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

Judgment pronounced on: 17.10.2025

\+ **O.M.P. (COMM) 363/2022 and IA Nos. 13865/2022, 13869/2022**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Manish K. Bishnoi, Ms. Ila Shikhar Sheel, Mr. Khubaib Shakeel and Ms. Pallavi Singh, Advs.

versus

LARESEN AND TOURBO LIMITED ..... Respondent

Through: Dr. P.V. Amarnadha Prasad, Adv.

\+ **O.M.P. (ENF.) (COMM.) 121/2023**

LARSEN AND TOURBO LTD ..... Decree Holder

Through: Dr. P.V. Amarnadha Prasad, Adv.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Judgement Debtor

Through: Mr. Manish K. Bishnoi, Ms. Ila Shikhar Sheel, Mr. Khubaib Shakeel and Ms. Pallavi Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

O.M.P. (COMM) 363/2022

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the

"A&C Act"), challenging the impugned arbitral award dated 11.04.2022, rendered by an Arbitral Tribunal in the context of disputes arising under an Engineering Procurement and Construction (EPC) Agreement dated 25.02.2014, executed between the parties for the purpose of rehabilitation and augmentation of 6 Laning of KM 192.00 to KM 198.00 between Vadodara- Surat Section of NH-8, including the construction of a new four lane extradosed bridge across the river Narmada in the State of Gujarat.

2. The respondent (the original claimant before the Arbitral Tribunal) raised the following claims:-

Claim No.	Description	Amount
1.	Interest charges towards delayed payment of Mobilization Advance	55,33,400
2.	Additional cost incurred in the construction of metal beam crash barrier at the median at Flyover Ramp Locations	1,06,36,595
3.	Damages payable for delay in handing over Right of Way	6,47,81,186
4.	Design and construction of retaining earth wall for embankment near Govt. Circuit House	38,01,410
5.	Compensation for prolongation and acceleration costs and interest charges towards withheld amount of price adjustment	134,28,42,471
6.	The amount receivable towards the works executed and other withheld amounts	8,84,00,000
7.	The amount receivable towards the works	8,84,00,000

	executed and other withheld amounts	
8.	Payment of pendent lite interest @12% per annum on claims 1-7 from the respective due dates of reference to date of reference to arbitration	23,83,06,542

3. The petitioner filed a counter-claim towards damages as per Clause 10.3.2 of the EPC Agreement on account of delay in the construction of the project and for loss of toll revenue amounting to Rs. 183.67 crores along with pendente lite interest.

4. The Arbitral Tribunal concluded as follows with respect to the aforesaid claims of the respondent (original claimant) and counter claim of the petitioner:-

Claim No.	Particulars
1.	Dismissed
2.	1,06,36,595.00
3 and 6(a)	15,00,00,000.00
4.	37,51,410.00
5.	6,46,61,745.00
6(b).	27,54,059.97
7.	6,28,05,261.00
8 and 9.	11.95% per annum from 04.08.2018 on claims allowed, except for Claim no. 6(b).
Counterclaim of the petitioner	Dismissed

5. During the course of arguments, as well as in the written submissions filed on behalf of the petitioner, the challenge has been confined to the award in respect of Claim Nos. 3, 6(a) and 5.

6. It is submitted by the petitioner that the award in respect of the Claim Nos. 3 and 6(a) is unsustainable, being based on conjectures and surmises, and rendered without any cogent reasoning. Claim No. 3, as raised by the respondent/claimant before the Arbitral Tribunal, pertained to the recovery of an amount of Rs. 6,47,81,186/- towards damages for delay in handing over the ROW (Right of Way) by the petitioner. The respondent/claimant alleged in its Statement of Claim that the petitioner failed to hand over the ROW within the specified time schedule and, accordingly, computed liquidated damages in terms of the formula prescribed under Clauses 8.3.1 of the EPC Agreement dated 25.02.2014.

7. The claimant not only sought liquidated damages but also claimed unliquidated damages in the form of compensation towards prolongation and acceleration costs amounting to Rs. 134,00,88,411/- under Claim No. 6(a), for the same breach i.e. non-handing over of the ROW in time. One of the contentions raised by the petitioner before the Arbitral Tribunal was that, in view of Clauses 8.3.1, 9.2 & 4.1.5, it was not open to the respondent/claimant to claim unliquidated damages. It was further asserted that even with respect to liquidated damages, the contract provides that the maximum amount payable cannot exceed 1% of the contract value, which in the present case comes to Rs. 3.78 Crore.

8. Claim Nos. 3 and 6(a) were considered together in the Arbitral Award. The Arbitral Tribunal examined the factual aspects in

considerable detail and noted that extension of time (EOT) had been granted for various components of the work. It was noted that the agreement was signed on 25.02.2014; the appointment date was declared as 03.03.2014, and the scheduled date of completion of the work was 28.08.2016. The Authority's Engineer had split the works into six components, i.e. Main Bridge and its approaches, Zadeshwar Flyover, Toll Plaza and other related works, Jagadia Flyover, Road Works and Guide bunds. It was also noted that extension of time was granted by the respondents as follows: for the Main Bride up to 27.01.2017; for the service road near Zadeshwar Flyover up to 06.03.2017; for the Toll Plaza and its related works up to 20.09.2017; for the Jagadia Flyover up to 20.05.2017 and its Service road up to 15.10.2017; for the balance Highway work up to 15.10.2017; and for Guide Bunds up to 30.11.2017.

9. The same was construed as an admission by the petitioner of the factual conspectus (as canvassed by the Claimant) which impelled the Authority's Engineer to grant the extension of time. The relevant observations of the Arbitral Tribunal on the above aspect are as under:

> *"12.(xxvi) The claimant has pleaded that the delay in execution of the various works took place on account of the Right of Way not been handed over fully and additionally on account of hinderances. Learned counsel for the claimant took the Tribunal through the correspondence on this subject, which has been tabulated in para 6(vi) above. The Tribunal notes that the issue got terminated when the Authority's Engineer made recommendation in its letter dated 19.09.2017, Ex. C-528, which were accepted by the respondent vide its letter dated 30.11.2017, Ex. C-557. In said letter the respondent granted extension of time for the Main Bridge up to 27.01.2017, Service road near Zadeshwar Flyover up to 06.03.2017, Toll Plaza and its related works up to 20.09.2017, Jagadia Flyover up to 20.05.2017 and for its Service road up to 15.10.2017, for balance Highway work up to 15.10.2017 and*

for Guide Bunds up to 30.11.2017 (for record it may be noted that the letter dated 30.11.2017, refers to the Authority's Engineer's as dated 25.09.2017, this seems to be the date when the respondent received the letter dated 19.09.2017, for the reason the dispatch no. of said letter is AA/HW/NHAI/ Narmada/1681/16-17/835, which is the number referred to in the respondents letter dated 30.11.2017). This is an admission by the respondent of acceptance of the facts noted by the Authority's Engineer and based there on its recommendation. In Ex.C-528, the Authority's Engineer has considered the proposal for Extension of Time (EOT). The Authority's Engineer has split the works into six components i.e. Main Bridge and its approaches, Zadeswar Flyover, Toll Plaza and other related works, Jagadia Flyover, Road works and Guide bunds. The Authority's Engineer has noted that the EPC Agreement was signed on 25.02.2014 and the Appointed Date was declared as 03.03.2014 and the Scheduled Completion Date was 28.08.2016"

10. The Arbitral Tribunal then ventured to consider whether the respondent/claimant was entitled to claim any damages for the delay in the execution of the aforesaid works pertaining to the "flyovers, toll plaza and road works". It was noticed as under:-

"12.(Li). To justify the claim, the claimant has pleaded that the planned cost of labor, plant and machinery for the 8 broad items of works are:-

Planned Labour

Sl No.	***Description***	***Planned Cost (Rs.)***
1.	*Zadeshwar Flyover*	*1,75,15,985*
2.	*Zadeshwar Service Road*	*47,63,748*
3.	*Main Bridge*	*8,13,67,329*
4.	*Jhagadia Flyover*	*1,71,77,436*
5.	*Jhagadia Service Road*	*1,71,77,436*
6.	*Road Works*	*4,00,08,833*
7.	*Toll Plaza*	*2,03,68,479*
8.	*Guide Bunds*	*1,19,94,994*
	Total Planned Labour Cost	***21,03,74,240***

Planned Plant & Machinery

Sl No.	***Description***	***Planned Cost (Rs.)***
1.	*Zadeshwar Flyover*	*2,39,49,967*
2.	*Zadeshwar Service Road*	*1,80,43,400*
3.	*Main Bridge*	*15,92,79,268*
4.	*Jhagadia Flyover*	*2,41,40,581*
5.	*Jhagadia Service Road*	*1,90,46,427*
6.	*Road Works*	*6,37,58,846*
7.	*Toll Plaza*	*2,75,22,011*
8.	*Guide Bunds*	*1,03,02,337*
	Total Planned Plant & Machinery Cost	***34,60,42,838***

