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

Date of decision: 08th JULY, 2025

IN THE MATTER OF:

\+ **O.M.P. (COMM) 546/2024 & I.A. 48657/2024**

MS TPF GETINSA EUROESTUDIOS SL IN ASSOCIATION WITH SEGMENTAL CONSULTING AND INFRASTRUCTURE ADVISORY P LTD NOW KNOWN AS SEGMENTAL INFRASTRUCTURE DEVELOPMENT LTD .....Petitioner

Through: Mr. Jayant Mehta, Sr. Advocate with Mr. Aditya Vaibhav Singh, Advocate and Mr. Khwaja Umair, Advocate.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA .....Respondent

Through: Mr. Rishi K Awasthi, Mr. Amit V Awasthi, Ms. Ritu Arora, Mr. Piyush Vatsa, Mr. Rahul Raj Mishra, Advs.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as* "**the Act**") has been filed by the Petitioner for setting aside the Award dated 27.08.2024 passed by the Ld. Arbitral Tribunal.

2. M/s. TPF Getinsa Euroestudios S.L., is a Consulting Engineering Company that provides Civil Engineering Consultancy Services to Government, Semi Government and Private Organizations. The company's expertise is Highways, Bridges, Structures, Urban and Regional Infrastructure Development, etc.

3. Segmental Consulting & Infrastructure Advisory (P) Ltd. is a company incorporated under the provision of Companies Act with similar credentials and is engaged in similar activity like M/s. TPF Getinsa Euroestudios S.L. These companies are working on various projects in association with each other and handling several projects for different organizations. The name of the Company has been changed to Segmental Infrastructure Development Ltd (*hereinafter collectively referred to as the* **"Petitioner"**).

4. National Highway Authority of India (*hereinafter referred to as the* **"Respondent"**) is an autonomous body established under the National Highway Authority of India Act, 1988 (*hereinafter referred to as the* **"NHAI Act"**) and undertakes the development, maintenance and management of national highways and for matter connected therewith or incidental thereto.

5. The present dispute emanates from the termination of the Contract Agreement dated 11.12.2019 executed between the Petitioner and the Respondent, under which the Petitioner was appointed as the Authority's Engineer to provide consultancy services to the Respondent in relation to the Duburi–Chandikhole section of NH-200 (now NH-53).

6. Shorn of unnecessary details, facts leading to the filing of the present petition are as under:

i. On 25.11.2019 the Petitioner applied and submitted their tender for providing consultancy services to NHAI for rehabilitation and upgradation of the Duburi to Chandikhole section of NH-200 (New NH-53) from double lanes to quadruple lanes under NHDP-III on Engineering, Procurement and Construction

Mode (*hereinafter referred to as* '**EPC Mode**'). The Petitioner was appointed as the Respondent Authority's Engineer and a Letter of Acceptance was issued by the Respondent in favour of the Petitioner. Thereafter, on 11.12.2019, a Contract Agreement for aforesaid consultancy services was executed between Petitioner and Respondent.

ii. Following the onset of COVID-19 pandemic, the Ministry of Road Transport & Highways (*hereinafter referred as* '**MoRT&H**') issued a circular dated 03.06.2020 under the "Atmanirbhar Bharat: Relief for contractor/Developers of road sector" (*hereinafter referred to as the* **"MoRT&H Circular"**), with an aim to maintain cash flow of contractor. The said circular relaxation the applicability of Schedule H of monthly Stage Payment Schedule (*hereinafter referred to as* **"SPS"**) to contractor for the work done and accepted as per specification of contract during the month under EPC/HAM contract. Thereafter, MoRT&H vide circular dated 31.12.2020 extended the period of relief measure related to relaxation of Schedule H.

iii. *Vide* letter dated 26.04.2022, the EPC Contractor submitted SPS-15 for the period 01.03.2022 to 31.03.2022, claiming Rs. 49,44,75,052 against value of work done. On 28.04.2022, after scrutinizing SPS-15, the Petitioner recommended the authority to release Rs. 41.65 Crore after withholding certain amounts.

iv. Subsequently, *vide* letter dated 15.07.2022, the EPC Contractor submitted SPS-16 for the period of April-May 2022 amounting to Rs. 12.84 Crore against value of work done. The Petitioner,

through its then Team Leader, returned the same on 11.08.2022, requesting revision in light of the de-scoping of the Brahmani Bridge amounting to Rs. 57.74 Crores, as per Competent Authority approval dated 24.06.2022.

v. It is averred that the Respondent directed the Petitioner to reconcile the billed quantities released up to SPS-15 under Atmanirbhar Circular and closing of balance NCR issued up to SPS-15. The Petitioner, vide letter dated 16.09.2022, requested the EPC Contractor to adhere to the contractual deadline for SPS submission, i.e., the 7th day of each month.

vi. On 06.10.2022, the Project Director called a meeting at PIU Dhenkanal (i.e. Project Implementation Unit), wherein he expressed displeasure to the Team Leader of Petitioner for non-submission of SPS from April-2022 to September-2022, Subsequently, the EPC Contractor vide letter dated 12.10.2022 re-submitted SPS-16 for the period April, May & June-2022 amounting Rs.26.07 crore against gross value.

