IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 9TH DAY OF NOVEMBER 2021 / 18TH KARTHIKA, 1943

ARB.A NO. 31 OF 2016

AGAINST THE ORDER/JUDGMENT IN OPARB 134/2012 OF ADDITIONAL DISTRICT COURT & MOTOR ACCIDENT CLAIMS TRIBUNAL , NORTH PARAVUR, ERNAKULAM

APPELLANTS-PETITIONERS 3 TO 5 AND 7 TO 27:

1 * V.G.THANKAMANI
NOW RESIDING AT MANAKKOLIL HOUSE, MANJUMMEL PO, VIA ELOOR, ERANAKULAM DISTRICT. (DIED)
ADDL.APPELLANTS 25 AND 26 IMPLEADED

2 V.S. GOPALAKRISHNA PILLAI
NOW RESIDING AT CHERUSSERIL HOUSE,
P.O.IRINGOLE, PERUMBAVOOR, ERNAKULAM DISTRICT.

3 * V.G. RAMANI
THERODATH HOUSE,OLD DESOM ROAD,
THOTTAKKATTUKARA,ALUVA-683108.
(DIED).ADDL.APPELLANTS 27 AND 28 IMPLEADED.

4 SMT. MALLIKA
WIFE OF LATE V.S.RADHAKRISHNAN, RESIDING AT PUTHUKULANGARA, PARAYANCHERRY,PUTHIYARA, KOZHIKODE-4.

5 R. VISHNU MINOR
SON OF LATE V.S.RADHAKRISHNAN,REP. BY HIS MOTHER SMT.MALLIKA,WIFE OF LATE V.S.RADHAKRISHNAN,PUTHIYARA, KOZHIKODE-4.

6 V.S. MURALEEDHARAN
SON OF LATE KRISHNA PILLAI, VALLURATHUTTU HOUSE, POURNAMI NAGAR, NEAR DYSP OFFICE, ALUVA, NOW RESIDING AT-KUNNATH PARVATHY NIVAS, U.C.

COLLEGE PO,ALUVA.

7 SMT. REMA, D/O LATE SUMATHI, NOW RESIDING AT KALLINGAL HOUSE,P.O., THAYIKKATTUKARA, AMBATTUKAVU, ALUVA.

8 SUMA, D/O LATE SUMATHI, NOW RESIDING AT KANJIRATHINKAL HOUSE, KAROTHUKUNNU,MUPPATHADAN, ALUVA.

9 UMA, D/O LATE SUMATHI, NOW RESIDING AT- SARASWATHI VILASAM, PO.BAKTHANANTHAPURAM,VENKITA, PUTHENCRUZ.

10 MANI, SON OF LATE KRISHNAN NAIR,PUTHEN VEEDU, ASHOKAPURAM, ALUVA.

11 SMT.JAYASREE D/O VISWANATH PILLAI,NOW RESIDING AT GOURISANKARAM, KADUNGALLOOR, ALUVA.

12 SMT.SREELATHA D/O LATE VISWANATHA PILLAI,NOW RESIDING AT LOVE DALE THOTTAKKATTUKARA, ALUVA.

13 *SMT. PADMAKUMARI(DECEASED) WIFE OF LATE VENUGOPAL,NOW RESIDING AT SIVA SAILAM,NOCHIMA, NAD-PO, ALUVA.

IT IS RECORDED THAT THE APPELLANT NO.13 IN THE ARB.APPL. 31/2016 EXPIRED ON 23.10.2018 AND HER ONLY LEGAL HEIRS ARE HER CHILDREN WHO ARE ALREADY IN PARTY ARRAY AS APPELLANTS 14 TO 16 AS PER ORDER DATED 28.1.2019 VIDE MEMO DATED 22.01.2019.