12.(Lii) As per the pleadings, the actual labour cost incurred was INR 52,04,74,015.00 and for plant and machinery the actual cost incurred was INR 83,25,28,963.00"

11. The Arbitral Tribunal rendered a finding of fact that the aforesaid premise, insofar as it related to the total "Planned Labour Cost" and the total "Planned Plant and Machinery cost", was thoroughly misconceived and ill founded. It was held as under:-

> *"12.(Liii) The bid being invited on an EPC contract basis, having an escalation clause and the weighted percentage of various items being disclosed, logic guides the Arbitral Tribunal that the bidders took said data indicated in the bid documents to determine their price bid. From the percentage break-up of the price on which escalation would have been paid, the bidders would be guided by sub-para (e) of Article 19.10.4. For earthwork, granular work and other works, the labor element is 20% and for plant and machinery it is 15%. The same are the percentages for bituminous work and cement concrete pavement works. The rest is bifurcated for cement, steel, bitumen, fuel and lubricants and other materials. For culverts, minor bridges and other structures the labor element is 15% and for plant and machinery it is 15%. The same are the*

percentages for major bridge and structures. Meaning thereby for the works at items at S.No.1 under clause 1.2 of the Schedule-H, the weightage percentage to the contract price being 17.87%, and the contract price being INR 379 crores, the contract price comes to INR 67.7273 crores and for these items of works the labor element being 20%, the labor element would be 13.54 crores. For the main bridge, the weightage in percentage to the contract price is 75.28% ,which comes to INR 285.3112 crores. For the main bridge the labor element being 15%, the labor element would be 42.79 crores. For other works the weightage in percentage to the contract price is 6.84% which comes to INR 25.9615 crores and the labor element being 15% for some works and 20% for some, taking the average to be 17.5%, the labor element would be 4.5433 crores. Thus, on the contract price the labor element price would be 60.8 crores. The claimant has stated that its planned labor cost was INR 21,03,74,240.00. The same is ex-facie an attempt to pull the wool over the eyes of the Tribunal, being 1/ 3rd of what it ought to be as per the bid documents. The Tribunal would be failing to note that in the escalation bills submitted the percentages towards labor and material have been taken as stated in the Articles of the contract. Pertaining to plant and machinery, the planned deployment costs stated to be INR 34,60,42,838.00 is again an ex-facie attempt to pull wool over the eyes of the Tribunal. For all items of work towards plant and machinery the contract allocates 15% and thus the contract price being INR 379 crores this element would be 56.85 crores. Thus, the deployment data placed on the record of the Tribunal in the form of the compilations CD-4D is so soiled that no intellectual washing machine can clean it. Further, the claimant has not produced any financial expert to justify the computation with reference to the compilation CD-4A, and its witness i.e. CW-1 being an Engineer would not be a person capable of proving said fact…."

12. Thus, the Arbitral Tribunal found that the very basis of the claim, viz., that the contractor's planned labour cost was to the tune of Rs. 21,03,74,240/- was "an attempt to pull the wool over the eyes of the Tribunal," being 1/3rd of what it ought to be as per the bid documents. Pertaining to the claimant's assertion that the total planned plant and machinery costs amounted to Rs. 34,60,42,838/-, the Arbitral Tribunal found that (i) the same was "in the nature of an *ex-facie* attempt to pull wool over the eyes of the Tribunal"; and (ii) the deployment data placed on record by the contractor was "so soiled that no intellectual

washing machine can clean it"; and (iii) the claimant had failed to justify its computation.

13. Another reason, cited in the subsequent portion of the award for rejecting the respondent's claim, was that it has been established that the respondent/claimant had engaged sub-contractors for a significant part of the work, and had neither pleaded nor demonstrated that it was forced to pay additional cost to its sub-contractors over and above the value of their sub-contracts. In Para 12. (Lvi) of the Final Award, it was concluded as under:-

> *"Prima facie the claimant cannot claim any compensation for the delay on the value of the sub-contracted work unless it is able to show that it was forced to pay additional amounts to its sub-contractor due to delay. ....."*

14. However, despite the above findings recorded in para 12 (Lvi) of the Final Award, the Arbitral Tribunal observed that the purpose of arbitration proceedings, amongst others, is to do justice between the parties and not be bogged down by the technicalities of law. Thereafter, it was held by the Arbitral Tribunal as under:-

> *"12.(Lviii) The issue of the casting yard ended in January 2015, when the casting yard was operationalized. For the Main Bridge all encumbrances and land related issues came to end and end by December 2014. Thus, on account of concurrent delays the claimant is held entitled to no compensation on any account. The chainages affected are the ones tabulated in para 12(xxiv). The Authority's Engineer in Ex.C-528 has admitted that for the Zadeswar Flyover the land related issue came to end and end on 08.11.2016. For Toll Plaza on 06.01.2016 but traffic movement issues and strike by Gujrat Contractor Association as also unexpected high temperatures and unexpected heavy rainfall impacted the works causing further delay of 133 days. For Jagadia Flyover the land related and obstruction issues got resolved on 19.06.2015, but moisture content in the Fly-ash delayed the completion of the Flyover by another 40 days. For balance works the land relate issues got resolved in March 2017, the claimant would be intitled to compensation for these*

delays not attributable to it at all. There is no concurrent causing a delay attributable to the claimant for said works (save and except for casting items in the 2 flyovers for which the concurrent event of not setting up the casting yard by the claimant came to an end in January 2015). But the problem is in the quantification. The first problems is the ex-facie wrong assertion of planned man power and machinery deployment. The second is in the projection of the actual man power and machinery deployment. The third is in the fact that the claimant has not disclosed the works subcontracted and the value there of. (There is intrinsic evidence of subcontracted works being at least of the value of INR. 35 Corers. The cumulative effect is that the Tribunal has no definite identifiable material to compute the extra cost incurred by the claimant for the works other than the Main Bridge. but noting the fact that the breakup of the costs as per Article 19.10.4 shows that cement, steel, bitumen, fuel and lubricants and other material input for the works constitute between 65% to 70%, for which items the escalation clause adequately compensates the claimant and hence only 30% to 35% is not covered by the escalation, the Tribunals holds that said 30% to 35% would be a logical basis on which the compensation claim of the claimant can be worked out. Considering the contract price allocation to these components indicated in para 12.(Liii) above, taking in to account that at least work worth INR. 35 Crores for these works was subcontracted and the subcontractor has not been proved by the claimant to have been paid any extra sum, the Tribunal is of the opinion that for claims No. 3 and 6(a) INR. 15 Crores would be a fair and reasonable compensation under all heads of the loss suffered i.e., extra deployment of man power, machinery, site office and head office expenses and loss of opportunity costs (by deploying said resources elsewhere and earn profits).

12. (Lix) Claims No. 3 and 6(a) are jointly allowed in sum of INR. 15 Crores."

15. It is in the above conspectus that the petitioner has urged that the Arbitral Tribunal committed a patent illegality in awarding an amount of INR 15 Crores under Claim Nos. 3 and 6(a) without any evidence, despite the respondent/ claimant having miserably failed to prove that it suffered any damages. It is submitted that, having thoroughly rejected the basis on which the respondent/claimant advanced his claims, the Arbitral Tribunal grossly exceeded its jurisdiction by virtually devising

its own methodology (at variance with the pleaded case of the respondent/claimant) to award INR 15 crores under Claim Nos. 3 and 6(a). It is further submitted that the Arbitral Tribunal was not authorised to decide the claim *ex aequo et bono* or act as an *amiable compositeur* since the parties had never authorised it do so under Section 28(2) of the A & C Act.

16. It is further submitted that it was incumbent upon the Arbitral Tribunal to decide the dispute in accordance with the applicable legal principles and not on the basis of what it considered fair and reasonable, unless the parties had specifically authorised it to do so by an express agreement. It is submitted that, in awarding an amount of INR 15 crores, the Arbitral Tribunal has disregarded the pleaded case of the respondent/claimant and virtually devised an altogether new claim, without even putting the parties to notice as regards thereto. In these circumstances, it is contended that the petitioner was "unable to present its case" as regards thereto, and therefore, the award is liable to be set aside under Section 34(2)(a)(iii) of the A&C Act. It is further submitted that even the methodology devised by the learned Arbitrator is fraught with difficulties.

17. On the contrary, it has been urged on behalf of the respondent that the Arbitral Tribunal was well within its rights to award damages in the manner it did. It is submitted that the award contains reasons to justify the award of INR 15 crores to the respondent/ claimant. It is further submitted that the Arbitral Tribunal is not helpless in the matter of quantifying the compensation once it is satisfied about entitlement. Reliance is placed on the judgment of the Supreme Court in ***Gemini***

Bay Transcription Pvt Limited versus Integrated Sales Service Limited and Another (2022) 1 SCC 753, to urge that the Arbitral Tribunal is entitled to "make best judgment assessment" for the purpose of awarding damages.

