NTP.

42. The Daikia/DIPL in breach of the contract by an indirect way assigned the contract in question to the Respondent, a non Daikia Company.

43. Thus, it stands determined that the SCA and the three Contract Agreements were executed. Their existence and effectiveness is no longer in dispute.”

(iii) Mr. Advani further relies on the following findings of the learned Arbitral Tribunal in the impugned award:

“It is intriguing that on 16.03.2012 the parties arrived at the Contract Agreements and thereafter in four days or so, Daikia took a decision to quit India and sold its shareholding to EFS vide Sale Purchase Agreement dated 29.03.2012. Daikia made it impossible for the Claimant to issue NTP. Therefore, it cannot claim that the agreements did not trigger because NTP was not issued by the Claimant. It is well settled that no one can take advantage of its own wrong. DIPL exited India without caring to discharge its contractual obligations arising from the SCA and the Contract Agreements. This was an act of renunciation/repudiation. It was in breach of its contractual obligations under the SCA and the Contract Agreements. The following observations of the Tribunal found in the order dated 15.09.2016 have acquired a fresh dimension in view of the Appellate order:

“103.On the one hand, Daikia was negotiating with the Claimant and on the other hand extricating itself from the Respondent. On March 10, 2011 Daikia had written a letter to SBI stating that the legal draft of the EPC contract is with the lawyers in Paris for final vetting before document could be signed. The letter also states that the estimated contract value had been finalized. It may be recalled that during the same time, Daikia International was negotiating with EFS, Mauritius for sale of 100% shares of Daikia to it without disclosing this to the Claimant. The factum of negotiations and sale of its total shareholding is evident from the Share Purchase Agreement dated March, 29, 2012 between Daikia International SA, Cadrazur and Daikia India Pvt. Ltd. On the one hand and EFS Services Facilities Ltd., Mauritius on the other. The Share Purchase Agreement reveals that the process of

negotiations between Daikia and EFS Mauritius started with the offer of the latter dated January 3, 2012. The three agreements were initialled on March 16, 2012. All this was going on without even giving any inkling of it to the Claimant. Silence does not normally amount to misrepresentation but reticence must be considered as antithetic to fairness. Daikia's conduct leaves much to be desired. It's conduct ought to have been impeccable but unfortunately it was not so.....”

Mr. Advani points out that by opining that

- (i) DIPL took a decision to quit India four days after the Contract Agreements had been signed, thereby rendering it impossible for Indeen to issue Notice To Proceed,
- (ii) no one could take advantage of its own wrong,
- (iii) the act, of DIPL, in exiting India, without caring to discharge its contractual obligations arising out of the SCA and the Contract Agreements, was an act of renunciation and repudiation, in breach of the SCA and the Contract Agreements,
- (iv) Daikia was simultaneously negotiating with, and extricating itself from its relationship with, Indeen and, even while writing to the SBI to the effect that the EPC contract with Indeen was in the process of finalization, was negotiating with EFS for sale of its entire shares to EFS without disclosing this fact to Indeen, which amounted to misrepresentation an “antithetic to fairness” and

(v) the conduct of DIPL left much to be desired and could not be recorded as impeccable, which it ought to have been,

the learned Arbitral Tribunal had effectively questioned the *bonafides* of DIPL, in its relationship with Indeen. It could not, therefore, according to Mr. Advani, be sought to be contended that there was no finding of “deliberate default” by DIPL, of its obligations under the PDA or the SCA. “Deliberate default”, submits Mr. Advani, relying for the purpose, on *De Beers UK Ltd. (formerly Diamond Trading Co. Ltd.) v. Atos Origin IT Services UK Ltd.*⁸, was a specie of indiscretion inferior to fraud or wilful misconduct. Mr. Advani also relies, in this context, on the decision in *Kudos Catering (UK) Ltd. v. Manchester Central Convention Complex Ltd.*⁹.

(v) Mr. Advani contends, as his final submission on this issue, that no argument, regarding limitation of liability or Clause 11.2 of the SCA was ever advanced by EFS before the learned Arbitral Tribunal. He contends that it is not permissible, therefore, for EFS to raise this argument, for the first time, before this Court, as a ground to challenge the impugned award.

