IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBP (ICA) No.1 of 2021

(An application under Section 34 of the
Arbitration and Conciliation Act, 1996)

GMR Kamalanga Energy Ltd. ……. Petitioner

-Versus-

SEPCO Electric Power Construction Corporation,
Shandong 250014, China ……. Opposite Party

Advocates appeared in this case:-

For Petitioner : Dr. Abhisekh Manu Singhvi, Senior Advocate
being assisted by Mrs. Pami Rath, Advocate

For Opposite Parties : Mr. Jayant Mehta, Senior Advocate
being assisted by Mr.N. Paikray, Advocate

CORAM: MR JUSTICE K.R. MOHAPATRA
JUDGMENT
17th June, 2022

K.R.MOHAPATRA, J This Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act') has been filed assailing the award dated 7th September, 2020 (corrected on 17th November, 2020) passed by a three member Arbitral Tribunal. The matter is heard on the question of admission.

2. The Petitioner, GMR Kamalanga Energy Limited (for convenience 'GKEL') entered into an agreement with Opposite Party-

SEPCO Electric Power Construction Corporation (for convenience 'SEPCO') in 2008 for construction and operation of a Coal Fired Thermal Power Plant at Kamalanga village in Dhenkanal district of Odisha. In that process, GKEL and SEPCO entered into four agreements, which were amended subsequently. Dispute arose between the parties for delay in construction as well as on other technical issues relating to the construction and operation of the plant. On 30th March, 2015, SEPCO served a notice of dispute on GKEL and initiated arbitration proceeding serving notice of arbitration dated 18th June, 2015. An Arbitral Tribunal was constituted to adjudicate upon the dispute between the parties. As per the agreement, arbitration was to be made in accordance with the provisions of the Arbitration Act. The seat of Arbitration was India though the venue was at Singapore. As per the provisions of the Arbitration Act, the Arbitration is an international commercial arbitration governed by Part-1 of the said Act. The three member Arbitral Tribunal passed the impugned award on 7th September, 2020, which was unanimous. However, both SEPCO and GKEL filed applications for correction of the award under Section 33 of the Arbitration Act and the Arbitral Tribunal passed a corrected award on 17th November, 2020. As per the impugned award, the GKEL has been directed to pay Rs.995 crores (approximately) to SEPCO (this figure has been arrived at by converting the amount awarded in different currencies to INR at contemporaneous rates). The GKEL being aggrieved has filed present petition under Section 34 of the Arbitration Act on 15th February, 2021.

2.1 The matter was argued at length by learned counsel for the parties on the question of admissibility of the petition. In one hand, learned counsel for the Petitioner made an endeavour to encompass the argument raised within the scope of Section 34 of the Arbitration Act, learned counsel for the Opposite Party, on the other hand, made efforts to persuade this Court by arguing that the issues raised by learned counsel for the Petitioner are not within the scope and ambit of Section 34 of the Arbitration Act.

3. For convenience and appreciation of respective cases of the parties, GKEL filed convenience compilation on 17th April, 2021 as well as additional compilation on 26th July, 2021. Likewise, SEPCO filed compilation of case laws on 19th July, 2021 and additional compilation of case laws on 19th July, 2021, 21st July, 2021, 16th August, 2021 as well as on 31st August, 2021. Mr. Salve, learned Senior Advocate as well as Dr. Singhvi, learned Senior Advocate vehemently argued that the Tribunal has treated the parties unequally and tried to make out a third case which was not even the case of either of the parties. It is also argued on behalf of the Petitioner that by virtue of the impugned award, the Tribunal has effectively modified the contract between the parties by holding that the parties have waived the requirements to issue contractual notices. Dr. Singhvi, learned Senior Advocate, also made elaborate submission in response to the submission made by Mr. Mehta, learned Senior Advocate for SEPCO.