18. As far as claim no. 5 is concerned, the respondent/claimant claimed a sum of Rs. 6,46,61,745/- towards construction of six additional toll lanes (3×2) at the toll plaza, contending that it was directed to construct 18 toll lanes instead of the 12 envisaged under the Bid Documents. The respondent/claimant asserted that this constituted a change in scope of work, thereby entitling it to reimbursement for the additional cost incurred. The learned arbitrator allowed the said claim of the respondent/ claimant by observing as under –

> *"Claim No. 5*
> *14.(i) This claim is in sum of INR. 6,46,61,745.00 for construction of additional 6 lanes in Toll Plaza. The case of the claimant is that it submitted the bid in sum of INR. 379 crores based on the bid documents (contained in Volume CD-1E at page 7) furnished by the respondent which contained a layout of the Project Highway showing 12 Toll Plaza lanes. The bid documents showed the projected daily traffic flow on the Project Highway which obviously was base upon some study conducted by the respondent. The Toll Plazas had to be constructed in accordance with Schedule D, which in turn incorporated IRC-SP-87-2010 specifications and standards for a 6 laning highway. Ex. C- 597 reveals that before taking up the design of the Toll Plaza, the claimant conducted a traffic survey on 24.12.2014 for 24 hours and determined the peak hour traffic, which revealed that keeping in view IRC-SP-87- 2010 the number of lanes required on each side would be 7 if 2 were ETC and 5 semi-automatic with ROW width requirement of 145 meters. Accordingly vide Ex. C-139 dated 07.03.2015 the claimant submitted the traffic survey report and the drawings Revision-0 showing 14 lanes. Vide Ex. C-0176 dated 21.05.2015 the Authority's Engineer returned the drawings asking the claimant the considered maximum of 3 ETC lanes. Vide Ex. C-181, dated 28.05.2015 the respondent directed to adhere to the proposed ROW of 145 meters for Toll Plaza layout and thus, vide Ex. C184, dated 01.06.2015 the Authority's Engineer directed claimant to ensure the ROW be maintained at 145 meters. The matter was deliberated upon vide*

Ex. C-185, Ex. C-202, Ex. C-214 and Ex. C- 215, dated 01.06.2015, 03.07.2015, 25.07.2015 and 28.07.2015 respectively. Accordingly, since the consensus emerged that 1 ETC and 8 semi-automatic lanes would be provided on each side, vide Ex. C-218, dated 30.07.2015 the claimant revised the drawing showing 9 lanes of each side i.e. 18 in number. The increase is therefore from 12 to 18. These facts have not been disputed by the respondent. The defence is that in view of Schedule D since IRC-SP-87- 2010 was applicable and known to the claimant and because the EPC contract required the Project Highway to be constructed as per IRC-SP-87-2010, the claimant would not be intitled to any extra costs.

14.(ii) The argument in defence is self-destructive. The respondent, as the author of the bid documents knew that IRC-SP-87-2010 was applicable to the works. Yet, in the tender drawings layout it showed 12 Toll Plaza lanes to be constructed. The bidders would be intitled to the benefit of the presumption that the respondent had done its home work properly. Logic guides that while calculating what should be the bid value, the bidders factored in 12 Toll Plaza lanes to be constructed and for this item of work worked out the price accordingly. There is obviously a hiatus between the layout indicated in the tender drawing and the actual requirement keeping in view IRC-SP-87- 2010. As opined here-in-before, the bidders took in to account 12 Toll Plaza lanes to be constructed as part of the projects works based upon the layout contained in the tender drawings. The actual requirement was worked out later when it dawned that 18 Toll Plaza lanes need to be constructed. The Tribunal concludes that the claimant would be intitled to additional costs because there is change in scope of work from 12 Toll Plazas to 18 Toll Plazas. The calculation for the claim are in Annexure C6-1, C6-2 and C6-3, which are part of Annexure -3 of PART-2 of the Statement of Claim. These computations have not been traversed by the respondent. The Tribunal would be failing if not noted that Schedule-H to the EPC Agreement, in respect of which Schedule the Tribunal would be making a detailed analysis while dealing with claim 3 and 6(a), bifurcates the contract price weightages in to 3 components of 17.87%, 75.28% and 6.85%. In the first component of Road Works, including culverts, minor bridges etc. the further percentage weightage in column 4 of the Schedule table show that 10.01% of said component is for Rigid Pavement at Toll Plaza. 17.87% of the contract price of INR. 379 crores is INR. 67.7273 crores. 10.01% of INR. 67.7273 crores is INR. 6.779 crores. As per Schedule- H the third component of 6.85% has the sub element Toll Plaza being 12.62% thereof. 6.85% of the contract price of INR. 379 crores is INR. 25.961 crores. 12.62% of INR. 25.961 crores is 3.276 crores. Thus, the Agreement between the parties shows that to construct 12 Toll Plazas with Rigid Pavement the price would be INR. 6.779 crores + INR. 3.276 crores = INR. 10.055. Per Toll Plaza it comes to INR. 83,79,166.66.

Therefore, with reference to the intrinsic material aforenoted the cost of 6 additional Toll Plazas comes to INR. 5.0275 crores. The claimant has claimed INR. 6,46,61,745.00. The Tribunal notes that the EPC contract has a provision for escalation [which shall be discussed while dealing with claim No. 3 and 6(a)]. The Toll Plazas were constructed in the year 2016 and thus factoring in escalation, the Tribunal finds that the claim is justified even after having given a deeper in-look in to the same, notwithstanding that the respondent has not traversed the calculation pleaded by the claimant.

14.(iii) Claim No. 5 is allowed in sum of INR. 6,46,61,745.00"

19. While challenging the same, it is submitted by the petitioner that in the Statement of Claim and Written Submissions, the respondent contended that the original requirement of 12 toll lanes was based on the traffic data and report furnished by the petitioner, in the Bid Documents. However, it is submitted that during the course of arguments, the respondent shifted its stance and relied upon the drawings of the toll plaza annexed to the Bid Documents, which merely contained a typical and representational cross-section of a toll plaza derived from the IRC Manual.

20. It is submitted that the said drawing in the Bid Documents only depicted a representational layout of the toll plaza complex, comprising toll booths, administrative building, and associated facilities, and was not intended to prescribe a fixed number of toll lanes.

21. It is the case of the petitioner that the number of toll lanes varies from project to project, depending on the peak-hour traffic volume. It is submitted that in terms of Schedules C and D, read with Clauses 10.3 and 10.4.12 of the IRC Manual (IRC:SP:87-2010), the number of toll lanes must correspond to the projected traffic in the peak hour, with a maximum of two ETC lanes permitted on each side.

22. However, it is submitted that the Arbitral Tribunal, in para 14(i)–(ii) of the impugned award, erroneously relied solely upon the tender drawing of the toll plaza layout while disregarding the express contractual clauses governing the construction of toll lanes, as well as the specifications contained in the Schedules and the IRC Manual.

23. It is averred that even the respondent admitted that the toll plaza was to be constructed strictly in accordance with Schedule D of the EPC Agreement. Schedule D of the EPC Agreement explicitly provides that the specifications and standards to be adopted are those set out in IRC:SP:87-2010, applicable to six-laning of National Highways through PPP mode.

24. The case of the petitioner is that the construction of 18 toll lanes was entirely in accordance with the contractual requirement and the respondent's own proposal, and no additional work was executed warranting any extra payment.

25. It is urged that the Arbitral Tribunal's finding, based merely on representational drawings, is contrary to the express contractual provisions and the priority clauses under Clauses 1.2.1(u) and 1.4.1 of the EPC Agreement. It is submitted that the respondent itself never raised any objection to the drawing during execution and, having voluntarily proposed and built 18 lanes, is estopped by its conduct and acquiescence from claiming any additional cost.

26. Hence, it is contended that the award under Claim No. 5 is ex-facie illegal, perverse, contrary to the terms of the EPC Agreement, and liable to be set aside under Section 34 of the Arbitration and Conciliation Act, 1996.

27. On the other hand the respondent has objected to the said contentions of the petitioner by submitting the Tribunal in Paras 14(i) and 14(ii) has held that the Tender drawings showed only 12 Toll Plaza lanes to be constructed and Bidders would factor in the same as the scope and price the bid accordingly. It is submitted that the tribunal rightly held that the tender drawings would reflect the actual requirement as per the IS Code. If 18 Toll Plazas were found required at a later point, it constitutes Change of the Scope. As such, the Tribunal having considered all the relevant specifications, tender drawings and conditions of contract has come to the above conclusion that there is a Change in Scope. It is submitted that this decision thus, does not attract any intervention under Section 34.