49. I am unable to subscribe to the submission, of Mr. Dayan Krishnan, that the learned Arbitral Tribunal had violated Clause 11.2 of the SCA. Clause 11.4 clearly carves out an exception from Clause

⁸ 2010 EWHC 3276 (TCC)

11.2, in cases of “fraud, deliberate default or reckless misconduct by the defaulting party”. While it may be arguable as to whether DIPL has been found, by the learned Arbitral Tribunal, as guilty of “fraud”, or “reckless misconduct”, the findings of the learned Arbitral Tribunal, in my considered opinion, are sufficiently comprehensive to amount to a finding of “deliberate default”, on the part of DIPL.

50. The expression “deliberate default” is not a term of art. The words “deliberate” and “default” have their own well-known etymological connotations. I am in agreement with Mr. Advani that the observations and findings returned by the learned Arbitral Tribunal, in the passages, from the impugned Award, extracted in para 49 (iii) *supra*, clearly amount to a finding of “deliberate default”. There is no legal requirement for a pointed finding of *mens rea* to have to be returned by the learned Arbitral Tribunal. The elements culled out, by Mr. Advani, from the impugned Award, as enumerated in para 49(iii) *supra* are, in my opinion, sufficient to amount to a finding of “deliberate default” on the part of DIPL, within the meaning of Clause 11.4 of the SCA. That being so, it cannot be said that the amounts awarded by the learned Arbitral Tribunal were in derogation of Clause 11.2 of the SCA. This submission of Mr. Dayan Krishnan, therefore, is rejected.

Re. argument regarding the SCA constituting the “entire agreement” between the parties

⁹ (2013) EWCA Civ 38.

51. Mr. Dayan Krishnan advances, as his second ground of challenge to the impugned Award, the contention that the learned Arbitral Tribunal erred in awarding Claim 1 to Indeen on the basis of the Reference Business Plan and the Plant Project Profit and Loss Account. In this regard, Mr. Krishnan submitted thus:

(i) The learned Arbitral Tribunal had held, in paras 92 and 93 of the impugned Award, as under:

“92. There can be no quarrel with the proposition that party that claims damages for loss of profit must base its claim on evidence. In the case in hand the best evidence is the Reference Business Plan which was prepared by the Respondent. On the appreciation of the evidence on record there is no doubt that the Business Reference Plan Exhibit C-22 (Pages 712-714 of the SoC) is part of the PDA and was prepared by Daikia and the Respondent has not been able to disprove its authenticity. The figure relating to loss of profit has been computed according to the Reference Business Plan. Keeping in view the period 2012-13 to 2014-15, the total loss of profit according to the Final Business Plan for a period of two and a half years works out to Rs.12.19 crores. But the Claimant has claimed a lower amount of Rs.11.37 crores as loss of profit on account of generation loss. This figure was neither disputed in the SOD nor was it challenged during cross examination of the witnesses of the Claimant. The basis of the Claim is that had Daikia completed the project as per the Reference business plan the Claimant would have earned a profit of Rs.11.37.

93. In the circumstances the Tribunal is of the view that claim based on the Reference Business Plan issued by the Respondent is tenable.”

Mr. Krishnan submits that the Reference Business Plan was an annexure to the PDA (as evident from Clause E towards the

commencement of the PDA), which was executed on 2nd May, 2010. As against this, he submits, the arbitral proceedings were relatable to the SCA, which was signed on 8th September, 2011. Mr. Krishnan points out that under Article 3.1 of the PDA, the PDA would continue to remain in force till (a) August 2nd, 2010 or (b) the execution of the agreements mentioned in EPC Agreement and O & M Agreement, whichever is earlier. As such, submits Mr. Krishnan the PDA could not continue beyond 2nd August, 2010.

(ii) Mr. Krishnan draws my attention to Question 137 put to CW-1 Mr. Mahesh Mansukhani, and the response of CW-1 thereto, which reads thus:

“Q.137 Shown Exhibit C-1 (page 30 of SOC). Can you state the budgetary offer of the EPC under the PDA?

Ans. Budgetary offer, Exhibit C-22 is part of the PDA Exhibit C-1 and mentions the price.”