vii. On 13.10.2022 the Team Leader of the Petitioner again requested the Project In-charge of the EPC Contractor to submit the Stage Payment Statement as per the contractual provisions. It is averred that the EPC Contractor was also advised to expedite the work progress by taking remedial measures and deploying necessary resources at site pursuant to Clause 11.14 of the Contract Agreement. After scrutinizing the same, Petitioner vide letter dated 14.10.2022 intimated the Project Director, PIU- Dhenkanal that the EPC Contractor's SPS should

not be processed due to lack of supporting documents and them not being in line with the provision of Contract Agreement. Further, Petitioner vide letter dated 18.10.2022 rejected the SPS-16 and requested the contractor to resubmit the SPS-16 with proper supporting documents and necessary reconciliation of the work done at site.

viii. On 18.10.2022, a meeting was held by the then Project Director, NHAI, PIU-Dhenkanal for review of various works in the stretch Duburi to Chandikhole section of NH-53, whereby the Project Director expressed displeasure for non-submission of SPS from April, 2022 to September, 2022 (i.e. SPS-16).

ix. On 18.10.2022 the EPC Contractor re-submitted SPS-16 dated 12.10.2022 for the period April, May & June-2022 amounting Rs.26.07 crore against gross value. And on the same day, the Petitioner rejected the SPS-16 for the second time and requested the contractor to resubmit the SPS-16 with proper supporting documents and necessary reconciliation of the work done at site.

x. *Vide* letter dated 29.10.2022, the Petitioner returned SPS-16 for the third time to the EPC Contractor, stating that the same was submitted without the requisite supporting documents. It has been averred that, in terms of the meeting held at PIU on 18.10.2022, the Team Leader of the Petitioner requested a joint site visit to assess the actual quantum of work completed at site.

xi. It has been averred that pursuant to the said visit, conducted in the presence of representatives of the Respondent and the EPC

Contractor, and in accordance with Clause 19.5.1 of the Contract Agreement, the Petitioner, vide its letter dated 16.11.2022, recommended release of 90% of the SPS-16 amount—i.e., Rs. 14.82 Crores (net)—against the Contractor's claimed amount of Rs. 25.27 Crores, by withholding certain sums. The said 90% amount was subsequently released by the then Project Director, PIU Dhenkanal.

xii. On 29.11.2022, the then Project Director of the Respondent wrote to the Petitioner to certify the documents relating to SPS-16. A reminder letter was also issued by the Respondent on 27.12.2022.

xiii. On 20.01.2023, the Project Director wrote to the Petitioner regarding submission of documents related to SPS-15, whereafter a show cause notice dated 18.02.2023 was issued by the Respondent. The said show cause notice states that excess payments had been made by the Petitioner under SPS-15 and SPS-16 to the Contractor without corresponding work being completed.

xiv. Pursuant to the said Show Cause Notice on 24.02.2023 a site visit was undertaken by representatives of the Respondent and visit fact sheet for the said visit was recorded by the Respondent on 25.02.2023.

xv. On 14.03.2023, the Petitioner submitted its reply to the Show Cause Notice explaining the reasons under which recommendations were made under SPS-15 and SPS-16, along with proposed mitigation measures.

xvi. On 17.05.2023, the Respondent issued notice of termination to the Petitioner, followed by a debarment order dated 05.06.2023 barring the Petitioner from participating in any future NH projects of the Respondent or MoRT&H or its existing agencies, either directly or indirectly for a period of two years.

xvii. On 13.06.2023, the Petitioner invoked arbitration by issuing a notice and writing to the the Secretary, Society of Affordable Redressal of Dispute in terms of arbitration clause for appointment of arbitrator. The Petitioner also approached this Court seeking relief under Section 9 of the Arbitration Act.

xviii. An Arbitral Tribunal consisting of a Sole Arbitrator was appointed by this Court *vide* Order dated 21.08.2023.

xix. The Arbitrator *vide* Order dated 04.03.2024 framed the following questions:-

"i) Whether the notice of termination dated 17.05.2023 is not legal and valid? ..... OPC.

ii) Whether the Claimant is entitled to the amounts claimed? .... OPC

iii) Whether the Respondent is entitled to the amounts claimed in the Counter Claim? .... OPR

iv) If any sum is awarded to either party, at what rate of interest and from what date the said party is entitled to interest?
.... OPP
v) Relief.
vi) Costs."

xx. The Tribunal passed its award on 27.08.2024, whereby it held that the notice of termination was valid and only granted claim number 3 of the Petitioner i.e. payment related to pending invoices amounting to Rs. 52.69 Crore along with 10% interest and rejected all the counter claims of the Respondent.