14 *SMT. PARVATHY D/O LATE VENUGOPAL, NOW RESIDING AT SIVA SAILAM, NOCHIMA, NAD -PO, ALUVA.(LEGAL HEIR OF APPELLANT NO.13)

15 * SMT..LAKSHMI
D/O LATE VENUGOPAL, NOW RESIDING AT SIVA SAILAM, NOCHIMA, NAD-PO,ALUVA.(LEGAL HEIR OF APPELLANT NO.13)

16 * PRASAD
SON OF LATE VENUGOPAL,NOW RESIDING AT SIVA SAILAM NOCHIMA, NAD-PO, ALUVA.(LEGAL HEIR OF APPELLANT NO.13)

17 T.N. SIVASANKARA PILLAI
SON OF LATE NARAYANA PILLAI,NANDANAM, KEENPURAM, SOUTH VAZHAKULAM,ALUVA-683105.

18 T.N. MOHANDAS
SON OF LATE LARAYANA PILLAI, GEETHAMANDIRAM, THOTTAKKATTUKARA, ALUVA.

19 V.P.SANTHAKUMARI
WIFE OF PRABHAKARAN PILLAI,VINOD BHAVAN, SOUTH VAZHAKULAM ALUVA.683105.

20 V.P. INDIRAKUMARI
WIFE OF PURUSHOTHAMAN PILLAI,VATTATHIL PUTHEN VEEDU, EAST KADUNGALLOOR,U.C. COLLEGE PO, ALUVA-683102.(DIED) (ADDITIONAL APPELLANTS 29 TO 31 ARE IMPLEADED AS PER ORDER DATED 29.11.2019.)

21 V.P. PADMAKUMARI
WIFE OF RAVEENDRANATHA PILLAI,MEERA BHAVANAM, UC.COLLEGE PO,ALUVA-683102.

22 V.P. GEETHAKUMARI
WIFE OF RADHAKRISHNAN NAIR, KEENPURAM, SOUTH VAZHAKULAM, ALUVA-683105.

23 V.P. VIJAYALAKSHMI
W/O. JEEVANGOPAL, ALANKAR APARTMENT,5/84, GOPAL STREET, MADIPAKKAM, CHENNAI-600009.

24 V.P. USHAKUMARI
WIFE OF CHANDRA MOHANAN, ANANDALAYAM,U.C. COLLEGE-PO,EAST KADUNGALLOOR, ALUVA-683102.

25 MRS.LATHIKA M.P
WIFE OF AJITHKUMAR, AGED 50 YEARS, NOW RESIDING AT 'NANDANAM', MANJUMMEL P.O., VIA., UDYOGAMANDAL, ERNAKULAM DISTRICT, PIN-683501.

26 RAJESH M.P, AGED 42 YEARS
SON OF THE PRABHAKARAN PILLAI, AGED 42 YEARS, RESIDING AT MANAKKOLI HOUSE, MANJUMMEL P.O., VIA, UDYOGAMANDAL, ERNAKULAM DISTRICT, PIN-683501.

LEGAL HEIRS OF THE DECEASED 1ST APPELLANTS ARE IMPLEADED AS ADDITIONAL APPELLANTS 25 AND 26 AS PER THE ORDER DATED 20.12.2017 IN IA 4835/2017.

27 P.SREEKUMAR, AGED 40 YEARS
SON OF P.MURALEEDHARAN, AGED 40 YEARS, RESIDING AT THERODATH HOUSE, OLD DESOM ROAD, THOTTAKKATTUKARA, ALUVA-683108.

28 P. JAYAKUMAR, AGED 38 YEARS
SON OF P.MURALEEDHARAN, AGED 38 YEARS, RESIDING AT THERODATH HOUSE, OLD DESOM ROAD, THOTTAKKATTUKARA, ALUVA-683108.

LEGAL HEIRS OF THE DECEASED 3RD APPELLANT ARE IMPLEADED AS ADDITIONAL APPELLANTS 27 AND 28 AS PER THE ORDER DATED 5.7.2018 IN IA 2090/2018.

29 ADDL.29.P.PURUSHOTHAMAN PILLAI,
AGED 67 YEARS, SON OF LATE PARAMESWARAN PILLAI, VATTATHIL PUTHAN VEEDU, EAST KADUNGALLUR, U.C.COLLEGE.PO., ALUVA -683102.