Clearly, therefore, submits Mr. Krishnan that it was an acknowledged contractual reality that the Reference Business Plan constituted an annexure to the PDA.

(iii) Mr. Dayan Krishnan now draws my attention to Clause 13.2 and 13.4 of the SCA which read thus:

“13.2 Dispute Resolution: All disputes, controversies, claims or counter claims resulting from the Contract Agreement or relating to the Contract Agreement or to a breach of this Agreement, to its rescission or its invalidity, shall be settled by

arbitration in accordance with the (Indian) Arbitration and Conciliation Act, 1996 as amended from time to time. There shall be three arbitrators. The seat of arbitration shall be New Delhi, India. The language used for the arbitration procedure shall be English. The Contract Agreement shall be governed by the laws of India.

13.4 Entire Agreement: Contract Agreements along with this Agreement constitutes the entire agreement between the Parties and sets out a full statement of the contractual rights and liabilities of Indeen and Daikia.”

Juxtaposing these two clauses of the SCA, Mr. Krishnan contends that the SCA alongwith the Contract Agreements represented the “entire agreement” between DIPL and Indeen, under which the arbitral proceedings had been instituted and were continued. He took me, thereafter to the definition of “Contract Agreements” as contained in Clause 1.2 of the SCA which reads as under:

“1.2 “Contract Agreements” shall mean Works Contract Agreement, Service Contract Agreement and Supply Contract Agreement, proposed to be executed between Indeen and Daikia in a mutually agreed form.”

From Clause 1.2, Mr. Krishnan proceeded to Clause 2 of the SCA, which set out the indicia of the Contract Agreements to be executed between DIPL and Indeen. As such, contends Mr. Krishnan, the PDA did not constitute any part of the agreements between the EFS and Indeen which were entirely circumscribed by the SCA and the Contract Agreements. The arbitral proceedings also having been initiated under the SCA, the

submission of Mr. Krishnan is, essentially, that the learned Arbitral Tribunal fundamentally erred in relying on the Reference Business Plan which constituted an annexure to the PDA and was not part of the SCA, to award Claim 1 to Indeen. He has also relied, in this context, on the order dated 21st January, 2013, of this Court in Arb. P. 184/2012, which clearly notes that the arbitration was relatable to Clause 13.2 of the SCA.

(iv) To support his argument, premised on the “entire agreement” clause contained in the SCA, Mr. Dayan Krishnan relies on the judgment of this Court in *Thyssen Krupp Materials AG v. SAIL*¹⁰, and of the Supreme Court in *Joshi Technologies International Inc v. U.O.I.*¹¹.

(v) Though this specific argument was advanced before the learned Tribunal and noted in the impugned Award, there is no finding thereon. According to Mr. Krishnan, this is a fatal infirmity which vitiates the impugned Award *in toto*.

52. In response to this submission, Mr. Hiroo Advani contends thus:

(i) The reliance, by DIPL, on Clause 13.4 of the SCA, to contend that the Contract Agreement constituted the entire agreement between the parties was misplaced. He submits that such an “entire agreement” Clause would stand infracted only

¹⁰ 2017 SCC OnLine Del 7997

¹¹ (2015) 7 SCC 728

where an attempt was made to subtract from the agreement. In this context, Mr. Advani invites my attention to paras 41 to 45 of the Statement of Claim, which read thus:

“41. The first claim relates to the loss in revenue of power generation caused to the Claimant due to the exit of the Respondent. The PDA was signed on 02.05.2010 showing an EPC Cost of Rs 46.32 Crores with projected ROE of 23.44%. The EPC cost agreed between Claimant and the Respondent as per the SCA signed on 08.09.2011 was Rs 43.35 Crores. The difference is on account of shifting of some scope of work from EPC to the Claimant.

42. The Cost of Project submitted to SBI In October 2011 (post signing SCA) was Rs 51.00 Crores. The Project Cost included the following components which were outside the Scope of EPC Contract Price:

- Land & Land Development - Rs 0.85 Crores
- Change of Scope of Work - Rs 0.50 Crores
- Pre-operative & Site Management - Rs 2.00 Crores
- Interest during Construction - Rs 1.66 Crores
- Margin Money for Working Capital - Rs 2.64 Crores
- Total Scope of Indeen (Claimant) - Rs 7.65 Crores.