7. After hearing both sides in detail and after minutely perusing the records, as far as the Issue No.(i) - is concerned, the Tribunal held that the termination of the contract by the Respondent/NHAI against the Claimant/Petitioner is valid. The Tribunal held that in matters pertaining to finances, the duty of care is higher and if the misdemeanour is of the kind which has resulted in a loss of confidence, the jural relationship can be terminated. The Tribunal gave a finding that the gross wrongs committed by the Claimant/Petitioner while certifying release of excess payment.

8. The Tribunal rejected the case of the Claimant/Petitioner that it was coerced by the Project Director in certifying the losses. Since the termination was held to be valid, the Claim Nos.4, 5, 6, 7, 8 and 9 were consequently rejected because they were dependent on the finding as to whether the termination was valid or not. Similarly Claim No.10 which was towards expenses of legal and otherwise to litigate before this Court and before the High Court of Orissa was also dismissed on the ground that termination was valid.

9. However, the Tribunal granted Claim No.3 which was related to invoices for the work done which were kept pending resolution of the issue whether the Petitioner had recommended excess payment under SPS-15 and if yes, the consequences thereof. The Tribunal held that the Respondent having terminated the agreement between the parties and having encashed

the Bank Guarantee in sum of Rs.22,46,600/-, which was furnished by the Petitioner/Claimant as Performance Security, cannot deny payment of the pending invoices and thus allowed the Claim No. 3 in sum of Rs.52,69,436/-. The Respondent was therefore directed to pay the said amount with interest @ 10% p.a. from 14.06.2023. As far as the Issue No.(iii) is concerned which pertained to counter claims, the Tribunal held that the counter claims have been drafted casually and in the most unintelligible fashion and they have not been proved.

10. Learned Senior Counsel for the Petitioner has vehemently contended that there has been a failure on the part of the Arbitrator to test the contents of the termination notice and against the specific reasons that have been invoked under it. In particular, he contends that the said termination notice is sans application of mind and does not take into account Clauses 2.9.1(d) and 2.9.1(g) of the Contract Agreement. Similarly, the only observation made by the Tribunal with respect to the breach of contract is limited to the aspect of a breach having occurred. The essential question that should have been examined was whether the defects or breach if any were incurable so as to warrant termination under the relevant clauses which were attracted in the Notice of Termination dated 17.05.2023. He contends that this aspect has been completely ignored by the Tribunal while it was adjudicating the issue of termination of contract. The learned Senior Counsel for the Petitioner builds this argument further and contends that non-application of mind is also indicated by the finding of the Arbitral Tribunal that there was no culpable intention on the part of the Petitioner. He contends that the Tribunal merely held that the Petitioner negligently recommended excess payment.

11. The learned Senior Counsel for the Petitioner also argues that in the impugned award the Arbitrator frames an incorrect question for itself. He has contended that this signifies that the Award is based on fallacious premise *de hors* the terms of the contract.

12. It has also been contended on behalf of the Petitioner that they had provided documentary evidence demonstrating that excess payments were acknowledged and reported by it in its internal communication. Furthermore, the Tribunal has overlooked the Respondent's own site visit report dated 25.02.2023 which, according to him, explicitly acknowledges receipt of mitigation measures by the Petitioner and the Contractor. Thus, overlooking of such vital evidence by the Tribunal is a perversity that goes to the root of the matter and renders the award liable to be set aside.

13. The learned Senior Counsel for the Petitioner has also sought to assail the impugned award on the ground that the Arbitrator has gone beyond the terms of reference and given an implausible interpretation to clause 3.1.1. of the Contract Agreement. He argues that the Tribunal has held the termination notice to be valid by merely noting that there was a breach of a general fiduciary obligation under Clause 3.1.1 of the contract. The Tribunal has not dealt with the specific clauses under the contract, i.e., Clause 2.9.1(d) and 2.9.1(g) were attracted. He contends that the Tribunal has essentially re-written the terms of the contract. The contents of the show cause notice were accepted on their face value without testing it under the scheme provided under the contract. Learned Senior Counsel for the Petitioner fleshes this argument further by contending that the finding of the Tribunal upholding the validity of the notice of termination is without any evidentiary backing. He contends that Tribunal has not applied its mind as to

whether the specific Clauses 2.9.1(d) and (g) were attracted under the factual matrix of the case and as to how the parameters of the said Clauses were being satisfied and the justifications for the invocation of the above clauses were never submitted nor argued by the Respondent. The Tribunal did not go into their merits, and therefore, the impugned Award is patently illegal and is liable to be set aside on this ground alone.

14. Learned Senior Counsel for the Petitioner has also contended that the Tribunal has undertaken an extensive analysis of the MoRTH circular and Schedule H, even though both parties had not relied heavily on this aspect. This self-driven interpretation, as recorded by the learned Arbitrator shows that the decision was based on arguments that which were not advanced by either party.

