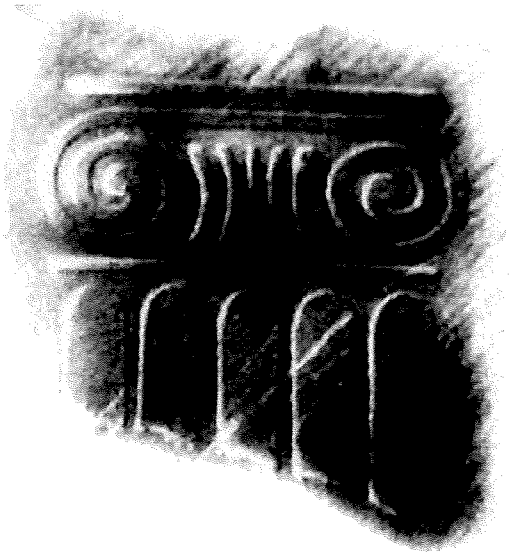
TAS / CAS

Tribunal Arbitral du Sport
Court of Arbitration for Sport
Tribunal Arbitral del Deporte



ARBITRAL AWARD

SC East Bengal, India

v.

Jaime Santos Colado, Portugal

CAS 2021/A/8079 - Lausanne, August 2022

CAS 2021/A/78079 SC East Bengal v. Jaime Santos Colado & FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr. Patrick Stewart, Solicitor, Manchester, United Kingdom

in the arbitration between

SC East Bengal, India

Represented by Mr. Luca Smacchia of Bologna, Italy

- Appellant -

and

Mr. Jaime Santos Colado, Portugal

Represented by Prof. Juan de Dios Crespo Pérez and Ms Emily Yu of Ruiz-Huerta & Crespo Sports Lawyers, Valencia, Spain

- First Respondent –

and

Fédération Internationale de Football Association, Switzerland

Represented by Mr. Saverio Paolo Spera, Senior Legal Counsel

- Second Respondent –

I. PARTIES

1. SC East Bengal (the "Appellant" or the "New Club Entity") is a professional football club based in India and is a member of the All India Football Federation ("AIFF") which in turn is affiliated to the Fédération Internationale de Football Association.

2. Jaime Santos Colado (the "First Respondent" or the "Player") is a professional football player from Spain.

3. The Fédération Internationale de Football Association FIFA (the "Second Respondent" or "FIFA").

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, this award refers only to the submissions and evidence considered necessary to explain its reasoning.

5. On 11 June 2019, the Quess East Bengal FC Private Limited (the "Former Club Entity") and the Player entered into an employment contract under which the Player was engaged to play football for the Former Club Entity (the "Employment Contract") in the Indian Super League (the "ISL"). The duration of the Employment Contract was from date of signature until 31 May 2021 and, pursuant to its terms, the Former Club Entity agreed to pay the Player US$ 87,500 net for each of seasons 2019/20 and 2020/21.

6. The Employment Contract contained a force majeure clause which stated as follows:

"*Force Majeure: No Party shall be liable to the other Party for delay or failure to perform caused by an event or occurrence of Force Majeure. The Party whose performance is affected by an event of Force Majeure shall promptly notify the other Parties of the existence and cessation of such event. The Parties shall take all reasonable steps within their power to recommence performance of the Agreement following an event of Force Majeure after it expires or is no longer in effect. The period of time during which any Party is prevented or delayed in the performance or fulfilling any obligation due to unavoidable delays caused by a Force Majeure Event, compliance with any directive, order, or regulation of any governmental authority or representative thereof acting under claim or colour of authority, or for any reason beyond such Party's reasonable control, whether or not similar to the forgoing, shall be added to such Party's time for performance thereof; and such Party shall have no liability by reason thereof.*"

7. Following the outbreak of the global COVID-19 pandemic, the AIFF ended season 2019/20 prematurely.

8. On 25 April 2020, the Former Club Entity sent a notice to the Player which, *inter alia*, stated the following:

"[....] *the current football season shall be deemed to be concluded on account of countrywide lockdown situation due to* [the COVID-19] *pandemic. As a result [...] all activities of Quess East Bengal FC has also been called off for the current season [....] The current football season, 2019-20, is incidentally also the last season before the cessation and dissolution of Quess East Bengal FC, the JV Sports Management company between Quess Corp Ltd. And East Bengal Club. Due to this unprecedented conditions Quess East Bengal FC Pvt. Ltd. Will be hence rendered unable to carry out its principle objective of managing and running football matters* [...]

[...] *we regret to intimate to you the premature cessation of your professional contract with Quess East Bengal FC under the 'Force Majeure Clause' of the agreement. The Cessation will be effective 30 April 2020 and this will imply that your prorated monthly salary will be payable till the effective date of cessation by Quess East Bengal FC. You are requested to consider this email as an official communication for the stated matter.*"

9. On 6 May 2020, the Former Club Entity sent the Player a mutual termination agreement with respect to the Employment Contract and request that the Player sign it by 9 May 2020. The Player did not do so.