4. It is submitted by learned counsel for GKEL that although issuance of notice was a condition precedent for SEPCO to make any claim for changes in the contract price or for seeking extension of

time, but the Tribunal has erroneously held that the GKEL is estopped from seeking compliance of contractual notice relying upon its email dated 18th March, 2012 without appreciating the context in which it was sent. Thus, the finding of the Tribunal that compliance with the contractual notice was waived with effect from March, 2012 is contrary to law. Further, in holding so, the Tribunal has prevented GKEL from raising the plea of lack of contractual notice by SEPCO in various claims, such as those pertaining to, *inter alia*, Grid Synchronisation (Issue No.6), fuel oil (Issue No.7), Coal (Issue No.8), UCT-PGT (Issue No.10); consequentially, the Tribunal allowed SEPCO's claims for extension of time and prolongation costs for delay which were barred by SEPCO's admitted failure to issue notices. In that process, the Tribunal awarded prolongation cost of Rs.70-80 crores (approx.), which consequently led to reduction in the amount of liquidated damages recoverable by GKEL from SEPCO by Rs.100 crore approximately. While dealing with the issue, the Tribunal has treated the parties unequally by applying a different standard to each of the parties by disallowing GKEL's counter-claim amounting to more than Rs.150 crores approximately at the threshold on the basis that GKEL had failed to serve notice even though such claim for default arose after March, 2012. In that process, the total impact is for an amount more than Rs.300 crores approximately by rejecting the claim of GKEL in its counter-claim and allowing the same in favour of SEPCO.

5. It is further submitted that learned Tribunal has made out a case in favour of SEPCO, which was neither pleaded nor argued. It was

not the case of SEPCO that there were separate agreements, which constituted estoppels, i.e., (a) that there was an agreement of 2010, which constituted an estoppel going forward all the way till end of the project execution; and alternatively (b) that if there was no agreement of March 2010, then there was an agreement of March 2012 which constituted an estoppel not to give any further contractual notices. Further, the plea of SEPCO of waiver or estoppel arising out of events of March 2010 being rejected by the Tribunal (paragraph 226 of the award) the very basis of SEPCO's claim that an estoppel or waiver would be operative taking into consideration the events of March 2012 could not have been accepted by the Tribunal, which *dehors* the SEPCO's own case. Therefore, the Tribunal has made out an independent case in favour of SEPCO basing upon the events of March 2012 to which GKEL did not have any opportunity to plead or lead evidence to that effect. Further, even if it is presumed that SEPCO had pleaded the case of waiver or estoppel based upon event of March 2012, then GKEL could have surely produced further contractual notices issued by the parties based on events of March 2012.

6. Section 34 (2)(a)(iii) of the Arbitration Act provides for setting aside of an award if a party challenging the award was not given proper notice or was unable to present its case. It is also the well-settled law that an award is liable to be set aside if the principles of natural justice has been breached or Section 18 of the Arbitration Act has been violated.

7. It is also pleaded that the Tribunal has modified the contract between the parties by holding that parties had waived the requirement

to issue contractual notices. The Tribunal failed to appreciate that the claim of estoppel would fail as it was inconsistent with the clause in Section 25.5.3 of the Amended CWEETC Agreement. It is the trite that an Arbitral Tribunal cannot act outside the four corners of the contract or against the express terms of the contract before it. The Tribunal has no jurisdiction to modify the terms of a contract as has been done in the instant case. The Tribunal failed to take into consideration that the email dated 18th March, 2012 from Mr. Rao (GKEL's representative) was a simple request to SEPCO to withdraw its letter of suspension and nothing more. But the Tribunal by misinterpreting such email came to hold that Mr. Rao was asking SEPCO not to issue formal notices for any matter or claims in future unconnected with suspension. Although in the meeting dated 13th March, 2012, SEPCO agreed to withdraw its letter of suspension by 14th March 2012, but it was not done. In fact, the suspension was withdrawn only when GKEL had established Letter of Credit (L/C) of 1266000 dollars and 11450000 dollars. Thus, it is evident that withdrawal of the suspension letter by SEPCO was on the basis of a positive action taken by GKEL and not on the basis of the email of March 2012. Thus, the Tribunal has acted in excess of its jurisdiction by modifying/amending the notice clause in the Agreement.