REASONING AND FINDINGS:-

28. A perusal of the impugned award reveals that the same unequivocally and emphatically rejects the quantification of Claim Nos. 3 and 6(a), as canvassed by the respondent/claimant. In fact, the Arbitral Tribunal found that the said quantification lacked credibility to such an extent that the same amounted to "an attempt to pull the wool over the eyes of the Tribunal".

29. The deployment data relied upon by the respondent/ claimant for substantiating its claim also came in for scathing comments from the Arbitral Tribunal, which found that the same "is so soiled that no intellectual washing machine can clean it".

30. Once the Arbitral Tribunal comprehensively rejected the basis on which monetary compensation was sought by the respondent/claimant, it was clearly impermissible for the Arbitral Tribunal to embark upon an

exercise of constructing an altogether new claim, which was not found in the pleadings of the parties and without even putting the parties to notice as regards thereto.

31. Awarding an amount dehors the pleadings and evidence adduced before the Tribunal, clearly falls within the ambit of patent illegality as encompassed within the scope of Section 34(2)(a)(iii) of the A&C Act. In the case of ***Delhi Development Authority v. Sportina Payce Infrastructure Pvt. Ltd.***, 2024 SCC OnLine Del 1693, this Court was confronted with an identical situation where the Arbitral Tribunal had awarded an amount based on its own working, in disregard of the pleaded case of the parties. It was held therein as under:-

> ***"28.*** *The law is well-settled that an arbitral tribunal, even when it does not accept the basis of calculation of damages as presented by the claimant, it is within its domain to re-work the same, and it is even recognised in a number of cases, that for this purpose, an arbitral tribunal may resort to some "guess work" in certain situations. However, when arbitral tribunal seeks to adopt a completely extraneous basis for assessing and awarding damages, at the very least, the award must mention:*
>
> *(i) reasoning for rejecting the computation/data furnished by the claimant;*
>
> *(ii) rationale for adopting the alternative methodology; and*
>
> *(iii) adequately explain the alternative methodology.*
>
> ***29.*** *In the impugned award, none of the above requirements is satisfied. As noticed, the claim as raised was founded on specific assertion as regards exact extent of idling of specifically identified and quantified machinery. The quantum of manpower rendered idle was also pleaded in precise terms. Once the same was found untenable, the impugned award at the very least should have explained the rationale for the alternative methodology to which it was resorting to. In particular, the award ought to have explained the linkage between the manpower and machinery allegedly rendered idle with "50% of the total overheads". Moreover, the award does not disclose on what basis it has assumed that the extent of overheads was 2.5% of the contract price. The explanation sought to be offered by the respondent in these proceedings is akin to inferring some reasoning, which is not discernible from the award itself.*

> ***30.*** *Also, when the arbitral award resorts to methodology which is different from methodology set out in the statement of claim, the same must be put to the opposite party so that the opposite party has an opportunity to make contentions with regard thereto. It is impermissible for an arbitral tribunal to spring a surprise on the parties by making an arbitral award on the basis of methodology which does not form part of the pleaded case at all and on which no submissions have been made by the respondent/claimant. This is essential to meet minimal requirements of natural justice and to ensure that the award does not hit by Section 34(2)(a)(iii) of the A&C Act.*
>
> ***31.*** *In Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, an arbitral award was inter alia set aside under Section 34(2)(a)(iii) of the A&C Act, when it was found that the arbitral tribunal had relied upon certain extraneous material which were never disclosed in the arbitration proceedings and thereby directly affected the ability of a party to present its case…..*

32. In "International Commercial Arbitration" (Second Edition, S 25.04[B], p.3249), Gary B. Born identifies "surprise decisions by arbitrators" as a ground for setting aside arbitral award. Relevant extracts from the book are reproduced hereunder:

> *""Surprise" Decisions by Arbitrators. If the arbitrators rest a decision on factual materials or (less clearly) a legal theory not advanced by the parties, without providing the parties an opportunity to be heard, their award is subject to annulment. One English decision correctly summarizes the approach of many courts to this issue:*
>
> *"**In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. The essential function of an arbitrator or, indeed, a Judge is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point - a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced Counsel and solicitors-then it is not only a matter of obvious prudence, but the***

arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it*."*

This rule follows from parties' general right to an opportunity to be heard, and is related to the arbitrators' obligation not to exceed the scope of the parties submissions.

xxx *xxx* *xxx*

As the above excerpts indicates, however, even where this reasoning is adopted, courts have annulled awards that rested on authorities or arguments that the parties did not address and could not reasonably have foreseen as relevant. Where the arbitral tribunal adopts a legal position or theory different from that previously communicated to the parties or where its decision, for other reasons, came as a surprise to the parties, the tribunal is required to inform the parties and permit them an opportunity to be heard on the issue.

Other national courts have annulled awards where the arbitral tribunal rested its decision on legal provisions or argument raised sua sponte by the arbitrators and not addressed by the parties. In the words of one French decision, "the principle of due process implies that the arbitral tribunal cannot introduce any new legal or factual issue without inviting the parties to comment on it."

[emphasis supplied]

33. In ***CEF v. CEH,*** [2022] SGCA 54, the Singapore Court of Appeal partially set aside an arbitral award, holding that the tribunal's reasoning on damages lacked both reasonable notice that the tribunal could adopt, and a sufficient nexus to the parties' arguments. Relevant extracts from the said judgment are as under:

"The fair hearing rule

110. On appeal, the appellants submit that the Damages Order was issued in breach of natural justice and/or that the appellants were unable to present their case. The Tribunal had rejected and/or found the respondent's evidence in support of its five heads of reliance loss to be deficient. Despite this, it inexplicably proceeded to adopt a "flexible approach" and to award the respondent 25% of each head of reliance loss, without first telling the parties it would be doing so or giving them the opportunity to address the

Tribunal on the same. Had the Tribunal indicated beforehand that it would apply this flexible approach, the appellants would have had the opportunity to decide whether to ask the respondent to produce the source documents, or to take a forensic risk by resting their defence only on the burden of proof.

The law

111. In the recent decision of this court in BZW v. BZV [2022] SGCA 1 ("BZW"), this court stated that a breach of the fair hearing rule could arise from the chain of reasoning which the tribunal adopts in its award (at [60(b)]):

"… a breach of the fair hearing rule can also arise from the chain of reasoning which the tribunal adopts in its award. To comply with the fair hearing rule, the tribunal's chain of reasoning must be (i) one which the parties had reasonable notice that the tribunal could adopt; and (ii) one which has a sufficient nexus to the parties' arguments (JVL Agro Industries at [149]). A party has reasonable notice of a particular chain of reasoning (and of the issues forming the links in that chain) if : (i) it arose from the parties' pleadings; (ii) it arose by reasonable implication from their pleadings; (iii) it is unpleaded but arose in some other way in the arbitration and was reasonably brought to the party's actual notice; or (iv) it flows reasonably from the arguments actually advanced by either party or is related to those arguments (JVL Agro Industries at [150], [152], [154] and [156]). To set aside an award on the basis of a defect in the chain of reasoning, a party must establish that the tribunal conducted itself either irrationally or capriciously such that "a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award" (Soh Beng Tee & Co. Pte. Ltd. v. Fairmount Development Pte. Ltd. [2007] 3 SLR(R) 86 ("Soh Beng Tee") at [65(d)])."

xxx *xxx* *xxx*

116. In our view, the Tribunal's chain of reasoning in respect of the Damages Order was not one which the parties had reasonable notice that the Tribunal could adopt, nor did it have a sufficient nexus to the parties' arguments.