15. Learned Senior Counsel for the Petitioner has also argued that the view taken by the Tribunal is not a plausible view. He points out that no action has been taken against the erring EPC contractor while the action of the Respondent against the Petitioner is clearly malafide. He argues that the Arbitrator did not consider that the Respondent, being a public functionary, was bound by the principles of natural justice, apart from the terms of the contract which were totally ignored by the Respondent. He submits that when the issue of excess payment first came to light, it was highlighted by the Petitioner and not as a result of any investigation, inquiry or fact-finding exercise either initiated or carried out by the Respondent or any of its agencies.

16. The learned Senior Counsel for the Respondent has also argued that the Tribunal has overlooked that the opportunity for invoking Clause 19.18 of the Model EPC was denied to the Petitioner by the Respondent. The said

clause provides for making any correction or modification in any previous Interim Payment Certificate issued by the Authority's Engineer.

17. *Per contra*, the learned Counsel for the Respondent has argued that the findings of the learned Arbitrator are well-reasoned, detailed and correctly appreciate evidence. He contends that the Tribunal had undertaken a meticulous analysis of the material on record and concluded that the Petitioner had failed to provide any verifiable proof of the work that had been actually done or performed corresponding to the recommended payment.

18. He also argues that the Petitioner's reliance on the Circular dated 03.06.2020 was based on a misinterpretation, and it was rightly rejected. The Petitioner's conduct indicated an attempt to inflate claims and misrepresent financial records. Therefore, the Petitioner is essentially seeking to re-argue factual findings that have been conclusively determined by the Tribunal. Given the extremely circumscribed scope of Section 34 the Petitioner cannot be allowed to re-evaluate or re-appreciate evidence.

19. The learned Counsel for the Respondent has contended that the Award is based on detailed reasoning that is rooted in the terms of the contract. He submits that the Petitioner is attempting to hide its fraudulent practices under the garb of MoRT&H Circular dated 03.06.2020. He submits that under the said circular, payment of the Contractor is to be recommended by the Petitioner after it had been thoroughly verified. The Petitioner was also required to certify the bill of completion of construction in respect of both quantity and quality on behalf of Respondent. He contends that the argument put forth by the Petitioner that it had to recommend payment of SPS-15 without measurement details based on estimates provided by the

EPC Contractor, is incorrect. The MoRT&H circular does not mention that payment should be recommended without measurement details or completion of work and on the contrary, the circular clearly states that relaxation has been provided in Schedule-H for making monthly payments to the contractor with respect to work done and accepted as per the specification of the contract during the month. This, he argues, negates the claim raised by the Petitioner and highlights the gross negligence and fraudulent practice committed by it in recommending the bills for payment in excess of Rs. 34.53 Crores for works that were never executed, as identified by the Vigilance Team of Respondent.

20. The learned Counsel for the Respondent has also argued that the Petitioner has not been able to make out a case under Section 34 and the learned Arbitrator acted well within its jurisdiction, following due process, and provided both parties a full opportunity to present their case. He has also contended that the commercial wisdom exercised by the Tribunal while interpreting the contract is just and reasonable. Similarly, the impugned award does not suffer from any manifest error or illegality that would justify setting it aside.

21. With respect to the issue of termination of the Contract the Respondent has argued that that the termination was based on material breaches of contractual obligations, particularly the unauthorized recommendation of excess payments to the EPC Contractor, in contravention of the Contract Agreement. He points out at the findings of the Tribunal that the Petitioner, in its capacity as the Authority's Engineer, was duty bound to exercise due diligence and adhere to sound financial and managerial practices while processing bills submitted by the EPC

Contractor, as mandated under Clause 3.1.1 and Appendix A of the Agreement. However, a joint inspection conducted between 01.03.2023 and 05.03.2023 revealed that the Petitioner had recommended an excess payment of INR 34.53 Crores to the EPC Contractor, despite the fact that substantial portions of the claimed work had not been executed. It is in context of these findings that a Show Cause Notice was issued and this material breach is sufficient to terminate the contract as was done by the Respondent under Clause 2.9.1 (d) and (g) of the Agreement. He argues that these clauses grant the Respondent the authority to terminate the contract if the consultant engages in corrupt or fraudulent practices. The acts of the Petitioner in misrepresenting the volume of work executed and recommending undue payments constitute as a fraudulent practice as defined under the Agreement. He has also pointed out that the Tribunal observed that financial misconduct in matters of payment results in a loss of confidence, which alone is sufficient to justify the termination. Therefore, according to the learned Counsel for the Respondent it is in this context and after having evaluated the material on record that the Tribunal has exercised his commercial wisdom and given a plausible and well reasoned interpretation of the terms of the contract and upheld the legality of the termination.

22. The learned Counsel for the Respondent has also placed reliance on Clause 2.9.6 of the Agreement and states that it does not apply to the present case, as it does not cover fraudulent practices under sub-para (g) of Clause 2.9.1. Therefore, the argument raised by the Petitioner seeking protection under Clause 2.9.6 of the contract is legally untenable.