8. Further, when the Tribunal held that the parties had waived to issue contractual notices it should have applied such waiver equally to both SEPCO and GKEL. In view of the above, it is argued on behalf of the Petitioner-GKEL that it is a fit case to be considered on merit within the scope of Section 34 of the Arbitration Act.

9. Mr. Mehta, learned Senior Advocate for the Opposite Party opened his argument submitting that while examining the admissibility of the petition under Section 34 of the Arbitration Act, the Court must keep in mind the scope and ambit of said provision *vis-a-vis* an international commercial arbitration.

10. It is submitted that the impugned award is unanimous one and has been rendered by the Arbitral Tribunal having three members of international repute in the matter of arbitration. The present petition is solely on the basis pertaining to merit of the dispute and an attempt to persuade this Court to re-appreciate the evidence which is *ex facie* in the teeth of the scope of Section 34 of the Arbitration Act. The scope and ambit of Section 34 does not permit the Petitioner to seek factual, evidentiary or legal review of findings of the award. Amendment to Section 34 introduced in 2015 further restricts the scope of interference with the arbitral award on the ground of public policy under Section 34(2)(b)(ii) of the Arbitration Act on three heads, such as (i) fraud or corruption; (ii) contravention of fundamental policy of Indian law; or (iii) conflict with most basic notions of morality or justice (Explanation-1). An important caveat is added in Explanation-2 according to which '*no review on merits of the award is allowed'*. Interference of the arbitral award on the ground of patent illegality is also not available in an international commercial arbitration in view of Section 34(2) of the Arbitration Act. Referring proviso to Section 34(2A) of the Arbitration Act, it is submitted that even non-international arbitration award shall not be set aside merely on the ground of erroneous application of law or by re-appreciation of

evidence. Thus, merit of international commercial arbitral award is completely outside the scope of challenge under Section 34 of the Arbitration Act. The Petitioner-GKEL endeavoured to challenge the impugned award on the issue of bias, violation of natural justice and perversity. It is submitted that these terms, though on the face of it are attractive, are completely misplaced and are nothing but fanciful expressions to camouflage its attempt to seek factual review of the award. In order to buttress the argument of '*bias*', the Petitioner made a desperate attempt to argue on merit of the dispute, which is against the very scheme of the Arbitration Act. It is nothing but an attempt to circumvent the statutory prohibition to challenge an award on the ground of merit.

11. Sections 12 and 13 of the Arbitration Act provide the grounds and procedure to be followed to challenge the arbitral award on the ground of '*bias'*. It is trite that the Petitioner had to take recourse to process provided therein and cannot be allowed to allege bias without following the prescribed procedure.

11.1 Section 12 of the Arbitration Act provides that an arbitral award can be challenged on the ground of bias if there exists, either direct or indirect, of any past or present relationship of the Arbitrator with any of the parties or in relation to the subject matter of dispute. The issue of bias does not clothe within its scope whether the Arbitral Tribunal has decided the matter correctly or incorrectly. The legal principles are enshrined under Section 12 (3) of the Act, i.e., *if circumstances exist that gives rise to justifiable doubts as to the Tribunal's independence or impartiality*. These principles are also

being articulated in several decisions of the Hon'ble Supreme Court as '*real likelihood of bias*.' In any event, challenge of bias under Sections 12 and 13 does not encompass a review on the merits of the dispute. The arguments advanced by the Petitioner do not encompass the element of bias in adjudicating the matter. It is only a naked attempt by the Petitioner to challenge the award on merit through a backdoor road, which is a clear abuse of process of Court and should be nipped from the bud.