10. On 13 May 2020, the Asociación de Futbolistas Españoles (the "AFE") sent a letter to the Former Club Entity on behalf of the Player in which it challenged the right of the Former Club Entity to terminate the Employment Contract pursuant to the force majeure clause and required the Former Club Entity to fulfil its obligations under the Employment Contract or to compensate the Player for termination of the Employment Contract without just cause, failing which the Player would be required to take appropriate action for termination without just cause.

11. On 14 May 2020, the CEO of the Former Club Entity, Mr. Sanjit Sen, responded to the AFE's letter of 13 May 2020. That response stated, inter alia, as follows:

"[...] *the football rights of East Bengal, which is currently residing with Quess East Bengal FC, will be transferred back to East Bengal Club on or before 31st May 2020* [....] *The football rights of East Bengal, post transfer back to the sole owner (East Bengal Club) will reside with a new Corporate entity to be formed by East Bengal Club. This new entity will be registered with AIFF / AFC / FIFA as the sole owner of all subsequent football rights and liabilities of East Bengal Club for the subsequent India Football season (2020-21) and onwards thereon.*

[...] Senior Football Team players with Contract for next football season (2020-21) or for subsequent years, have the option of negotiating with the new Corporate Owner of the football rights of East Bengal Club for the continuation of the signed contracts. Please note that the onus of honouring the liabilities attached with any contracts for subsequent season will be the onus of the new Corporate Sports Management entity which will manage the football rights of East Bengal Club. Many players who had contracts for subsequent season attached to the football rights of east Bengal FC (sic) *have contacted / been contacted by the concerned officials of East Bengal Club for signing the new Contract with the new entity which will be registered with AIFF.* [.....] [the Player] *or his representative may speak to the concerned officials of East Bengal Club on he terms and conditions for the continuity of Professional Contract for the next season.*"

12. On 18 May 2020, the AFE sent a further letter to the Former Club Entity in which the AFE, *inter alia*, stated that: (a) the Player had not had any contact with the East Bengal Club; (b) the Player wished to fulfil the Employment Contract; (c) the employer's obligations under the Employment Contract had to be assumed by either the Former Club Entity or the new corporate entity; and (d) the Player had yet to receive the April 2020 salary pursuant to the Employment Contract even though the Former Club Entity had previously stated that the Employment Contract continued until 31 April 2020.

13. On 28 May 2020, the CEO of the Former Club Entity responded to the AFE's letter of 18 May 2020 as follows: (a) he provided contact details for officials of the East Bengal Club; (b) he advised that the salary for April 2020 would be paid if the Player signed the mutual termination agreement sent to him on 6 May 2020; and (c) he advised that, after 31 May 2021, the operations of the Former Club Entity would cease to exist in Kolkata and that he would be unavailable to respond further on the matter.

14. On 12 June 2020, the Former Club Entity sent the Player a further letter which stated, *inter alia*, that: (a) the Employment Contract had become impossible to be performed, at the very latest, by April 2020, and that both parties had been discharged of their obligations under the Employment Contract; and (b) the Former Club Entity would pay the Player an *ex gratia* payment of 547,210 INR in lieu of the period to 30 April 2020.

15. On 17 July 2020, it was reported in the media that the joint venture between Quess Corp and East Bengal had terminated, resulting in sporting rights reverting to East Bengal.

16. On 28 September 2020, the Player's agent, Mr. Marcelino Elena, sent an e-mail to the East Bengal Club informing them of the existence of the Employment Contract and advising that the Player would return to Kolkata for training unless the East Bengal Club wished to propose an alternative solution.

17. On 29 September 2020, it was reported in the media that: (a) the East Bengal Club transferred sporting rights to Shree Cement East Bengal Foundation Limited, a new joint venture between the club and their investors Shree Cement Limited; and (b) the new club had been admitted to participate in the ISL.

18. On 27 October 2020, the AFE sent a default notice dated 26 October 2020 on behalf of the Player to the New Club Entity, the Former Club Entity and the AIFF which, *inter alia*, stated that: (a) according to media reports, the New Club Entity had failed to register the Player to enable his participation in the ISL; (b) the Player was owed outstanding salary under the Employment Contract of US$ 49,865.59 as at 26 October 2020; and (c) if the outstanding salary was not paid within 15 days, the Player reserved the right to terminate the Employment Contract with just cause in accordance with Article 14bis of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP").

19. On 18 November 2020, the AFE sent a final default notice on behalf of the Player to the New Club Entity granting an additional five days to comply.