23. Heard learned Counsel for the parties and perused the material on record.

24. The central issue for determination in this case is whether the termination letter dated 17.05.2023 was valid. The principal contention on behalf of the learned Senior Counsel for the Petitioner is that the Award fails to examine the termination notice in terms of the contractual clauses cited therein. Therefore, in the absence of a reasoned analysis of the contractual clauses, the Award fails to return a finding on whether the breach was incurable so as to warrant termination under the provisions invoked in the Notice of Termination dated 17.05.2023.

25. Clause 2.8 that deals with the conditions under which the Respondent may suspend the contract reads as under :

> ***2.8. Suspension***
> *The Client may, by written notice of suspension to the Consultants, suspend all payments to the Consultants hereunder if the Consultants fail to perform any of their obligations under this Contract, including the carrying out of the Services, provided that such notice of suspension (i) shall specify the nature of the failure, and (ii) shall request the Consultants to remedy such failure within a period not exceeding thirty (30) days after receipt by the Consultants of such notice of suspension.*

26. Similarly, Clause 2.9.1 that deals circumstances under which the Respondent could have terminated the Contract of the Consultant reads as under:

> ***2.9.1 By the Client***

The Client may, by not less than thirty (30) days' written notice of termination to the Consultants (except in the event listed in paragraph (f) below, for which there shall be a written notice of not less than sixty (60 days), such notice to be given after the occurrence of any of the events specified in paragraphs (a) through (h) of this Clause GC 2.9.1, terminate this Contract.

(a) If the Consultants fail to remedy a failure in the performance of their obligations hereunder, as specified in a notice of suspension pursuant to clause GC 2.8 hereinabove, within thirty (30) days of receipt of such notice of suspension or within such further period as the Client may have subsequently approved in writing;

(b) If the Consultants become (or, if the Consultants consist of more than one entity, if any of their Members becomes) insolvent or bankrupt or enter into any agreements with their creditors for relief of debt or take advantage of any law for the benefit of debtors or go into liquidation or receivership whether compulsory or voluntary;

(c) if the Consultants fail to comply with any final decision reached as a result of arbitration proceedings pursuant to Clause GC 8 hereof;

(d) If the consultants submit to the Client a statement which has a material effect on the rights, obligations or interests of the Client and which the Consultants know to be false;

(e) If, as the result of Force Majeure, the consultants are unable to perform a material portion of the Services for a period of not less than sixty (60) days; or

(f) If the Client, in its sole discretion and for any reason whatsoever, decides to terminate this Contract.

(g) If the consultant, in the judgment of the Client has engaged in corrupt or fraudulent practices in competing for or in executing the Contract. For the purpose of this clause;

"corrupt practice" means the offering, giving, receiving or soliciting of any of value to influence the action of a public official in the selection process or in contract execution.

"fraudulent practice" means a misrepresentation of facts in order to influence a selection process or the execution of a contract to the detriment of the Borrower, and includes collusive practice among consultants (prior to or after submission of proposals) designed to establish prices at artificial non-competitive levels and to deprive the Borrower of the benefits of free and open competition.

(h) If EPC Contractor represents to Employer that the Consultant is not discharging his duties in a fair, efficient and diligent manner and if the dispute remains unresolved, Employer may terminate this Contract.
2.9.3 Cessation of Rights and Obligations

Upon termination of this Contract pursuant to Clauses GC 2.2 or GC 2.9 hereof, or upon expiration of this Contract pursuant to Clause GC 2.4 hereof, all rights and obligations of the Parties hereunder shall cease, except;

(i) such rights and obligations as may have accrued on the date of termination or expiration;

(ii) the obligation of confidentiality set forth in Clause GC 3.3 hereof;

(iii) the Consultants' obligation to permit inspection, copying and auditing of their accounts and records set forth in Clause GC 3.6(ii) hereof; and

(iv) any right which a Party may have under the Applicable Law.

3. Obligations of the Consultants

27. Section 3.1.1 which stipulates the standard of performance to maintained by the Consultant reads as under :

3.1 General

3.1.1 Standard of Performance

The Consultants shall perform the Services and carry out their obligations hereunder with all due diligence, efficient and economy in accordance with generally accepted professional techniques and practices, and shall observe sound management practices, and employ appropriate advanced technology and safe and effective equipment, machinery, materials and methods" The Consultants shall always" act, in respect of any matter relating to this Contract or to the Services, as faithful advisers to the Client, and shall at all times support and safeguard the Client's legitimate interests in any dealings with Sub-consultants or Third Parties.

28. In its order dated 31.10.2023 the learned Arbitral Tribunal has meticulously analysed and interpreted the terms of the contract that would be relevant to the present dispute. The Arbitrator has exercised his commercial wisdom to give a plausible interpretation of the contract that is in alignment of its intended purpose. The operative part of the order reads as under :

*"**12**. The Claimant had relied upon Clause 2.9.6 of the Agreement. It reads:*

2.9.6. Disputes about Events of Termination

If either Party disputes whether an event specified in paragraphs (a) through (e) of Clause 2.9.1 or in Clause GC 2.9.2 hereof has occurred, such Party may, within forty-five (45) day after receipt of notice of termination from the other Party, refer the matter to arbitration pursuant to Clause GC-8 hereof, and this Contract shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award.