43. As per the Respondents representations the Project would be operational by September 2012, the net profit after indicated would be:

Row No.		2012-13	2013-14	2014-15	2015-16
21	Net Profit After Tax	-2.01	3.42	3.85	4.27
16	Depreciation	2.37	.237	2.37	2.37
	Total Cash	0.36	5.79	6.22	6.64

	Surplus				
--	---------	--	--	--	--

44. However due to the deliberate delays attributable to the Respondent even as per most optimistic situations, the earliest date of finding a contractor and finalizing the terms of engagement for the Project would be at least 6 months. This means that the Project is delayed by at least 2 ½ years consequent to Respondent's asking for splitting the single EPC agreement into the three Contract Agreements in September 2011. Considering that the Commercial operations would now start by April 2014 (with an implementation period of 18 months), Claimant would lose the entire Net Project Revenue from generation of Rs 12.37 Crores (0.36+5.79+6.22) during 2 ½ year period of 2012-13 to 2014-15. Even if it is assumed that Claimant makes a cash surplus of Rs 1.00 Crore in 2014-15 (being a full year's operation as compared to Rs 0.36 Crores in 6 months operation in 2012-13) the Net Claim would be Rs 11.37 Crores. The claimant is annexing a sheet which contains the reference business plan and which also contains the projections and tabulations for CLAIM 1 as ANNEXURE - C25(COLLY).

CLAIM 2: Escalation of Cost

45. The second claim relates to the cost escalation which has been caused due to the illegal and unilateral exit of the Respondent from the Project. Here it is pertinent to mention that under Clause 4.2 of the SCA the costs were agreed to by the Claimant and the Respondent way back on 8th September, 2011 based on prices which were finalized on the basis of negotiations in early 2011.”

Mr. Advani points out that, in the corresponding paragraphs of the Statement of Defence filed by it, EFS never sought to question the quantum of damages claimed by Indeen.

(ii) Similarly, Mr. Advani points out that exhaustive evidence was led, by Indeen, to substantiate its claim of ₹ 11.37 crores, and EFS did not choose to cross examine Indeen's witnesses in that regard. He relies on the findings, of the learned Arbitral Tribunal, as contained in paras 75, 84 to 87, 92, 93 and 95.1 of the impugned Award, which held the Reference Business Plan to constitute a valid basis for computation of the loss suffered by Indeen, as a consequence of DIPL exiting the project.

(iii) The learned Arbitral Tribunal had not awarded Claim 1 to Indeen solely on the basis of the Reference Business Plan. It had also taken into account the fact that there was no traversal, by EFS, of the assertion, by Indeen, in its Statement of Claim, that it was entitled to the compensation for the loss suffered by it, or even to the quantum of such loss. He pointed out that the learned Arbitral Tribunal had proceeded by appreciating the entire evidence holistically, and that it also relied on judgments of the Supreme Court, to that effect.

53. I have considered the submissions of both sides. The learned Arbitral Tribunal has itself acknowledged, correctly, the fact that the Reference Business Plan was part of the PDA. This is also apparent from Clause 'E in the recitals with which the PDA commences. Mr. Dayan Krishnan has contended that Clause 13.2 of the SCA states, unambiguously, that the SCA, read with the Contract Agreements, constituted the "entire agreement" between the parties. He has also invited my attention to the judgements which, in his submission,

proscribe reliance on material outside the agreement which contractually constitutes the “entire agreement”. Whether the submission is right, or wrong, is not for me to opine upon, as the learned Arbitral Tribunal would first have to take a view thereon. The jurisdiction of this Court, under Section 34 of the 1996 Act, does not include the authority to act as an arbitrator, qua issues which have not been decided in the arbitral award under challenge. Para 58 of the impugned Award specifically records this submission, as having been advanced before the learned Arbitral Tribunal, thus, by EFS:

“According to the learned counsel for the Respondent the alleged reference business plan was not part of the SCA. This being the position, the Reference Business plan cannot be relied upon as SCA represents the entire agreement between the parties. The alleged assurances given during the course of negotiation have no contractual force and cannot be acted upon. He also expressed grave doubt about the authenticity of the Reference Business plan relied upon by the Claimant.”