20. On 26 November 2020, the AFE sent a notice of termination on behalf of the Player to the New Club Entity under which the Employment Contract was terminated with just cause in accordance with Article 14bis of the FIFA RSTP.

21. On 6 January 2021, the Player entered into an employment contract with the Bolivian club, Club Atletico Palmaflor ("CA Palmaflor"), which commenced on signature and expires on 31 December 2022 (the "New Employment Contract").

B. Proceedings before the FIFA Dispute Resolution Chamber

22. On 21 December 2020, the Player filed a claim against the New Club Entity with the FIFA Dispute Resolution Chamber (the "FIFA DRC").

23. In making the claim, the Player submitted that the New Club Entity is the sporting successor of the Former Club Entity and made the following requests for relief:

> "a. *To condemn the* [New Club Entity] *to pay the residual value of the* [Employment Contract] *until date of expiration (31 May 2021) in the amount of USD 44,722.24 net*
> b. *To condemn the* [New Club Entity] *to pay USD 7,291.67 net as moral damages*
> c. *To condemn the* [New Club Entity] *to pay the outstanding salaries in the amount of USD 57,361.14 net*
> d. *To award 5% interest on the previous amounts*
> e. *To impose sporting sanctions on the* [New Club Entity]"

24. The New Club Entity failed to submit a response to the FIFA DRC within the stipulated timeframe.

25. The AIFF was invited by the FIFA DRC to provide its position with respect to the Player's submission that the New Club Entity is the sporting successor to the Former Club Entity. The AIFF responded as follows:

"*we would like to inform you that SC East Bengal is the sporting successor of Quess East Bengal FC and Kingfisher East Bengal FC. SC East Bengal is affiliated with the AIFF through its state association, i.e., Indian Football Association, and participates in competitions organized under the auspices of the All India Football Federation.*

Further, please note that all correspondences addressed to Quess East Bengal FC or Kingfisher East Bengal FC are to be forwarded to SC East Bengal."

26. On 29 April 2021, the FIFA DRC made the following decision with respect to the claim and notified that decision with grounds to the Appellant on 4 June 2021 (the "Appealed Decision"):

"*1. The claim of the Claimant, Jaime Santos Colado, is partially accepted*

2. The Respondent, Sporting Club East Bengal, has to pay to the Claimant, the following amounts:

- *USD 58,333 as outstanding remuneration plus 5% interest p.a. as follows:*
  - *On USD 7,291.67 as from 1 May 2020 until the date of effective payment.*
  - *On USD 7,291.67 as from 1 June 2020 until the date of effective payment.*
  - *On USD 7,291.67 as from 1 July 2020 until the date of effective payment*
  - *On USD 7,291.67 as from 1 August 2020 until the date of effective payment*
  - *On USD 7,291.67 as from 1 September 2020 until the date of effective payment*
  - *On USD 7,291.67 as from 1 October 2020 until the date of effective payment*
  - *On USD 7,291.67 as from 1 November 2020 until the date of effective payment*
  - *On USD 7,291.67 as from 1 December 2020 until the date of effective payment*

- *USD 21,875 as compensation for breach of contract without just cause plus 5% interest p.a. as from 21 December 2020 until date of effective payment.*

3. Any further claims of the Claimant are rejected.

4. *The Claimant is directed to immediately and directly inform the Respondent of the relevant bank account to which the Respondent must pay the due amount.*

5. *The Respondent shall provide evidence of payment of the due amount in accordance with this decision to* ***psdfifa@fifa.org****, duly translated, if applicable, into one of the official FIFA languages (English, French, German, Spanish).*

6. *In the event that the amount due, plus interest as established above is not paid by the Respondent* ***within 45 days,*** *as from the notification by the Claimant of the relevant bank details to the Respondent, the following consequences shall arise:*

   1. *The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods. The aforementioned ban mentioned* (sic) *will be lifted immediately and prior to its complete serving, once the due amount is paid. (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*

   2. *In the event that the payable amount as per in this decision* (sic) *is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee.*"

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

27. On 24 June 2021, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (2021 edition) (the "Code"), the Appellant filed a Statement of Appeal at the Court of Arbitration for Sport (the "CAS") which:

   a) challenged the Appealed Decision;

   b) requested that the case be submitted to a Sole Arbitrator;

   c) requested that the Player be required to produce the New Employment Contract as evidence; and

   d) requested that the deadline for it to file its Appeal Brief be suspended pending formation of the Panel, or the appointment of a Sole Arbitrator, and the Panel / Sole Arbitrator making a determination on its evidence production request.

28. On 28 June 2021, the CAS Court Office acknowledged receipt of the Statement of Appeal and invited the First Respondent and the Second Respondent (the

"Respondents") to provide their comments on the Appellant's procedural requests by 1 July 2021.