117. First, the Tribunal had expressly stated that there were deficiencies in the respondent's evidence due to the respondent's failure to produce the relevant supporting documents or to explain how the existing documents substantiated its claim. In our view, both parties would have expected that the Tribunal would only award the respondent loss that the respondent could prove. They

would have expected that if the Tribunal disagreed with the appellants about the state of the evidence adduced by the respondent in support of its reliance loss, it would award the respondent its claim in its entirety, ie, it would then award 100% of the respondent's claim for reliance loss. ***Similarly, if the Tribunal were to award 25% of the claim for reliance loss, this would be because the respondent had only proved 25% of its claim for reliance loss (and failed to prove the other 75%). In our view, a reasonable litigant in the appellants' shoes could not have foreseen the possibility of reasoning of the type revealed in the Award - ie, that the Tribunal, having noted all the deficiencies in the respondent's evidence, would then go on to adopt a figure of 25% of the amount claimed as being the loss incurred. Instead, the parties would have expected the Tribunal to dismiss the claim for reliance loss in its entirety.***

118. Second, the Tribunal's chain of reasoning did not have a sufficient nexus to the parties' arguments. The Tribunal justified its reasoning with reference to the "flexible approach" in Robertson Quay…

119. Even in the respondent's own reply post-hearing submissions, the respondent did not cite Robertson Quay for the proposition that, if the Tribunal was not satisfied as to the state of the respondent's evidence concerning proof of its loss, the Tribunal could then rely on the "flexible approach" to justify awarding a certain percentage of the respondent's total claim (assuming the case could have been cited for that proposition which seems doubtful). In fact, the respondent had cited Robertson Quay in support of its argument that the question was simply "whether the Tribunal is satisfied that [the respondent's] evidence on the loss and quantification is more likely to be true than not" [emphasis added]. Thus, even the respondent acknowledged that, on the "flexible approach", the Tribunal had to first be satisfied that the respondent's evidence was "more likely to be true than not" in order to award any damages to the respondent. In our view, therefore, the Tribunal's reliance on the "flexible approach" in Robertson Quay had no connection to the issue before the Tribunal of what the appropriate award for the respondent's alleged reliance loss should be. Once the Tribunal found that the respondent had not proved its reliance loss, the only appropriate percentage to award was 0% - the "flexible approach" did not allow the Tribunal to randomly select a figure of 25%.

120…

> *121. Third, we consider that this breach of natural justice was connected to the making of the Award (BZW at [62]), as the Tribunal awarded the respondent 25% of its claimed reliance loss based on the "flexible approach". In our view, this breach of natural justice prejudiced the appellants' rights. Had the Tribunal informed the parties of its intention to apply the "flexible approach" in this manner, the appellants would have had the opportunity to inform the Tribunal of its objections to such an approach, or the appellants would have had the opportunity to decide whether to ask the respondent to produce the source documents or to take a forensic risk by resting their defence only on the burden of proof. This compliance with the rules of natural justice could reasonably have made a difference to the outcome of the Arbitration (BZW at [63]).*
>
> [emphasis supplied]

34. Very recently, the High Court of the Republic of Singapore, in ***DOM v. DON,*** [2025] SGHC 103, while placing reliance on the judgment in ***CEF v. CEH,*** [2022] SGCA 54, partially set aside an arbitral award on the ground that the Tribunal's chain of reasoning bore an insufficient nexus to the parties' arguments. The Court observed that the Tribunal's decision to award Consultant B's fees, despite having concurrently found that Consultant B's services were unnecessary, was wholly disconnected from the issues raised before it. Similar view was taken with respect to Consultant D and Consultant E's fees. The relevant portion of the judgment is reproduced hereinbelow -

> *"20 DOM's case is focused on various breaches of the fair hearing rule, albeit not being always clear from DOM's submissions which breach of the fair hearing rule is being invoked.* ***I note that a breach of the fair hearing rule can manifest in, inter alia, the following two ways (CVV at [30]; DKT v DKU [2025] SGCA 23 ("DKT") at [8] and [12])****:*
>
> *(a) First, the tribunal's complete failure to apply its mind to the essential issues arising from the parties' arguments (ie, an infra petita challenge). The court will not set aside an award on this ground unless such failure is a clear and virtually inescapable inference from the award.*

*(b) Second, **from the chain of reasoning which the tribunal adopts in its award (ie, a chain of reasoning challenge). To comply with the fair hearing rule, the tribunal's chain of reasoning must be one that (i) parties had reasonable notice that the tribunal could adopt; and (ii) had sufficient nexus to the parties' arguments. To set aside an award based on a defect in the chain of reasoning, a party must establish that "a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award", and thus, could not have been expected to have addressed it in his previous arguments. Only then can a party be said to have been unfairly denied his opportunity to be heard on that issue**.*

*21 DOM contends that the tribunal's findings "were not ones that could be concluded as they did not reasonably flow from the parties' arguments" [emphasis removed] (ie, irrational and capricious and at odds with its own findings and established evidence). **The language it uses here (ie, irrational and capricious) is derived from the following paragraph in Soh Beng Tee (at [65(d)]):***

*(d) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice are complied with in the arbitral process is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the Act and the IAA. In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. **Only in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene**. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either **irrationally or capriciously**. To echo the language employed in Rotoaira ([55] supra), the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award. It is only in these very limited circumstances that the arbitrator's decision might be considered unfair.*

[emphasis added in italics and bold italics]

22 In the full context of [65(d)] of Soh Beng Tee, a tribunal will have conducted the arbitral process irrationally and capriciously when it breaches the chain of reasoning rule, by adopting a chain of

reasoning that was unforeseeable and had insufficient nexus to parties' arguments.

xxx *xxx* *xxx*

(A) CONSULTANT B (PROJECT MANAGER)

74 The tribunal repeatedly noted (above at [40] and [46]) that it did not see why there was a need to hire a project manager – in other words, it was quite emphatic that what Consultant B was doing was (with respect to DON's counterclaim) unnecessary. Even though it then went on to note (see [47] above) that Consultant B did not provide a breakdown of which fees related to rectification works or additional works, the tribunal never backtracked from its position that Consultant B's activities were unnecessary.

75 In my judgment, it is this clear finding that Consultant B's services were unnecessary that makes the award for Consultant B's fees akin to the award for reliance loss in CEF (above at [58]).

76 The parties in this case would have expected that, at the very least, the tribunal would only award consultants' fees that the tribunal found to be necessary. Hence, much like in the case of CEF (above at [58]), a reasonable litigant in DOM's shoes could not have foreseen that the tribunal, having expressly found that it did not think it was necessary to hire Consultant B, would then go on to award DON's claim for Consultant B's fees anyway, after applying a 50% discount.

77 For the same reason, the tribunal's chain of reasoning had insufficient nexus to parties' arguments. DON's own case was that the tribunal had to be satisfied that the consultants' fees were necessary. Hence, the tribunal's decision to award the Consultant B's fees despite its finding that Consultant B's services were unnecessary had no nexus to the issue before him.

78 That being the case, I agree with DOM that there was a breach of natural justice in the award of Consultant B's fees.

(B) CONSULTANT D (M&E ENGINEER) & CONSULTANT E (STRUCTURAL ENGINEER)

79 The tribunal's findings in relation to Consultant D and Consultant E are similar in that it was uncertain if their fees related to services performed for the rectification works (above at [53] and [55]). That being the case, much like with Consultant B, the tribunal seemed clearly unconvinced that the services of Consultant D and Consultant E were necessary for the rectification works.

80 Thus, I repeat my observations at [75]–[77] above, and agree with DOM that there was a breach of natural justice in the award of Consultant D's fees and Consultant E's fees.

81 These breaches of natural justice were also connected to the making of the award, as the tribunal awarded DON 50% of its claims for Consultant B's fees, Consultant D's fees and Consultant E's fees based on that chain of reasoning. This breach of natural justice also prejudiced DOM's rights, as had the tribunal informed parties of its intention to apply a discount to DON's claim for the consultants' fees, DOM would have had the opportunity to inform the tribunal of its objections, which could reasonably have made a difference to the outcome of this arbitration (CEF at [121], citing BZW and another v BZV [2022] SGCA 1 ("BZW") at [63]).

xxx xxx xxx

(3) The award of Consultant B, Consultant D and Consultant E's fees should be set aside

94 The only question remaining is whether the portions of the Award relating to Consultant B's fees, Consultant D's fees and Consultant E's fees (where I found there has been a breach of natural justice (above at [78], [80] and [81])) should be, as DON argues, remitted to the tribunal for reconsideration, or, as DOM argues, simply set aside.

95 In CEF, the Court of Appeal noted that resolving the question of whether to remit should, among other considerations, involve applying the objective test of whether a reasonable person would be confident that a tribunal would be able to reconsider the issue in a fair and balanced manner. On the facts of that case, the Court of Appeal found that a reasonable person would not have that necessary confidence, after having assessed how the impugned decision had been arrived at (at [124]).

96 The impugned decisions in the current case had been arrived at in much the same way as that in CEF. In CEF, the tribunal found that the respondent had not proven its reliance loss. Despite that, the CEF tribunal went ahead to grant its claim for reliance loss after applying a percentage discount. Thus, the Court of Appeal found that a reasonable person would not have the necessary confidence after having assessed the aforesaid arbitrary manner in which the CEF tribunal had arrived at its decision (at [117]–[119] and [124]). Here, the tribunal found that DON had failed to prove that the services of Consultant B, Consultant D, and Consultant E were necessary. Despite this, the tribunal went ahead to award DON these

fees after applying a percentage discount. Given the similarities between how the respective tribunals had arrived at impugned decisions in the current case and CEF, this suggests that similarly, no reasonable person would have the necessary confidence in the tribunal's ability to re-consider DON's claim for Consultant B, Consultant D, and Consultant E's fees in a fair and balanced manner.