***6**. A perusal of the termination order dated 17.05.2023 evinces that the termination is with reference to sub-para (d) and (g) of Clause 2.9.1. Suffice it to note that Clause 2.9.6 does not embrace sub-para (g) of Clause 2.9.1 and thus the argument predicated upon Clause 2.9.6 fails. The show cause notice as also the termination order have alleged breach of Clause 3.1.1 of the Agreement. The Clause obliges the Claimant to discharge duties diligently in accordance with accepted professional practices and to act as a faithful advisor. Further, the obligation of the Claimant is to safeguard the legitimate interest of the Respondent. By recommending release of excess payment the Claimant has prima facie breached the said fiduciary obligation and assuming there was coercion by the Project Director, nothing prevented the Claimant to report the same to the superior authorities. The Claimant is a company of professional. It is not subordinate to the officers of NHAI who are neither its disciplinary authority nor exercise any administrative control over the Claimant."*

29. Similarly, while dealing with the MoRT&H Circular dated 03.06.2020 and the relevant contractual provisions, the Arbitrator has held that the partial payment for work done during the pandemic was permissible by a conjoint reading of these two provided it was supported by proper documentation, revised schedule H and physical progress. However, this would at no point in time, supersede the contractual requirement for due diligence. Thus the Tribunal came to a considered decision that the Circular could not be used as the sole basis to justify payment certification and compliance with the contractual provisions for financial integrity was mandatory. The relevant excerpts of the Award reads as under:-

> *"9(i) The Tribunal commences the reasoning by noting that the Claimants are TPF Getinsa Euroestudeios S.L. and Segmental Consulting & Infrastructure Advisory P. Ltd., both of which as per the pleadings in the Statement of Claim are premier Consulting Engineering Company and specialized in Highways and Infrastructure Development Projects. Vide CW1/3 dated 25.10.2019 the Consultancy Services as the Authority's Engineer for Supervision of Rehabilitation and Upgradation of the existing two lanes highway of NH-200 from Duburi to Chandikhole was awarded to the Claimant at a contract price of INR 8,98,63,700.00 plus GST payable to the Government. The EPC Contractor was Gammon Infrastructure Projects Ltd.-GECPL (JV). Before the Letter of Award CW1/3 was issued, the Memorandum of Understanding (CW1/4) was executed between the Claimant and the Respondent on 24.10.2019. A formal agreement was executed on 11.12.2019 (the same forms a part of CW1/4). The services to be rendered by the Claimant are as per Appendix A to the agreement. As per Clause 3 of the agreement, inter-alia, the standard of performance of the obligations of the Claimant while*

performing the services and discharge its obligations, requires the Claimant to perform its duties faithfully and to act with due diligence. Appendix A to the Agreement, where the description of the services to be provided by the Claimant are listed, vide Clause 3.1 obliges the Claimant to discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity. Further, as required by Clause 4.7 of the Appendix, the Claimant was to prepare each month a Monthly Inspection Report. It was obliged, as per Clause 4.5 to ensure that the contractor submits the monthly progress report and within 7 days the Claimant was to review the same. Further, as per Clause 3.3 the Claimant was to submit each month a report to the Respondent of the progress of the work in the previous month by the 10th of the ensuing month. Thus, it is apparent that the Claimant was obliged to ensure that the works executed by the EPC Contractor were properly audited and recorded in the Monthly Inspection Report. Being charged with the duty to recommend Stage Payments under the Stage Payment Statements, the Claimant had to act with extra care because the duty pertained to fiscal affairs of the Respondent.

9(ii) Between the EPC Contractor and the Respondent a separate agreement was executed and as per Clause 19.4 thereof, the EPC Contractor was to submit a Stage Payment Statement (SPS) in the form set forth in Schedule O of the said agreement and along therewith had to submit a progress report with supporting documents. The said Clause casts the obligation on the EPC Contractor not to submit any claim for payment at an incomplete stage of the work.

9(iii) Clause 7.2 of Appendix A of the agreement between the Claimant and the Respondent, requires the Claimant to process the Stage Payment Statement

(SPS) received from the Contractor and within 10 days appraise the same and recommend release of 90% of the amount as part payment, pending issue of the Interim Payment Certificate, to the EPC Contractor.

9(iv) As was rightly argued by Learned Senior Counsel for the Claimant, which submission has been noted by the Tribunal in para 6(ii) above, the dispute between the parties lay within a small matrix of fact related to the release of payment to the EPC Contractor under Stage Payment Statement-15 (SPS-15). The arguments of Learned Senior Counsel for the Claimant pertaining to SPS-16 and the exhibits referred to by Learned Senior Counsel for the Claimant only bring home the point that when SPS-16 was submitted the issue of de-scoping of a major bridge over Brahmani River at Km 401.250 was simultaneously being discussed and this delayed the finalization of SPS-16 and by the time SPS-16 was finalized for release of payment to the EPC Contractor, the excess payment alleged by the Respondent to have been paid to the EPC Contractor upon recommendation of the Claimant got subsumed for the reason the works which as per the Respondent were not to be included for payment under SPS-15 got completed and to that extent no loss was caused to the Respondent. At best, a payment, not due when the payment was made under SPS-15 was released by the Respondent to the EPC Contractor. But the issue would be whether the Claimant breached its obligation to scrutinize SPS-15 as required by the contract between the parties.