11.2 Further, the allegation of bias is made without any material, more particularly not just against Arbitrator but against the entire Tribunal, which includes its own nominee. The same is neither separated by any legal or factual ground. Further, Section 13 prescribes that a party which intends to challenge the mandate of the Tribunal on the ground of bias must do so, within fifteen days on being aware of such circumstances. Only when such challenge is not successful, the aggrieved party can challenge the award on the ground of bias. It was under legal obligation to raise such a challenge before the Tribunal within a period of fifteen days of becoming aware of alleged circumstances, which according to him gave rise to justifiable doubts as to the Tribunal's independence and impartiality.

12. The Arbitral Tribunal pronounced a unanimous award on 7th September, 2020 (as corrected on 17th November, 2020). However, the mandate of the Arbitral Tribunal continued since the Tribunal was to render an award on interest and costs. The Petitioner continued to be involved in the arbitral proceedings regarding interest and costs without raising any objection of bias against the Arbitral Tribunal.

The final award was rendered on 24th June, 2021 and its corrections on 1st September, 2021. The Petitioner having failed to make any challenge under Section 13 of the Arbitration Act and continued to participate in the arbitral proceeding regarding interest and costs, it is not entitled to maintain a challenge of the award on the ground of bias.

13. It is contended by learned counsel for SEPCO that the Petitioner contended that it was unable to present its case and therefore, the principle of natural justice has been violated. Inability to present its case refers to a situation where evidence, documents or submission are accepted behind the back of the party and the party is deprived of an opportunity to comment on the same. This ground covers facets of natural justice and fair hearing, and cannot be taken to challenge an award on merits by nit-picking. The breach of natural justice has to be made out clearly.

14. It is well-settled that an Arbitrator is a master of the proceedings and procedures [see Section 19(3) of the Arbitration Act]. The Court in seisin of the matter under Section 34 of the Arbitration Act would not interfere with the award merely because it would have done things differently, but only when there is a real bias for alleging that arbitral process was conducted irrationally or capriciously. In the instant case, *ex facie* the award has only been rendered on the issues where proper pleadings were made by both parties, evidence was duly led, and written submissions were exchanged etc. There is not a single document or piece of evidence, regarding which it can be said that a party was not afforded with an opportunity to respond, in accordance

with law. There is nothing on record which would suggest that the Petitioner-GKEL was denied a fair hearing by learned Tribunal.

14.1 Hon'ble Supreme Court in the case of ***Gemini Bay Transcription Pvt. Ltd. Vs. Integrated Sales Service Ltd. and another***, reported in **(2022) 1 SCC 753** has categorically held that even the ground of perversity is not available to challenge the award rendered in an international commercial arbitration, relevant paragraph of which reads thus;

> "*60. The judgment in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] noted in para 29 that Section 48 of the Act has also been amended in the same manner as Section 34 of the Act. The ground of "patent illegality appearing on the face of the award" is an independent ground of challenge which applies only to awards made under Part I which do not involve international commercial arbitrations. Thus, the "public policy of India" ground after the 2015 Amendment does not take within its scope, "perversity of an award" as a ground to set aside an award in an international commercial arbitration under Section 34, and concomitantly as a ground to refuse enforcement of a foreign award under Section 48, being a pari materia provision which appears in Part II of the Act. This argument must therefore stand rejected."*

Thus, the grounds, on which the instant petition under Section 34 of the Arbitration Act has been filed, are not subject to scrutiny by this Court in the instant proceeding.

15. Learned counsel for the parties also made elaborate argument on interim application which will be considered separately after discussing the arguments on the admissibility of the petition under Section 34 of the Arbitration Act.