54. Mr. Advani has, in my opinion, not been able to satisfactorily traverse this submission, of Mr. Dayan Krishnan. The arguments of Mr. Advani have, essentially, been that there was no satisfactory rebuttal, to the claim of Indeen, based on the Reference Business Plan, or the Project-Profit and Loss Account, by EFS, in its Statement of Defence. Even if it were to be assumed, *arguendo*, that EFS did not specifically traverse the submissions, of Indeen, regarding the computation of the loss, suffered by Indeen as a consequence of exiting, by Daikia, of its operations in India, the submission, of EFS, that the Reference Business Plan could not be relied upon, as it did not constitute any part of the SCA, which was the “entire agreement”

between EFS and Indeen, was required to be addressed by the learned Arbitral Tribunal. The test, regarding the susceptibility of an arbitral awards interference, on the ground that issues canvassed before it were not addressed or decided, as enunciated by the Singapore Court of Appeal in *CRW Joint Operation*⁶, relying on Redfern and Hunter, is whether prejudice has resulted to the party aggrieved by the failure, on the part of the learned Arbitral Tribunal, to decide the issue. The aspect of “prejudice”, for its part, is to be decided by examining whether the issue was of such importance that, “had it been decided, the whole balance of the award would have been altered and its effect would have been different”. On this, in my view, there can be no two opinions, in the facts of the present case. It is clear that the learned Arbitral Tribunal has relied, extensively, on the Reference Business Plan, to arrive at the conclusion that Indeen had suffered loss on account of DIPL, and to compute the loss so suffered. The learned Arbitral Tribunal has, for so doing, proceeded on the premise that the assertions, made in this regard by Indeen, in its Statement of Claim, were not specifically traversed by DIPL, in its Statement of Defence. The impugned Award, even read in its entirety, does not disclose any specific application of mind, by the learned Arbitral Tribunal, to the effect of Clause 13.2 of the SCA, on the reliability of the Reference Business Plan, as evidence in favour of Indeen. Nor does the learned Arbitral Tribunal advert to the submission, of EFS, that the PDA, of which the Reference Business Plan constituted an annexure, had expired by efflux of time. In fact, para 65 of the impugned Award records that “the respondent also did not deny/dispute the Reference Business Plan annexed with the SOC”. This statement is, with

respect, not entirely accurate, as EFS had clearly contested the very reliability of the Reference Business Plan, on the ground that it was not part of the SCA, which constitute the entire agreement between the parties. By failing to advert to this challenge in its findings, the learned Arbitral Tribunal has proceeded on the premise that the applicability of the Reference Business Plan was never in challenge. If these issues have been addressed by the learned Arbitral Tribunal, the very reliability of the Reference Business Plan, as evidenced in favour of Indeen, may possibly have become questionable. Irrespective of the outcome of the deliberation on this question, it cannot, in my opinion, be said that, had this issue been addressed by the learned Arbitral Tribunal, it would have made no difference to the final outcome of the arbitral proceedings, as the profitability of the Project, and the consequent loss which, according to Indeen, or suffered, were based on the Reference Business Plan. Tested on the touchstone of the law laid down by the Court of Appeal in Singapore in *CRW Joint Operation*⁶, as cited in *Ssangyong Engineering and Construction Co. Ltd*³, a clear case for interference with the impugned Award, for not having addressed this argument, as advanced before it by EFS, is made out.

Re. Claim No. 2 - For escalation cost of the new contractor

55. Mr. Dayan Krishnan, on behalf of EFS, has questioned the correctness of the award of ₹ 4,33,57,100/ –, by the learned Arbitral Tribunal, towards escalation, on three grounds; firstly, that the learned Arbitral Tribunal had found the offer is obtained by Indeen, on the

basis of which it claimed escalation, not to inspire confidence, and had awarded escalation on the basis of mere presumption based on inflation figures of the International Monetary Fund in 2012, which was impermissible, secondly, that Indeen had failed to establish having taken any steps to mitigate the damage is, pursuant to the alleged repudiation of the contract by DIPL, and thirdly, that Indeen had abandoned the project, and could not, therefore, claim escalation.