9(v) At the fore front of the challenge to the termination of the agreement between the parties, is the argument of Learned Senior Counsel for the Claimant predicated on Ex.CW1/5, being the circular dated 03.06.2020 issued by MoRTH granting relief to

Contractors/Developers of Road Sectors. The object behind the circular is recorded in the circular itself. It reads as under: After due consideration of the representations received from the Construction Industry, the Competent Authority in the Ministry of Road Transport & Highways has approved following measures for providing urgent relief to the contractors, concessionaires and developers of road sector in view of the prevailing situation due to COVID19 for immediate implementation by all the concerned agencies. Of the various measures, 9(vi) the third relief measure is as under:

Relaxation in Schedule H to provide monthly payment to the Contractor for the work done and accepted as per the specification of the contract during the month under EPC/HAM Contract.

9(vii) Highlighting at the moment that the relaxation in Schedule H is qualified by the words 'for the work done and accepted as per the specification of the contract', the submission of learned counsel for the Respondent that the relaxation in Schedule H to provide monthly payment to the contractor could not be for work not done is accepted because it flows from the language of the circular Ex. CW1/5.

9(viii) The circular dated 03.06.2020 Ex. CW1/5, terminates as under:

After receipt of the proposal from the Contractor/Concessionaire invoking provisions under FMC, the Authority Engineer/Independent Engineer will examine and recommend for giving relief under the above measures to the Contractor/Concessionaire by the PD/ Executive Engineer who will approve the relief measures as mentioned above.

9(ix) Thus, the obligation of the Claimant to examine the Stage Payment Statements submitted by the EPC Contractor continues to exist even under the circular."

30. The Arbitral Tribunal is entitled to interpret the terms and conditions of a contract, while adjudicating a dispute. The Apex Court in OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions India (P) Ltd., (**2025) 2 SCC 417**, has held as under:-

*"**Scope of interference with the interpretation/construction of a contract accorded in an arbitral award***

***84**. An Arbitral Tribunal must decide in accordance with the terms of the contract. In a case where an Arbitral Tribunal passes an award against the terms of the contract, the award would be patently illegal. **However, an Arbitral Tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not intefere** [See : SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16; Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593; McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181; MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] . But where, on a full reading of the contract, the view of the Arbitral Tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference [South East Asia Marine Engg. & Constructions Ltd. v. Oil India Ltd., (2020) 5 SCC 164 : (2020) 3 SCC (Civ) 1] .*

Whether unexpressed term can be read into a contract as an implied condition

85*. Ordinarily, terms of the contract are to be understood in the way the parties wanted and intended them to be. In agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions used [Balco v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126 : (2016) 2 SCC (Civ) 580] .*

86*. However, reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by the parties thereto. An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. Rather, it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract [Adani Power (Mundra) Ltd. v. Gujarat ERC, (2019) 19 SCC 9 : (2020) 4 SCC (Civ) 330] .*

87*. But before an implied condition, not expressly found in the contract, is read into a contract, by invoking the business efficacy doctrine, it must satisfy the following five conditions:*

(a) it must be reasonable and equitable;

(b) it must be necessary to give business efficacy to the contract, that is, a term will not be implied if the contract is effective without it;

(c) it must be obvious that "it goes without saying";

(d) it must be capable of clear expression;

(e) it must not contradict any terms of the contract [Nabha Power Ltd. v. Punjab SPCL, (2018) 11 SCC 508 : (2018) 5 SCC (Civ) 1, followed in Adani Power case, (2019) 19 SCC 9 : (2020) 4 SCC (Civ) 330] ."

(emphasis supplied)

31. What flows from the above discussion is that the Tribunal can give a reasonable construction to the terms of the contract as long as it is reasonable, equitable, is in alignment with business efficiency, is capable of clear expression and does not contradict any terms of the contract. Therefore, in light of the dictum as laid down by the Hon'ble Apex Court this Court is of the view that the interpretation given by the Tribunal is a reasonable and plausible interpretation of the terms of the contract.

32. Similarly, the Apex Court in Batliboi Environmental Engineers Limited v. Hindustan Petroleum Corporation Limited and Another, **(2024) 2 SCC 375,** while delineating the scope of Section 34 of the Act, has observed as under:-

*"**35**. Sub-section (1) to Section 34 of the A&C Act requires that the recourse to a court against an arbitral award is to be made by a party filing an application for setting aside of an award in accordance with sub-sections (2) and (3) of Section 34. Sub-section (2) to Section 34 of the A&C Act stipulates seven grounds on which a court may set aside an*

arbitral award. Sub-section (2) consists of two clauses, (a) and (b). Clause (b) consists of two sub-clauses, namely, sub-clause (i) which states that when the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, and sub-clause (ii), which states that the court can set aside an arbitral award when the award is "in conflict with public policy of India". We shall subsequently examine the decisions of this Court interpreting "in conflict with public policy of India" and the explanation.