30 ADDL.R30.P.KRISHNAPRASAD,
AGED 36 YEARS
AGED 36 YEARS, SON OF PURUSHOTHAMAN PILLAI, VATTATHIL PUTHAN VEEDU, EAST KADUNGALLUR, U.C.COLLEGE.PO., ALUVA -683102.

31 SMT.P.K.KRISHNA PRIYA,
AGED 32 YEARS
AGED 32 YEARS, SON OF PURUSHOTHAMAN PILLAI,
VATTATHIL PUTHAN VEEDU, EAST KADUNGALLUR,
U.C.COLLEGE.PO., ALUVA -683102.

LEGAL HEIRS OF THE DECEASED 20TH APPELLANT ARE IMPLEADED AS ADDITIONAL APPELLANTS 29 TO 31 AS PER ORDER DATE 29.11.2019 VIDE IA 1/2019.

BY ADVS.
SRI.S.EASWARAN
SRI.M.A.AUGUSTINE
SRI.P.MURALEEDHARAN IRIMPANAM
SRI.P.SREEKUMAR THOTTAKKATTUKARA

RESPONDENT/RESPONDENTS:

1 NATIONAL HIGHWAY AUTHORITY OF INDIA
REP. BY ITS PROJECT DIRECTOR, 8/1187, ARUMUGHAN COLONY CHANDRA NAGAR, PALAKKAD-678007.

2 THE DEPUTY COLLECTOR
SPECIAL LAND ACQUISITION OFFICER & COMPETENT AUTHORITY, NATIONAL HIGH WAY DEVELOPMENT PROJECT. (NHDP), THRISSUR 680001.

3 THE ARBITRATOR
(NATIONAL HIGHWAYS ACT 1959)& DISTRICT COLLECTOR,CIVIL STATION, KAKKANAD, KOCHI-682030.

BY SRI.THOMAS ANTONY, SC

BY SRI.T.K. VIPINDAS, SR. GOVERNMENT PLEADER

THIS ARBITRATION APPEALS HAVING COME UP FOR ADMISSION ON 09.11.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Arbitration Appeal No.31 of 2016

Dated this the 9th day of November, 2021

JUDGMENT

P.B.Suresh Kumar, J.

This appeal is directed against the order in O.P. (Arbitration) No.134 of 2012 dated 18.12.2015 on the files of the Additional District Judge, North Paravur. Petitioners 3 to 5 and 7 to 27 in the proceedings are the appellants.

2. The appellants held lands abutting National Highway-47. 347 square meters (0.0347 hectares) of land held by the appellants in Survey No.2426/110 of Aluva West Village was acquired by the second respondent, the competent authority under the National Highways Act, 1956 (the Highways Act) for widening National Highway-47. Though the appellants claimed a sum of Rs.8 lakhs per cent, land value was fixed by the second respondent for the purpose of

granting compensation to the appellants only at Rs.5,88,100/- per Are. There were various structures in the acquired land and the value of the same was fixed for the purpose of granting compensation at Rs.5,83,761/-. Since the compensation determined by the second respondent for the acquired land and the structures therein was not acceptable to the appellants, they preferred an application under Section 3G(5) of the Highways Act for determination of the compensation by the Arbitrator appointed by the Central Government as provided for therein. The matter was accordingly referred for arbitration.

3. In the arbitration proceedings, the Arbitrator called for a report as to the value of the acquired land and the structures therein from the District Level Arbitration Committee constituted by the Government as per G.O.(MS) No.239/2005/Arb. dated 27.05.2005 in terms of Section 26(1)(a) of the Arbitration and Conciliation Act, 1996 (the Act). The Committee reported to the Arbitrator that the value of the land fixed by the competent authority does not match with the market price as on the date of the notification made under

Section 3A(1) of the Highways Act and recommended that the value of the land needs to be enhanced by 30%. The Arbitrator accepted the report of the Committee and passed an award enhancing the land value as recommended by the Committee.

4. The appellants challenged the award in O.P. (Arbitration) No.134 of 2012 invoking Section 34 of the Act. The court dismissed the original petition holding that the appellants have not made out any ground for interference in terms of Section 34(2) of the Act. The appellants are aggrieved by the decision of the court and hence this appeal.