16. In order to scrutinise the rival contentions raised by learned counsel for the parties, the relevant provisions of the Arbitration Act as well as case laws on the legal issues raised, are to be kept in mind. Section 34 of the Arbitration Act deals with an application for setting aside an arbitral award. It provides that challenge of an arbitral award may be made only by an application for setting aside such award in accordance with Sub-sections (2) and (3) of Section 34. Said provisions deal with in detail the grounds on which an arbitral award can be set aside. Sub-section (2A) provides that an arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award. Proviso to Sub-section (2A) makes it clear that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. Thus, it is made clear in Sub-section (2A) that the ground of '*patent illegality appearing on the face of the award*' shall not be a ground to challenge an international commercial arbitral award. Further, Sub-section (2A) also makes it clear that an arbitral award shall not be set aside merely on the ground of erroneous application of law or by re-appreciation of evidence. Thus, the submissions of learned counsel for the parties are to be scrutinized on the narrow compass available to this Court keeping in mind the restrictions as aforesaid.

17. The main grounds on which the Petitioner assails the arbitral award are that the Tribunal has made out a case for SEPCO, which was not even pleaded / argued by it. *Secondly* the Tribunal has modified the contract between the parties by holding that the parties had waived the

requirement to issue contractual notices; and *thirdly*, the Tribunal having held that the parties had waived the requirement to issue contractual notices, it would have applied such waiver equally to both SEPCO and GKEL and not unilaterally to favour SEPCO. Learned Senior Advocates also made detailed argument with reference to relevant paragraphs of the impugned award. Learned Senior Advocate for the Opposite Party obviously refuted such contentions in course of his argument emphasizing that the Tribunal has not created any new case for SEPCO nor has it treated the parties unequally, as alleged.

18. Dr. Singhvi, learned Senior Advocate, in course of argument contended that the impugned award violates Section 18 and Section 34 (2)(b)(ii) of the Arbitration Act as it is in conflict with the most basic notions of morality and justice being the result of unequal treatment of the parties. While SEPCO's claim has been allowed even though it had admittedly failed to issue any notice, but the GKEL was treated unequally by rejecting its claim in the counter-claim amounting to more than Rs.15 crores (approx) at the threshold holding that the GKEL had failed to serve notice even though all such claims arose after March, 2012. In support of his case, he relied upon the case law in the case of ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI*** reported in ***(2019) 15 SCC 131*** in which at paragraph 34, it is held that:

> ***"34.*** *What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily*

> *mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] ."*
>
> *(emphasis supplied)*

In paragraph 35 of the said case law, Hon'ble Supreme Court held as under;

> ***"35.*** *It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground."*
>
> *(emphasis supplied)*

Thus, it is held therein that it is only such arbitral award that shocks conscience of the Court can be set aside on this ground. In the case of ***Associate Builders v. DDA,*** reported in ***(2015) 3 SCC 49***, paragraph 33 of which reads as follows:-

> *33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it*

> *does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."*

19. In the instant case, the arbitral Tribunal relying upon the email of Mr. Rao (GKEL's representative) came to hold that through such email Mr. Rao was asking SEPCO not to issue formal notice to it in any matter in future. Thus, it cannot be denied that finding with regard to waiver of notice is perverse and based on no evidence. As held in ***Associate Builders (supra)***, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. This Court on re-appreciation of evidence cannot comment upon the quantity and quality of evidence relied upon by the Tribunal to come to a definite finding, unless it shocks the conscience of the Court. On perusal of the relevant paragraphs of the impugned award referred to by learned counsel for the parties, it is manifest that the Tribunal has dealt with the rival contentions of the parties while recording finding of waiver of notices. It would not be out of place to mention here that the claim of SEPCO with regard to waiver of notices in certain aspects have also been rejected by the Tribunal holding that waiver of notices in such matters is not permissible in law.

20. The allegation of '*bias*' is a serious allegation against the Tribunal and the same has to be viewed with circumspection.