****

***37**. Explanation to sub-clause (ii) to clause (b) to Section 34(2) of the A&C Act, as quoted above and before its substitution by Act 3 of 2016, had postulated and declared for avoidance of doubt that an award is "in conflict with the public policy of India", if the making of the award is induced or affected by fraud or corruption, or was in violation of Sections 75 or 81 of the A&C Act. Both Sections 75 and 81 of the A&C Act fall under Part III of the A&C Act, which deal with conciliation proceedings. Section 75 of the A&C Act relates to confidentiality of the settlement proceedings and Section 81 deals with admissibility of evidence in conciliation proceedings. Suffice it is to note at this stage that while "fraud" and "corruption" are two specific grounds under "public policy", these are not the sole and only grounds on which an award can be set aside on the ground of "public policy".*

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***45**. Referring to the third principle in Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , it was explained that the decision would be irrational and*

perverse if (a) it is based on no evidence; (b) if the Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in State of Haryana v. Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] (for short Gopi Nath & Sons) and Kuldeep Singh v. Delhi Police [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] clarifies that a finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral Tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be

overturned under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious. Referring to the third ground of public policy, justice or morality, it is observed that these are two different concepts. An award is against justice when it shocks the conscience of the court, as in an example where the claimant has restricted his claim but the Arbitral Tribunal has awarded a higher amount without any reasonable ground of justification. Morality would necessarily cover agreements that are illegal and also those which cannot be enforced given the prevailing mores of the day. Here again interference would be only if something shocks the court's conscience. Further, "patent illegality" refers to three sub-heads : (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the Arbitral Tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do."

33. This Court is of the view that the Petitioner has been unable to make out a case that would fit within the four corners of Section 34 of the Arbitration Act. The jurisdiction of this Court under Section is extremely circumscribed and this Court is not required to re-adjudicate the disputes and supplant its view over that of the Arbitral Tribunal. The Arbitral Tribunal's decision is final and binding on the parties unless it established that the same is in conflict with the public policy of India or is vitiated by perversity or patent illegality on the face of the award.

34. The issues raised by the Petitioner before this Court go into the matters of evidence, re-appreciation which is not permitted under Section 34 of the Act. The interpretation given by the Tribunal is consistent with the language and intent of the contractual provisions of the agreement. It clearly notes that Clause 2.9.1(g) bestows the Respondent with the power to terminate the contract in case of misconduct, gross negligence, or any act that leads to loss of confidence. Given that public money was at stake the clause allowed the Respondent to take immediate and prompt action in case of breach of integrity.

35. Similarly, the Tribunal has made categorical observations that being an independent consultant, the Petitioner was duty bound and had a fiduciary duty to uphold the financial integrity of the project and that termination under Clause 2.9.1(g) is an exception and does not require mandatory pre-termination arbitration as mandated under Clause 2.9.6.

36. It is well settled that the Arbitral Tribunal is the master of evidence and the Court while exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 ought not to interfere with the

finding of the Tribunal, unless it is completely contrary and perverse. The Apex Court in OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd., (2025) 2 SCC 417 has held as under:

> ***"69.*** *Perversity as a ground for setting aside an arbitral award was recognised in Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] . Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.*
>
> ***70.*** *In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] certain tests were laid down to determine whether a decision of an Arbitral Tribunal could be considered perverse. In this context, it was observed 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.*
>
> *However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, 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. It was also observed that 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 that score.

71. *In Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , which dealt with the legal position post the 2015 Amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that 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 [See Ssangyong Engg. case, (2019) 15 SCC 131, para 41 : (2020) 2 SCC (Civ) 213] .*

72. *The tests laid down in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] to determine perversity were followed in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] and later approved by a three-Judge Bench of this Court in Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd. [Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd., (2020) 7 SCC 167 : (2020) 4 SCC (Civ) 149]*

73. *In a recent three-Judge Bench decision of this Court in DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd. [DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd., (2024) 6 SCC 357 : (2024) 3 SCC (Civ) 112 :*

2024 INSC 292] , the ground of patent illegality/perversity was delineated in the following terms : (SCC p. 376, para 39)

"39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. 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 under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice."

74. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorised as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.

75. In Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1, paras 27-43] , a three-Judge Bench of this Court held

> ***that courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law.***
>
> (emphasis supplied)

37. In light of facts and circumstances surrounding instant case as well as settled law this Court is of the opinion that the view taken by the Arbitrator represents a plausible view which is based on a commercially sensible interpretation of the terms of a contract. Therefore, this Court is precluded from substituting its own conclusion in place of that arrived at by the Ld. Tribunal.

38. In view of the above, the petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

JULY 08, 2025
S. Zakir/RJ/Vibh. R