5. Heard the learned counsel for the appellants, the learned Standing Counsel for the first respondent as also the learned Government Pleader.

6. The learned counsel for the appellants contended that while calling for the report from the Committee in terms of Section 26(1)(a) of the Act, the Arbitrator has not issued notice to the appellants requiring them to give the Committee information and documents relevant for drawing up the report as provided for in Section 26(1)(b) of the Act and

therefore, the award passed solely based on the report of the Committee is unsustainable in law. It was also contended by the learned counsel that such an award is liable to be set aside under Section 34(2)(a)(iii) of the Act. It was pointed out by the learned counsel that the Collector of the District was the Arbitrator appointed in terms of the Highways Act and the Collector himself was the Chairman of the Committee from whom report was called for by the Arbitrator under Section 26(1)(a) of the Act. According to the learned counsel, the award, in the circumstances, is liable to be treated as one in conflict with the public policy of India and liable to be set aside on that ground as well.

7. The learned Standing Counsel for the first respondent, the National Highway Authority of India, did not dispute the fact that the appellants were not required to give to the Committee information and documents relevant for drawing up the report called for by the Arbitrator. It was, however, contended that it is not necessary to require the parties to give the relevant information and documents to the expert for drawing up the report in all cases where an expert is

appointed under Section 26(1)(a) of the Act. It was argued that the provision in Section 26(1)(b) of the Act needs to be invoked by the Arbitrator only if he/she thinks that it is necessary to do so on the facts of the case. To buttress this argument, the learned counsel relied on Section 19(3) of the Act which provides that in the absence of agreement between the parties on the procedure to be followed by the Arbitral Tribunal, the Tribunal is free to conduct the proceedings in the manner it considers appropriate. It was also argued by the learned Standing Counsel that at any rate, insofar as steps have not been taken by the appellants in terms of sub-sections (2) and (3) of Section 26 to discredit the report, the appellants cannot be heard to contend that the award is liable to be set aside for non-compliance of Section 26(1) of the Act. Similarly, the learned Standing Counsel did not dispute the fact that the Arbitrator himself was the Chairman of the Committee from whom report was called for under Section 26(1)(a) of the Act. Nevertheless, he argued that insofar as this point has not been raised by the appellants in the proceedings under Section 34 of the Act, the award cannot be set aside on that ground.

8. The learned Government Pleader appearing for the second respondent supported the contentions advanced by the learned Standing Counsel for the first respondent. In addition, in the context of the submission made by the learned counsel for the appellants that the Collector of the District who was the Arbitrator himself was the Chairman of the Committee from whom the report was called for by him under Section 26(1)(a) of the Act, the learned Government Pleader submitted that merely on account of the said reason, it cannot be said that the award passed by the Arbitrator is bad in law.

9. We have examined the contentions advanced by the learned counsel for the parties on either side.

10. In order to deal with the contention raised by the learned counsel for the appellants based on Section 26 of the Act, it is necessary to refer to the said provision. Section 26 of the Act reads thus:

> "**26. Expert appointment by arbitral tribunal.**—
>
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may—
>
> (a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and
>
> (b) require a party to give the expert any relevant

> information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
>
> (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.
>
> (3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report."

As explicit from the extracted provision, especially the word 'may' used in sub-section (1), there cannot be any doubt that the provision is only an enabling one for the Arbitrator to call for a report from an expert, if such a report is required for the purpose of the proceedings. The question arising for consideration, in the light of the submissions made by the learned counsel for the parties, however, is as to whether the parties should be required to give to the expert information and documents relevant for drawing up the report, while report is called for by the Arbitrator under Section 26(1)(a) of the Act. A close reading of Section 26 of the Act, especially the word

'and' used between Clauses (a) and (b) to Section 26(1), would indicate that if the Arbitrator finds in a given case that the report of an expert is to be called for, for the purpose of the proceedings, it is obligatory for the Arbitrator to require the parties to give the expert any information or document relevant for the purpose of drawing up the report. We take this view also for the reason that if Section 26(1) of the Act is not interpreted in that fashion, it would be unfair on the part of the Arbitrator to rely on a report under Section 26(1) of the Act as a means of resolving the dispute, for which the report is called for. It is all the more so since the expert is free to adopt an inquisitorial or investigative approach in the matter of drawing of the report. The contention taken by the learned Standing Counsel for the first respondent that the Arbitrator has discretion not to follow the requirement in terms of Section 26(1)(b) in the light of Section 19(3) of the Act is without any substance, for Section 19(3) clarifies that the provision therein would apply only subject to the provisions in that part which takes within its fold Section 26 as well. Even otherwise, Section 19(3) cannot be understood as one nullifying the provision

contained in Section 26(1)(b) of the Act.