Arbitration Act is a complete Code and it provides mechanism to raise such issue before the Tribunal itself. Section 12(3) provides that an Arbitrator may be challenged only if; (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (b) he does not possess the qualifications agreed to by the parties. Thus, the Petitioner had an opportunity to raise the issue of '*bias*' of the Arbitrator(s) before the Tribunal itself in terms of Section 13 of the Arbitration Act. Admittedly, no such objection with regard to '*bias*' of the Tribunal was raised by the Petitioner before the Tribunal. The allegation of '*bias*' must be supported with material particulars and be proved beyond any reasonable doubt.

20.1 It is the allegation of the Petitioner that the Tribunal adopted a double standard to appreciate respective cases of the parties. When in one hand, the Tribunal waived the requirement of issuance of notices by the Opposite Party basing upon the email issued by Mr. Rao, on the other hand rejected the claim of the Petitioner on the ground of lack of issuance of notice.

21. The Tribunal in paragraph-191 of the award has observed that the Petitioner-GKEL (Respondent before the Tribunal) raised its issue that Claimant's/ (SEPCO)'s failure to give notices in its statement of defence and counter-claim and submitted that if the Tribunal is satisfied that requirement of notice is a condition precedent, the claim and majority of claims of the Claimant fall away. Taking into consideration the issue raised by the GKEL (present Petitioner), the Tribunal proceeded to decide '*is a contractual notice,*

a condition precedent'. While adjudicating, the Tribunal also considered relevant clauses of amended CWEETC Agreement.

21.1 In order to consider the plea raised by the Petitioner, it is relevant to quote the discussion of the Tribunal at para-199 to 200 (Volume-3 of CC)

> *"199. The Respondent referred to three decisions which confirmed that 'where the service of a notice is mandatory, the clause operates as a condition precedent'. At the outset the Tribunal notes that each of the subject notice provisions does not use the words 'condition precedent' or 'mandatory' and do not expressly state that a contracting party will be denied a contractual entitlement because of a failure to follow a particular procedural requirement to give notice of a claim. It is therefore necessary to examine the operation of each notice clause to see if it has the mandatory effect of a condition precedent.*
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> *200. The Tribunal notes that the parties have expressly stated their intention elsewhere in the Amended CWEETC Agreement that a provision is a 'condition precedent' such as in Sections 4.3.5, 4.11.1.1, 4.11.2.1 and 4.11.3.1 but have not used that language in the notice provisions under consideration. Accordingly, it is necessary to closely examine these decisions and the language used by the parties in each of the particular notice provisions to determine their proper construction."*

In furtherance of the aforesaid observation, the Tribunal proceeded to discuss different provisions of the CWEETC Agreement, wherein a reference to the notices was made. Taking into consideration the relevant provisions of CWEETC Agreement, arguments of the parties and referring to the materials on record, the Tribunal rendered the finding with regard to requirement of notice pursuant to the meeting in March, 2010. The said finding reads as under:-

> *"226. Having regard to the state of this evidence, the Claimant has not established any proper basis for a waiver or an estoppels arising out of the events at the meeting or during the break at the meeting in 2010. There may have been discussions but the evidence is vague and uncertain as to the contents of the discussions."*

The Tribunal then proceeded to discuss about the waiver of notice taking into consideration the meeting in March, 2012 between the representatives of the parties. In course of discussion, the observation of the Tribunal at para-234 is relevant (page-1359). The same reads as under:-

> *"234. The Respondent challenged the sufficiency of the evidence advanced in support of a case for waiver or an estoppel. The Respondent also relied on the terms of a no oral modification clause found in Section 25.5.3 of the Amended CWEETC Agreement which provided: 'Without prejudice to Section 4.2 and the issue of law Variation Order, no variation, amendment supplement, modification or waiver of this Agreement shall be effective unless in writing and signed by or on behalf of each Party."*

In support of its case, the Petitioner relied upon the English law in the case of ***Rock Advertising Ltd. Vs. MWB Business Exchange Centres Ltd.***, reported in 2018 UKSC 24. The relevant portion of the case law reads as under:-

> *"..... the scope of estoppels cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself."*
>
> *(emphasis supplied)*

Discussing the rival contentions of the parties in the light of the ratio (supra), the Tribunal came to the following finding.