97 The Court of Appeal also found that as the CEF tribunal had determined that there was insufficient evidence on the record to support each head of reliance loss claimed after having dealt with each head in detail, "it would be pointless to send the claim back to the Tribunal to repeat an exercise which, logically, should result in the same conclusion of lack of evidence" (at [124]). The same can be said here. The tribunal had examined the claims for Consultant B, Consultant D and Consultant E's fees in detail and found that DON had not proven that their services were necessary. Hence, if the claim was remitted to the tribunal, logically, it would come to the same conclusion.

98 DON has raised the concern that the tribunal has already heard the 2nd tranche of the arbitration, so if this award were set aside to be reheard by a new tribunal, it may result in parts of or the entire 2nd tranche to be reheard. However, I do not think that the consequences of setting aside this portion of the Award will result in such dire consequences. The portion of the Award relating to Consultant B's fees, Consultant D's fees and Consultant E's fees concern self-contained and isolatable issues. I do not see how they would have the outsized impact raised by DON.

99 In summary and with respect to the consultants' fees, I conclude that the portions of the Award relating to DON's counterclaim for the sums of S$254,303.00, S$174,950.00 and S$65,000.00, for Consultant B's fees, Consultant D's fees and E Consultant's fees respectively, be set aside. I reach the opposite conclusion with respect to the portions of the Award relating to Consultant A's fees and Consultant C's fees and I dismiss DOM's application to set aside the Award with respect to Consultant A's fees and Consultant C's fees.

35. In ***Fox v PG Wellfair Ltd,*** [1981] 2 Lloyd's Rep 514, The English Court of Appeal, observed as under –

"That principle seems to me to apply to questions of fact as much as to a question of law. ***If the expert arbitrator, as he may be entitled to do, forms a view of the facts different from that given in the evidence***

> ***which might produce a contrary result to that which emerges from the evidence, then he should bring that view to the attention of the parties.*** *This is especially so where there is only one party and the arbitrator is in effect putting the alternative case for the party not present at the arbitration.*
>
> ***Similarly if an arbitrator as a result of a view of the premises reaches a conclusion contrary to or inconsistent with the evidence given at the hearing, then before incorporating that conclusion in his award he should bring it to the attention of the parties so that they may have an opportunity of dealing with it****."*

36. In ***Gbangbola v Smith & Sherriff Ltd,*** [1998] 3 All ER 730, Judge Humphrey Lloyd QC opined as under –

> *"A tribunal does not act fairly and impartially if it does not give a party an opportunity of dealing with arguments which have not been advanced by either party. It is not suggested by the claimant contractor that either of the two points mentioned in the arbitrator's letter was raised by it in the arbitration as being influential on the overall burden and determination of costs. Unless such an opportunity is given there is danger that the final result will not be determined fairly against the party who would be ordered to pay the costs."*

37. In ***The Republic of Kazakhstan v. World Wide Minerals Limited & Paul A Carroll QC,*** [2020] EWHC 3068 (Comm), the English High Court set aside an arbitral award on the ground that damages were awarded based on an argument not raised during the hearing, depriving the petitioner of a fair opportunity to respond. The relevant portion of the judgment is reproduced as under –

> *"30. Whether there has been a serious irregularity depends on whether the Tribunal decided the case on the basis of a point that TRK had not had a fair opportunity to deal with. As Popplewell J warned in para (4) of his summary of the applicable principles, if a tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point."*

38. Learned counsel for the petitioner is right in contending that by not even giving an inkling to the parties as to the methodology proposed to be adopted by the Arbitral Tribunal (dehors the pleaded case of the respondent/claimant), the petitioner was, in effect, "unable to present its case," and resultantly, the award is hit by 34(2)(a)(iii) of the A&C Act. In ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***, (2019) 15 SCC 131, [as also relied upon by this Court in ***Delhi Development Authority v. Sportina Payce Infrastructure Pvt. Ltd*** (supra)], the Supreme Court has observed as under -

> ***"The ground of challenge under Section 34(2)(a)(iii)***
>
> …
>
> *52. Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where materials are taken behind the back of the parties by the Tribunal, on which the parties have had no opportunity to comment, the ground under Section 34(2)(a)(iii) would be made out.*
>
> *53. In New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards - Commentary, edited by Dr. Reinmar Wolff (C.H. Beck, Hart, Nomos Publishing, 2012), it is stated:*
>
> > *"4. Right to Comment*
> >
> > *According to the principle of due process, the tribunal must grant the parties an opportunity to comment on all factual and legal circumstances that may be relevant to the arbitrators' decision-making.*
> >
> > (*a) Right to Comment on Evidence and Arguments Submitted by the Other Party*
> >
> > *As part of their right to comment, the parties must be given an opportunity to opine on the evidence and arguments introduced in the proceedings by the other party. The right to comment on the counterparty's submissions is regarded as a fundamental tenet of adversarial proceedings. However, in accordance with the general requirement of causality, the denial of an opportunity to comment on a particular piece of evidence or argument is not prejudicial,*

unless the tribunal relied on this piece of evidence or argument in making its decision.

In order to ensure that the parties can exercise their right to comment effectively, the Arbitral Tribunal must grant them access to the evidence and arguments submitted by the other side. Affording a party the opportunity to make submissions or to give its view without also informing it of the opposing side's claims and arguments typically constitutes a violation of due process, unless specific non-disclosure rules apply (e.g. such disclosure would constitute a violation of trade secrets or applicable legal privileges).

In practice, national courts have afforded Arbitral Tribunals considerable leeway in setting and adjusting the procedures by which parties respond to one another's submissions and evidence, reasoning that there were "several ways of conducting arbitral proceedings". Accordingly, absent any specific agreement by the parties, the Arbitral Tribunal has wide discretion in arranging the parties' right to comment, permitting or excluding the introduction of new claims, and determining which party may have the final word.

(b) Right to Comment on Evidence Known to or Determined by the Tribunal

The parties' right to comment also extends to facts that have not been introduced in the proceedings by the parties, but that the tribunal has raised sua sponte, provided it was entitled to do so. ***For instance, if the tribunal gained "out of court knowledge" of circumstances (e.g. through its own investigations), it may only rest its decision on those circumstances if it informed both parties in advance and afforded them the opportunity to comment thereon. The same rule applies to cases where an arbitrator intends to base the award on his or her own expert knowledge, unless the arbitrator was appointed for his or her special expertise or knowledge (e.g. in quality arbitration). Similarly, a tribunal must give the parties an opportunity to comment on facts of common knowledge if it intends to base its decision on those facts, unless the parties should have known that those facts could be decisive for the final award."***

54 …

55. Gary Born states:

"German courts have adopted similar reasoning, holding that the right to be heard entails two related sets of rights : (a) a party is

entitled to present its position on disputed issues of fact and law, to be informed about the position of the other parties and to a decision based on evidence or materials known to the parties [see e.g. judgment of 5-7-2011]; and ***(b) a party is entitled to a decision by the Arbitral Tribunal that takes its position into account insofar as relevant*** *[see e.g. judgment of 5-10-2009]. Other authorities provide comparable formulations of the content of the right to be heard [see e.g.* Slaney *v.* International Amateur Athletic Foundation, *F 3d at p. 592].”*

56. *Similarly, in* Redfern and Hunter *(supra):*

“11.73. The national court at the place of enforcement thus has a limited role. Its function is not to decide whether or not the award is correct, as a matter of fact and law. Its function is simply to decide whether there has been a fair hearing. One mistake in the course of the proceedings may be sufficient to lead the court to conclude that there was a denial of justice. For example, in a case to which reference has already been made, a US corporation, which had been told that there was no need to submit detailed invoices, had its claim rejected by the Iran-US Claims Tribunal, for failure to submit detailed invoices! The US court, rightly it is suggested, refused to enforce the award against the US company [Iran Aircraft Industries *v.* Avco Corpn.]. ***In different circumstances, a German court held that an award that was motivated by arguments that had not been raised by the parties or the tribunal during the arbitral proceedings, and thus on which the parties had not had an opportunity to comment, violated due process and the right to be heard*** *[see the decision of the Stuttgart Court of Appeal dated 6-10-2001 referred to in Liebscher, The Healthy Award, Challenge in International Commercial Arbitration (Kluwer law International, 2003), 406]. Similarly, in* Kanoria *v.* Guinness, *the English Court of Appeal decided that the respondent had not been afforded the chance to present its case when critical legal arguments were made by the claimant at the hearing, which the respondent could not attend due to a serious illness.*

In the circumstances, the court decided that ‘this is an extreme case of potential injustice’ and resolved not to enforce the arbitral award.