11. The next question is as to whether non-compliance of the requirements in Section 26(1)(b) of the Act is a ground falling under Section 34(2)(a)(iii) of the Act, justifying interference with the award. The relevant portion of Section 34 of the Act reads thus:

> **"34. Application for setting aside arbitral award.**—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award may be set aside by the Court only if—
>
> (a) the party making the application furnishes proof that—
>
> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from

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

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

(b) The Court finds that –

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

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

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

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

(ii) It is in contravention with the fundamental policy of Indian law; or

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

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

The ground provided for in Section 34(2)(a)(iii) gets attracted

only if the party making the application was not given proper notice of the appointment of the Arbitrator or of the arbitral proceedings or was otherwise unable to present his case. The specific contention raised by the learned counsel for the appellants was that the case on hand would fall within the scope of the expression 'was otherwise unable to present his case'. Although it would appear that the expression aforesaid would get attracted only in cases where the party making the application was unable to present his case before the Arbitrator, according to us, the said expression needs to be interpreted to include cases where the parties were not able to present their case before the expert appointed under Section 26(1)(a) of the Act as well, when the Act categorically provides, as interpreted by us, that the parties shall be required to give to the expert relevant information and documents for drawing up the report. It is apposite in this context to refer to a few passages from the decision in **Ssangyong Engg. & Construction Co. Ltd. v. NHAI**, (2019) 15 SCC 131, where the scope of Section 34(2)(a)(iii) of the Act has been examined by the Apex Court. The passages read thus :

“51. Sections 18, 24(3) and 26 are important pointers to what is contained in the ground of challenge mentioned in Section 34(2)(*a*)(*iii*). Under Section 18, each party is to be given a *full* opportunity to present its case. Under Section 24(3), all statements, documents, or other information supplied by one party to the Arbitral Tribunal shall be communicated to the other party, and any expert report or document on which the Arbitral Tribunal relies in making its decision shall be communicated to the parties. Section 26 is an important pointer to the fact that when an expert's report is relied upon by an Arbitral Tribunal, the said report, and all documents, goods, or other property in the possession of the expert, with which he was provided in order to prepare his report, must first be made available to any party who requests for these things. Secondly, once the report is arrived at, if requested, parties have to be given an opportunity to put questions to him and to present their own expert witnesses in order to testify on the points at issue.

52. Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where materials are taken behind the back of the parties by the Tribunal, on which the parties have had no opportunity to comment, the ground under Section 34(2)(*a*)(*iii*) would be made out.

53. In *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards — Commentary*, edited by Dr Reinmar Wolff (C.H. Beck, Hart, Nomos Publishing, 2012), it is stated:

> “4. Right to Comment

According to the principle of due process, the tribunal must grant the parties an opportunity to comment on all factual and legal circumstances that may be relevant to the arbitrators' decision-making.

(*a*) Right to Comment on Evidence and Arguments Submitted by the Other Party

As part of their right to comment, the parties must be given an opportunity to opine on the evidence and arguments introduced in the proceedings by the other party. The right to comment on the counterparty's submissions is regarded as a fundamental tenet of adversarial proceedings. However, in accordance with the general requirement of causality, the denial of an opportunity to comment on a particular piece of evidence or argument is not prejudicial, unless the tribunal relied on this piece of evidence or argument in making its decision.

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

In practice, national courts have *afforded Arbitral Tribunals considerable leeway in setting and adjusting the procedures* by which parties respond to one another's submissions and evidence, reasoning that there were “several ways of conducting arbitral

proceedings". Accordingly, absent any specific agreement by the parties, the Arbitral Tribunal has wide discretion in arranging the parties' right to comment, permitting or excluding the introduction of new claims, and determining which party may have the final word.