> *"The Tribunal finds that an equitable estoppels arose in March 2012 because the Respondent by its words in the email dated 18 March 2012, having regard to the context in which it was sent, expressly and by its conduct represented that the formal notice provisions in the Agreements were not, and would not be, strictly relied on by it and encouraged and invited the Claimant to adopt the same co-operative approach and to not issue formal notices of claims. The Tribunal is satisfied that the Claimant has thereafter, to the knowledge of the Respondent, acted to its detriment by relying on the representation and Respondent's conduct, by not issuing formal notices. An estoppel arises because there is evidence of reliance by inference drawn from the terms of the Claimant's reply email dated 29 March 2012 emphasised above, from the evidence of Mr. Xu in relation to his earlier discussions with Mr. Rao and from the reaffirmation at the November 2012 Jinan Meeting. It would be unjust and inequitable having regard to all the circumstances, including the inconsistency arising out of the benefits obtained by the Respondent in the CERC proceedings, to allow the Respondent to deny a claim because the Claimant, to the knowledge of the Respondent, followed a co-operative approach as a result of the Respondent's invitation to the Claimant to do so in March 2012."*

21.2 In view of the above, it can be safely concluded that the Petitioner itself raised the issue of waiver/estoppel, relying upon the materials available on record, also the English law (supra) in support of its case. Thus, by no stretch of imagination, it can be said that the Petitioner did not get an opportunity to produce materials in support of its case with regard to waiver/estoppel. It is a case that the Petitioner itself raised the plea of waiver/estoppel and fell prey to it. As discussed earlier, the ratio in ***Associate Builders (supra)*** restricts the power of this Court to interfere with the finding of the Tribunal, which

is based on little evidence or on evidence which it has not measured up in quality of trained legal mind. In view of the above, the plea of Dr. Singhvi, learned Senior Advocate to the effect that the Tribunal has made out a third case which was not even pleaded or argued by the parties is not sustainable. Also the plea of Mr. Salve, learned Senior advocate and Mr. Singhvi, learned Senior Advocate that the Tribunal has modified the contract between the parties by holding that the parties have waived the requirement of issue of contractual notice is not sustainable.

22. It is also argued on behalf of the Petitioner that the Tribunal having held that the parties have waived the requirement of issuance of contractual notices it should have applied such waiver equally to both SEPCO and GKEL and not unilaterally in favour of SEPCO. It is further argued that the Tribunal has effectively adopted different standards for each of the parties and treated them unequally in violation of mandatory provisions of Section 18 of the Arbitration Act. As discussed earlier and on perusal of the relevant paragraphs of the impugned award, it appears that no such plea was ever raised by the Petitioner before the Tribunal. Further, no case, as discussed above, is made out by the Petitioner to come to a definite conclusion that the Tribunal has treated the parties unequally in violation of the provisions of Section 18 of the Arbitration Act.

22.1 It is also well-settled that an award is liable to be set aside if the principles of natural justice have been breached or Section 18 of the Arbitration Act has been violated. In view of the discussions made

above, it can neither be said that principles of natural justice has been violated nor the parties to the arbitration have been treated unequally.

23. It is argued on behalf of the Petitioner that the Tribunal taking note of the aforesaid notices dated 19th December, 2013, 10th June, 2013 and 18th December, 2013, which were issued by SEPCO to GKEL, held that these notices were akin to the notices of 7th March, 2012 issued by GKEL. It is further contended that the Tribunal did not give any weightage to the notice dated 7th March, 2012 and heavily relying upon the subsequent email dated 18th March, 2012 as well as the notices as aforesaid issued by SEPCO allowed their claim. Mr. Mehta, learned Senior Advocate refuted such plea stating that such notices cannot be compared with the email issued by the representative of the Petitioner to answer the issue of estoppel/waiver of contractual notices raised by the Petitioner. It is his contention that the plea of waiver/estoppel was not applicable to the notices dated 19th December, 2013, 10th June, 2013 and 18th December, 2013, as those were required to be issued with regard to breach of warranty raised by the Petitioner. SEPCO would not be in a position to know as to whether the equipment supplied and/or installed by it is working or not, unless it was notified within the warranty period. Thus, the same is not comparable with the issues with regard to waiver of contractual notices for extension of time, delay and damages.