56. Mr. Advani contends, *per contra*, that the learned Arbitral Tribunal did not conclusively reject the offer as submitted by Indeen, on the basis of which it claimed escalation, and that, in any event, the learned Arbitral Tribunal was well within its jurisdiction to have awarded escalation on a reasonable basis, which is all it did. Reliance was placed, for this purpose, on the judgement of the Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd*¹².

58. I confess my inability to agree with Mr. Advani. While the authority of the learned Arbitral Tribunal to have awarded escalation, in an appropriate case, cannot be gainsaid, as such award has to be based on some material evidence, led by the party claiming escalation, supported by the covenants of the agreement between the parties. Para 105 of the impugned Award commences with the following recital:

“The question is whether escalation should be granted on the basis of the offers received by the Claimant. The Tribunal is not inclined to go by the offers obtained by the Claimant. They do not inspire confidence.”

¹² (2006) 11 SCC 181

Having thus rejected, in clear, unequivocal and unambiguous terms, the evidence led by Indeen, to support its claim for escalation, the learned Arbitral Tribunal went on to hold that Indeen was, nevertheless, entitled to receive “reasonable escalation in cost”. This finding, read in isolation, may not be exceptionable. The learned Arbitral Tribunal, however, proceeded to award escalation on the basis of the inflation rate emanating from the International Monetary Fund figures, of 10%, in 2012, when offers were received by Indeen. On this basis, the learned Arbitral Tribunal has held Indeen to be entitled to escalation of ₹ 4,33,57,100/ –, “as extra cost towards inflation”.

59. To my mind, such a course of action was not open to the learned Arbitral Tribunal. Even assuming Indeen was entitled to escalation, awarded escalation would have to be based on materials provided by Indeen, or otherwise emanating from the record, and not on any other basis. This would amount to “wandering”, by the learned Arbitral Tribunal, outside the covenants of the agreement between the parties, the pleadings on record, and even the case set up by Indeen itself. It was not open, with greatest respect to the learned Arbitral Tribunal, to so peregrinate. It is nobody’s case that the material, on the basis of which the learned Arbitral Tribunal awarded escalation to Indeen, was ever relied upon, by Indeen itself, or cited by Indeen as a basis to claim escalation. The material cited was found to be lacking in credibility, by the learned Arbitral Tribunal. Mr. Dayan Krishnan submitted that the learned Arbitral Tribunal

effectively extended charity to Indeen, which it was not competent to do. I do not propose to express any opinion regarding whether Indeen was, or was not, entitled to escalation, as the award of escalation, in my view, deserves to be set aside as being premised on material outside the contract between the parties, which was never pleaded by Indeen before the learned Sole Arbitrator. The judgement in *McDermott International*¹², on which Mr. Advani sought to place reliance, does not advance the case of Indeen to any substantial extent. All that is stated, in the said decision, is that “different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator”. There can be no cavil with this proposition. The formula adopted by the learned Arbitral Tribunal has, however, to emanate from some material on record. In case the learned Arbitral Tribunal seeks to decide on public knowledge, to award any particular sum to the claimant, the proposal to do so has to be put to the respondent, and both sides have to be heard on that aspect. Else, the learned Arbitral Tribunal would, additionally, be proceeding in violation of the principles of natural justice and fair play.

60. In the circumstances, the award of escalation of 4,33,57,100/–, by the learned Arbitral Tribunal to Indeen, in my considered opinion, cannot be sustained.

Conclusion

61. As a result of the above discussion, the impugned Award, passed by the learned Arbitral Tribunal, cannot be sustained and is, accordingly, quashed and set aside. It would be open to Indeen to re-agitate its claims before the learned Arbitral Tribunal. In case the matter is re-agitated, the learned Arbitral Tribunal would reconsider the claims of Indeen, in accordance with law, keeping in view the observations made hereinabove.

62. The present petition is, accordingly, allowed, with no orders as to costs.

63. Pending IAs, if any, do not survive for consideration and accordingly stand disposed of.

C. HARI SHANKAR, J

JANUARY 04, 2021