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

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

(emphasis in original)

x x x x x x x x x x

57. In *Minmetals Germany GmbH* v. *Ferco Steel Ltd.* [*Minmetals Germany GmbH* v. *Ferco Steel Ltd.*, 1999 CLC 647 (QB)] , the Queen's Bench Division referred to this ground under the New York Convention, and held as follows:

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

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

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

> underlay it. I conclude that it was to give Ferco's lawyer an opportunity to refute this material that the Beijing court ordered a “resumed” arbitration.”
>
> (at pp. 656-657)

The extracted passages reinforce our conclusion. The contention raised by the learned Standing Counsel for the first respondent that the appellants have not taken steps to discredit the report of the expert as provided for under sub-sections (2) and (3) of Section 26 is only to be rejected, for it is found that there is non-compliance of sub-section (1) of Section 26, and the non-compliance of the said provision by itself is a ground to set aside the arbitral award as the same would amount to 'patent illegality'. In short, the impugned award is liable to be set aside for non-compliance of the requirements in Section 26(1)(b) of the Act.

12. Now, we shall deal with the contention raised by the learned counsel for the appellants that the award is liable to be set aside since the Collector of the District himself was the Chairman of the Committee appointed under Section 26(1)(a) of the Act. As noted, the fact that the Collector who was the Arbitrator was the Chairman of the Committee appointed under Section 26(1)(a) of the Act also is not in

dispute. As indicated, insofar as the Arbitrator has called for a report of the Committee as to the land value of the acquired land at the time of the notification, the issue in the arbitration proceedings was as to whether the report of the Committee could be acted upon for the purpose of passing the award. In other words, in the proceedings, the Arbitrator was examining the acceptability or otherwise of his own report, and the award is one passed by the Arbitrator accepting his own report.

13. Arbitration, albeit lacking state sponsorship, is an adjudicatory system which has a direct bearing on the rights and liabilities of the parties involved. Therefore, it is essential that it shall be concluded in accordance with the principles of natural justice and fairness. Neutrality, impartiality and independence of the adjudicator form the very basis of any adjudicatory system and the same is a requirement of principles of natural justice. The provisions of the Act, especially after Act 3 of 2016, in terms of which the Act has been amended substantially, would show that the scheme of the Act is also that an Arbitrator adjudicating a dispute in terms of the provisions of the Act shall be neutral,

impartial and independent. It is trite that only an unbiased adjudicator can be said to be a neutral adjudicator. Similarly, only an adjudicator who is not favouring one party more than another, unprejudiced, disinterested, equitable and just, can be said to be an impartial adjudicator. No doubt, the Collector may not be interested personally in the outcome of the arbitration proceedings, but he cannot, according to us, be said to be a neutral and impartial adjudicator in a proceedings in which the correctness of a report drawn by him and others is arising for consideration. The principle that a dispute shall be adjudicated only by a neutral and impartial adjudicator is a principle of natural justice which is deeply embedded in our jurisprudence and it is therefore a fundamental policy of Indian law. If that be so, the award in the instant case is liable to be set aside under Section 34(2)(b)(ii) of the Act as well, as one in conflict with the public policy of India. The contention that the appellants have not raised this objection before the court below is also without any substance, for if an award is found to be vitiated for non-compliance of the principles of natural justice and consequently in conflict with the public

policy of India, according to us, it is irrelevant as to whether the parties have raised such a contention in the proceedings, for violation of the principles of natural justice is a point that could be urged at any stage of the proceedings.

14. That apart, in a case of the instant nature, if it is held that the Arbitrator can act as an expert or a member of the expert committee provided for in Section 26(1) of the Act as well, the provisions in sub-section (2) of Section 26 cannot be complied with.

In the result, the appeal is allowed and the order in O.P.(Arbitration) No.134 of 2012 and the award impugned therein are set aside.

Sd/-
P.B.SURESH KUMAR, JUDGE.

Sd/-
C.S.SUDHA, JUDGE.

ds 10.09.2021