11.74. Examples of unsuccessful ‘due process’ defences to enforcement are, however, more numerous. In Minmetals Germany GmbH v. Ferco Steel Ltd., the losing respondent in an arbitration in China opposed enforcement in England on the grounds that the award was founded on evidence that the Arbitral Tribunal had

obtained through its own investigation. An English court rejected this defence on the basis that the respondent was eventually given an opportunity to ask for the disclosure of evidence at issue and comment on it, but declined to do so. The court held that the due process defence to enforcement was not intended to accommodate circumstances in which a party had failed to take advantage of an opportunity duly accorded to it."

57. In Minmetals Germany GmbH *v.* Ferco Steel Ltd.*, the Queen's Bench Division referred to this ground under the New York Convention, and held as follows:*

"The inability to present a case issue.-Although many of those States who are parties to the New York Convention are civil law jurisdictions or are those which like China derive the whole or part of their procedural rules from the civil law and therefore have essentially an inquisitorial system, Article V of the Convention protects the requirements of natural justice reflected in the audi alteram partem rule. Therefore, where the tribunal is procedurally entitled to conduct its own investigations into the facts, the effect of this provision will be to avoid enforcement of an award based on findings of fact derived from such investigations if the enforcee has not been given any reasonable opportunity to present its case in relation to the results of such investigations. Article 26 of the Cietac rules by reference to which the parties had agreed to arbitrate provided:

*'**26.** The parties shall give evidence for the facts on which their claim or defence is based. The Arbitral Tribunal may, if it deems it necessary, make investigations and collect evidence on its own initiative.'*

***That, however, was not treated by the Beijing court as permitting the tribunal to reach its conclusions and make an award without first disclosing to both parties the materials which it had derived from its own investigations.** That quite distinctly appears from the grounds of the court's decision - that Ferco was, for reasons for which it was not responsible, unable "to state its view". Those reasons could only have been its lack of prior access to the sub-sale award and the evidence which underlay it. I conclude that it was to give Ferco's lawyer an opportunity to refute this material that the Beijing court ordered a "resumed" arbitration."*

xxx xxx xxx

73. Given these parameters of challenge, let us now examine the arguments of the learned counsel on behalf of the appellant. There can be no doubt that the government guidelines that were referred to and strongly relied upon by

the majority award to arrive at the linking factor were never in evidence before the Tribunal. In fact, the Tribunal relies upon the said guidelines by itself and states that they are to be found on a certain website. The ground that is expressly taken in Section 34 petition by the appellant is as follows:

> *"It is pertinent to mention here that no such guidelines of the Ministry of Industrial Development had been filed on record by either of the parties and therefore, the Tribunal had no jurisdiction to rely upon the same while deciding the issue before it. Accordingly, the impugned award is liable to be set aside."*

74. The learned counsel for the respondent also agreed that these guidelines were never, in fact, disclosed in the arbitration proceedings. This being the case, and given the authorities cited hereinabove, it is clear that the appellant would be directly affected as it would otherwise be unable to present its case, not being allowed to comment on the applicability or interpretation of those guidelines. For example, the appellant could have argued, without prejudice to the argument that linking is dehors the contract, that of the three methods for linking the New Series with the Old Series, either the second or the third method would be preferable to the first method, which the majority award has applied on its own. For this reason, the majority award needs to be set aside under Section 34(2)(a)(iii)."

[emphasis supplied]

39. In ***Five Star Construction Pvt Ltd v. Orchid Infrastructure Developers Pvt,*** 2024 SCC OnLine Del 41, a Division Bench of this Court has observed as under –

> *"An Arbitrator cannot award an amount that he may feel is just to a party in the interest of justice, when there is no specific Claim in that regard. The learned Arbitrator thus, has exceeded his mandate and jurisdiction by awarding a sum of Rs. 4,33,877/-."*

40. An Arbitrator cannot award an amount to a party that is at variance with the pleaded case, in the guise of "doing justice," especially when the parties have not empowered the arbitrator to decide *ex aequo et bono*.

41. It is impermissible for an arbitral tribunal to engage in conjectural or speculative reasoning. The limited latitude to make "guesstimates" exists only for the purpose of evaluating, quantifying or justifying the

components of a claim that have been specifically pleaded by a claimant. Such estimation may justifiably affect the entitlement without changing the basis on which the claim was canvassed. In the guise of making "guesstimates", it is not open for an arbitral tribunal to cure / overcome defects or omissions in pleadings or claims, to alter the nature of the claim or to re-construct and / or to set up a new claim. The discretion is confined for the purpose of legitimate assessment of a pleaded claim within its parameters.

42. Arbitral proceedings falling within the purview of Part-I of the Arbitration and Conciliation Act, 1996 are adversarial in nature. In ***The Indian Officer's Association vs. M/s. Swaruba Engineering Construction Company Private Limited and Ors.*** in O.P. No. 16 of 2015 it has been observed that "*the adjudication of disputes through an adversarial, as opposed to an inquisitorial process, is a fundamental policy of Indian law.....*". In this context, an arbitral tribunal's role is that of an impartial adjudicator between the parties, authorized to decide the disputes brought before it strictly on the basis of the pleadings, evidence and submissions.

43. The arbitral tribunal is not vested with any independent investigative or fact finding mandate and cannot travel beyond the case as presented by the parties, nor can it formulate new factual grounds in respect of claim or defence on its own accord.

44. If the arbitral tribunal is inclined to give weight to, or rely upon, any aspect that has not been canvassed by the parties, it is incumbent upon the arbitral tribunal to put the parties to notice in this regard.

45. In ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI*** (supra), while referring to the English case of ***Minmetals Germany GmbH v. Ferco Steel Ltd***., 1999 CLC 647 (QB) it was noted that even in civil law jurisdictions, which essentially have an inquisitorial system and where the tribunal may be procedurally entitled to conduct its own investigation into the facts, the requirements of the New York Convention mandate that the tribunal must disclose to the parties the materials which it had derived from its own investigations[1].

46. Thus, when a tribunal proceeds to award a relief altogether distinct from that advanced by the claimant, it transgresses its jurisdictional limits. Such an exercise amounts to recasting the claimant's case and deciding matters beyond the scope of reference, thereby rendering the award patently illegal and unsustainable.

47. In the present case, apart from the fact that methodology adopted in the award for the purpose of computing damages is at variance with the case set up by the Claimant, the same is also fraught with some other difficulties as well. For the purpose of quantifying the amount to be awarded to the respondent/claimant, the Arbitral Tribunal noted that, in respect of 65-70 per cent of the cost, "the escalation clause adequately compensates the claim". It is noticed that for the purpose of escalation, the works are divided into various components namely,

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[1] **Minmetals Germany GmbH v. Ferco Steel Ltd**., 1999 CLC 647 (QB)
"The inability to present a case issue.—Although many of those States who are parties to the New York Convention are civil law jurisdictions or are those which like China derive the whole or part of their procedural rules from the civil law and therefore have essentially an inquisitorial system, Article V of the Convention protects the requirements of natural justice reflected in the audi alteram partem rule. Therefore, where the tribunal is procedurally entitled to conduct its own investigations into the facts, the effect of this provision will be to avoid enforcement of an award based on findings of fact derived from such investigations if the enforcee has not been given any reasonable opportunity to present its case in relation to the results of such investigations….."

namely, labour, cement, steel, bitumen, fuel and lubricants, other materials and plant, machinery and spares. The petitioner has contended that given the total aggregate weightage attributed to these components, the premise of the award viz. that "30% to 35% is not covered by the escalation", is incorrect. Be that as it may, the award does not disclose how its assumption/s have applied to calculate/ arrive at the figure of INR 15 crores. Also, although the award purports to take into account that work worth at least INR 35 crores had been sub-contracted, and also finds that the claimant failed to prove that any extra sum was paid to the sub-contractor, yet, the award does not disclose any detail/s whatsoever as to how the extent of sub contracting has affected the working/calculation of the Arbitral Tribunal. In fact, the award does not disclose at all as to how the amount of INR 15 crores has been deduced. The award simply makes a sweeping observation that "for Claim Nos. 3 and 6(a), INR 15 crores would be a fair and reasonable compensation under all heads of loss suffered".

48. It is thus evident that the amount of INR 15 crores is a random/ ad- hoc figure having no nexus with the pleadings, the evidence or even the notional methodology sought to be employed by the Arbitral Tribunal. The petitioner is right in contending that equity cannot be invoked in purely commercial and contractual matters to award amounts when, despite being given full opportunity, a party has failed to establish its loss through evidence. In any event, upon the party's failure to prove loss/damages, it is not permissible for an Arbitral Tribunal to embark upon setting up a fresh methodology thereby

virtually creating a new claim, without even putting the parties to notice as regards thereto.

49. The Tribunal is statutorily bound, by virtue of Section 28 of the Arbitration and Conciliation Act, 1996, to render its adjudication strictly in accordance with the terms of the contract and the substantive law governing the parties, and not on the basis of equity, unless specifically authorized by the parties to do so. Undoubtedly, there exists no agreement between the claimant and the respondent to the contrary. In such a situation, equity cannot be invoked as a ground for fashioning relief, and the Tribunal's reliance thereon is impermissible.