23.1 Issue of waiver/estoppel of contractual notices as discussed above, were either relating to extension of time, delay and damages etc, but the notices dated 19th December, 2013, 10th June, 2013 and 18th December, 2013 are with regard to the notices for

breach of warranty. Thus, Mr. Mehta has rightly pointed out that the plea of waiver/estoppel will not be applicable to the said notices, as it would not be possible on the part of SEPCO to know the defects unless the same is intimated by the Petitioner to SEPCO. Thus, it cannot be said that the Tribunal has re-written the contract between the parties.

24. Dr. Singhvi, learned Senior Advocate, in order to invoke the jurisdiction of this Court under Section 34 of the Arbitration Act, reiterated his argument and contended that when the Tribunal has modified the contract between the parties and created a new contract by holding that the parties had waived the requirement to comply the notice provision based on a verbal communication and a simple letter in contravention to the specific provisions of the amended CWEETC Agreement, certainly violates the provisions under Section 18 of the Arbitration Act and is in breach of fundamental principles of justice and will thus be in violation of public policy of India. In support of his case, he relied upon the case law in ***Ssangyong Engineering and Construction Co. Ltd. (supra).*** The relevant portion of which reads as follows:

> *"76..... This being the case, it is clear that majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula de hors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available*

> *only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."*

24.1 As discussed earlier, in the instant case, the Tribunal has not re-written the contract. When an issue with regard to waiver/estoppel of issuance of notices in violation of the amended CWEETC Agreement was raised by the Petitioner, the Tribunal was obliged to answer the same on the basis of the materials available on record. Accordingly, on discussion of the materials on record, the Tribunal came to a conclusion that the parties have agreed to waive issuance of notices as per the contractual provision. The Tribunal, while answering the issue, has rejected the plea of waiver of contractual notices by the SEPCO relying upon the events of March, 2010 only. Basing upon the materials on record, the Tribunal came to a conclusion that by their conduct in March, 2012 the parties have consciously and diligently decided to waive issuance of contractual notices. Although the material available may not be sufficient to come to the impugned conclusion, as alleged by the Petitioner, but that cannot be a ground of interference in view of the case law discussed earlier. Further, the finding of the Tribunal does not shock the conscience of the Court, which would warrant interference with the impugned award under Section 34 of the Arbitration Act, on the plea of breach of fundamental principles of justice. Thus, it cannot be said that finding of the Tribunal is contrary to the public policy of India.

25. In that view of the matter, this Court is of the considered opinion that the impugned award does not fall under the category which warrants interference under Section 34 of the Arbitration Act.

26. Since this Court has already come to a conclusion that the Petitioner failed to satisfy the Court for interference in the impugned award under Section 34 of the Arbitration Act, there is no occasion to deal with the issue with regard to suspension and cancellation of Unit-4 raised by the Petitioner as it relates to quantum of award and cost. Had the Petitioner been successful in satisfying the Court with regard to admissibility of this petition, then occasion to consider the issue would have arisen.

27. In the result, this petition under Section 34 of the Arbitration Act does not justify to be considered for a detailed hearing. Accordingly, the petition under Section 34 of the Arbitration Act is dismissed and in the circumstances there shall be no order as to costs.

28. As the petition under Section 34 of the Arbitration Act is dismissed, no separate order is required to be passed under Section 17 of the Arbitration Act.

(K.R. Mohapatra)
Judge

Orissa High Court, Cuttack.
Dated the 17th June, 2022/S.S. Satapathy