50. In ***NHPC Limited v. Jaiprakash Associates Ltd***., 2023 SCC OnLine Del 3294, the Court, while determining the issue whether the Arbitral Tribunal could pass an award, after observing that there was no material on record to substantiate the claims of the respondent, on the basis of equity, observed as under –

> *"59. Therefore, the position is no more res integra that in the absence of an express authorization an arbitrator shall not act merely on the principles of justice, equity and good conscience. The law prevailing shall be applied justly, duly and impartially, before reaching a conclusion and granting a monetary relief of compensation to a party.*
>
> *60. In the instant case, it is evident that the parties had not expressly authorized the Arbitral Tribunal to act on the principle of equity. The express bar of the Tribunal prohibited the Tribunal to pass an award on the basis of equity. A perusal of the portion of the Award, which is reproduced as above, shows that the Tribunal has done exactly so. When the respondent herein failed to produce any material before the Tribunal to substantiate its claims of costs and the quantum thereof, which has been categorically observed by the Tribunal in its findings, the Tribunal proceeded with granting an award based on estimates and equity after taking note of the absence of any evidence or material.*
>
> *61. This is expressly in contradiction to the mandate of Section 28(2) of the Act. The Tribunal was barred from acting in the manner as it did in*

absence of an express authority by the parties. Neither in the contract nor by way of any communication it has been shown that the Tribunal was authorized to act on the basis of equity. Therefore, there is force in the arguments on behalf of the petitioner that the learned Tribunal was barred from granting an award ex aequo et bono.

62. Accordingly, in terms of Issue No. II, this Court finds that the Tribunal has acted beyond the mandate of law."

51. In ***John Peter Fernandes v. Saraswati Ramchandra Ghanate since deceased and Others***, 2023 SCC OnLine Bom 676, the Bombay High Court has observed as under –

"23. Learned counsel for the respondents is also justified in referring to Section 28(2) and (3) of the said Act. The learned arbitrator, while discussing the reasons as to why direction for refund could be granted in favour of Mr. Fernandes, adopted an approach consistent with the principles of equity. But, in the teeth of the above quoted terms of the agreement dated 6th October 2003, there was no scope for applying the principles of equity, more so when the parties had not expressly authorized the learned arbitrator to decide the matter ex aequo et bono or as amiable compositeur under Section 28(2) of the said Act. In this context, learned counsel for the respondents is justified in relying upon the judgement of this Court in the case of Board of Control for Cricket in India Vs. Deccan Chronicle Holdings Limited (supra), the relevant portion of which reads as follows: -

> *"232. Mr Mehta points out that the terms ex aequo et bono and amiable compositeur have a specific legal connotation. The first means 'according to what is equitable (or just) and good'. A decision-maker (especially in international law) who is authorized to decide ex aequo et bono is not bound by legal rules and may instead follow equitable principles. An amiable compositeur in arbitration law is an arbitrator empowered by consensus of parties to settle a dispute on the basis of what is 'equitable and good'.*
>
> *233. Given the wording of the Arbitration Act, a longer examination of the antecedents of these concepts is unnecessary. The statute itself is clear and unambiguous; and in Associate Builders, the Supreme Court in paragraph 42.3 extracted Section 28 and said that a contravention of it is a sub-head of patent illegality. Ssangyong Engineering does not change this position. Given this now-settled position in law, it is unnecessary to examine the additional authorities on which Mr. Mehta relies, all to the same effect. They also say this:*

commercial arbitrators are not entitled to settle a dispute by applying what they conceive is 'fair and reasonable,' absent specific authorization in an arbitration agreement. Section 28(3) also mandates the arbitral tribunal to take into account the terms of the contract while making and deciding the award. Section 28 is applicable to all stages of proceedings before the arbitral tribunal and not merely to the making of the award. Under Section 28(2), the Arbitral Tribunal is required to decide ex aequo et bono or as amiable compositeur only if the parties expressly authorize it to do so. The Arbitrator is bound to implement the contractual clauses and cannot go contrary to them. He cannot decide based on his notions of equity and fairness, unless the contract permits it."

52. In ***P. Radhakrishna Murthy vs. NBCC,*** (2013) 3 SCC 747, the Supreme Court has observed as under –

"15. The High Court has rightly held that the arbitrator is not a conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider to be fair and reasonable. The High Court has further rightly made observation in the impugned judgment [Misc. First Appeal No. 4377 of 2000 along with Cross-Objection No. 34 of 2001, decided on 29-8-2002 (KAR)] that an arbitrator cannot ignore law or misapply it, nor can he act arbitrarily, irrationally, capriciously or independent of the contract while passing the award. The courts of law have a duty and obligation to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in the minds of litigants while adjudicating the claims of the parties by resorting to alternate dispute redressal method of arbitration under the provisions of the Arbitration Act."

53. In ***Maruti Traders v. Itron India Pvt. Ltd***., 2024 SCC OnLine Del 4897, the Court has observed as under –

"No equity in commercial transactions

54. Before adverting to the findings of the learned Arbitral Tribunal regarding which not much is required to be said, it is necessary to emphasise that there is no equity in commerce. Commercial transactions between private parties, as a legal luminary once said, are red in tooth and claw. The principle of universal brotherhood of man does not apply to commercial relations. There is no compulsion on a person entering into a commercial transaction even to be fair,

> *much less kind or equitable, and no Court can compel him to be so. The colour of money is all that matters.*
>
> *55. A limited to duty to act fairly and equitably may, on occasion, be read into transactions in which the Government is a contracting party; but, even there, overarching pre-eminence has to be accorded to the contract, and its provisions.*
>
> *56. The Court cannot, in commercial matters, grant relief on the principles of equity and fairness. The statute governs. Relief, if any, has to be granted within the four corners of the Contract Act, or any other statute which may apply, and not outside its peripheries. Howsoever, unfair the consequence, on the petitioner, of the respondent's actions may be, the petitioner is entitled to relief only if it can establish the existence of a right in contract, entitling it to relief. The ubi jus ibi remedium principle applies with full force in such cases. Every remedy has to be founded on a legal, existing, right."*

54. In the above circumstances the award of Rs. 15 crores under Claim No. 3 and 6(a) is unsustainable; the same is accordingly set aside.

55. With respect to Claim No. 5, having regard to the limited scope of judicial review available under Section 34 of the Arbitration and Conciliation Act, this Court is not inclined to accept the contentions advanced by the petitioner that the learned arbitrator has erroneously relied solely upon the tender drawing of the toll plaza layout while disregarding the contractual clauses governing the construction of toll lanes, as well as the specifications contained in the Schedules and the IRC Manual. The learned Arbitral Tribunal has rendered a factual finding that there was a change in the scope of work from 12 toll lanes to 18 toll lanes, relying principally on the tender drawings forming part of the bid documents. The Tribunal observed that—

> "*There is obviously a hiatus between the layout indicated in the tender drawing and the actual requirement keeping in view IRC-SP-87-2010.*"

It was further concluded that—

> "*As opined here-in-before, the bidders took in to account 12 Toll Plaza lanes to be constructed as part of the projects works based upon the layout contained in the tender drawings. The actual requirement was worked out later when it dawned that 18 Toll Plaza lanes need to be constructed. The Tribunal concludes that the claimant would be intitled to additional costs because there is change in scope of work from 12 Toll Plazas to 18 Toll Plazas*."

56. The aforesaid findings are purely factual in nature and are based upon the appreciation of evidence and material/s placed before the learned Arbitrator. Interference with such factual determinations is beyond the permissible scope of scrutiny under Section 34 of the Act. It is trite that while exercising jurisdiction under Section 34, this Court would not reappraise or substitute its own view for that of the arbitral tribunal on the merits of the dispute.

57. Consequently, the finding of the learned Arbitral Tribunal allowing Claim No. 5 does not warrant any interference in exercise of the Court's limited supervisory jurisdiction.

58. The petition is disposed of in the above terms. Pending applications also stand disposed of.

O.M.P. (ENF.) (COMM.) 121/2023

59. In view of the judgment passed in O.M.P. (COMM) 363/2022, the present execution petition is allowed to the extent it seeks execution of the award in respect of Claim Nos. 2, 4, 5, 6(b), 7, 8, and 9. Execution of the award insofar as it pertains to Claim Nos. 3 and 6(a) is declined, the same having been set aside *vide* judgment passed in O.M.P. (COMM) 363/2022.The judgment-debtor shall pay the said

awarded amount along with up to date interest within 8 weeks from today to the decree holder.

60. List for further directions before the Roster Bench on 02.12.2025.

SACHIN DATTA, J

OCTOBER 17, 2025/*uk*/*sv*