29. On 30 June 2021, the First Respondent responded as follows to the CAS Court Office: (a) he opposed the Appellant's requests for document production and suspension of the Appeal Brief submission deadline; and (b) he agreed to the appointment of a Sole Arbitrator.

30. On 1 July 2021, the Second Respondent responded as follows to the CAS Court Office: (a) they opposed the Appellant's requests for document production and suspension of the Appeal Brief submission deadline; and (b) they agreed to the appointment of a Sole Arbitrator.

31. On 1 July 2021, the Deputy President of the CAS Appeals Arbitration Division denied the Appellant's request to suspend the Appeal Brief submission deadline and lifted the suspension of the time-limit to file the Appeal Brief.

32. On 2 July 2021, the Appellant requested a 15-day extension to submit the Appeal Brief.

33. On 2 July 2021, the CAS Court Office invited the Respondents to respond to the Appellant's request by 5 July 2021.

34. On 2 July 2021, the Second Respondent confirmed to the CAS Court Office that it did not object to the Appellant's request for a 15-day extension. On the same day, the First Respondent advised the CAS Court Office that he was only willing to agree to a seven-day extension.

35. On 2 July 2021, the CAS Court Office informed the Parties that the Deputy Division President had agreed to grant the Appellant an extension of 15 days to file its Appeal Brief.

36. On 21 July 2021, the Appellant filed its Appeal Brief and the CAS Court Office instructed the Respondents to file their Answers within 20 days (pursuant to Article 55 of the Code).

37. On 22 July 2021, the First Respondent:

    a) submitted to the CAS Court Office that the Appellant was late in filing its Appeal Brief and that, accordingly, the appeal should be deemed withdrawn pursuant to Article 51 of the Code. The First Respondent withdrew this objection later on the same day; and

    b) requested that the deadline for filing his Answer be suspended pending payment by the Appellant of advanced costs.

38. On 22 July 2021, the CAS Court Office informed the Parties that the time limit for the Respondents to submit their Answers was set aside and that a new submission deadline would be set upon payment by the Appellant of the advanced costs.

39. On 11 August 2021, the CAS Court Office confirmed that the Appellant had paid the advance of costs and instructed the Respondents to submit their Answers within 20 days.

40. On 8 September 2021, the CAS Court Office:

    a) informed the Parties that, in accordance with Article R54 of the Code, had constituted a Panel as follows:

       Sole Arbitrator: Mr. Patrick Stewart, Solicitor in Manchester, United Kingdom;

    b) in response to a further request from the Appellant for production of the New Employment Contract, granted the Respondents five days to provide their views.

    c) invited the Parties to confirm by 15 September 2021 whether they preferred for a hearing to be held or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

41. On 8 September 2021, the First Respondent responded as follows to the CAS Court Office:

    a) He objected to the production request on the basis that the New Employment Contract was available to the Appellant within the file which was prepared for the Appealed Decision.

    b) He requested a hearing.

42. On 10 September 2021, the Second Respondent advised the CAS Court Office that, due to the horizontal nature of the issue, it did not intend to comment on the production request as the First Respondent was better placed to produce it if required.

43. On 27 September 2021, the CAS Court Office informed the Parties as follows:

    a) The Sole Arbitrator had granted the Appellant's production request and the First Respondent was required to produce a copy of the New Employment Contract within seven days.

    b) The Sole Arbitrator had decided that, pursuant to Articles R44.2 and R57 of the Code, a hearing would be held by way of videoconference.

44. On 5 November 2021, each Party submitted a duly signed Order of Procedure.

45. On 16 December 2021, a hearing was held by videoconference as provided for in Articles R44.2 and R57 of the Code. In addition to the Sole Arbitrator and Mr. Giovanni Maria Fares, CAS Counsel, the following persons attended the hearing:

For the Appellant:

- Mr. Luca Smacchia - Counsel

For the First Respondent:

- Mr. Jaime Santos Colado – First Respondent
- Mr. Juan de Dios Crespo Pérez - Counsel
- Mr. Juan Crespo Ruiz-Huerta – Counsel
- Ms. Juan Yu (Emily) – Counsel
- Mr. Pedro Blauzwirn Sáenz – Legal Intern for the First Respondent's Counsel
- Mr. Hazem Elsaidy – Legal Intern for the First Respondent's Counsel

For the Second Respondent:

- Mr. Jaime Cambreleng Contreras, Head of Litigation
- Mr. Saverio Paolo Spera, Senior Legal Counsel

46. At the opening of the hearing, the Parties confirmed that they had no objections to the constitution of the Arbitral Tribunal nor to the procedure adopted by the Sole Arbitrator so far. The Parties were given full opportunity to submit their arguments in opening and closing statements and to answer the questions posed by the Sole Arbitrator.

47. Before the hearing was concluded, the Parties confirmed that their right to be heard had been duly respected.

IV. SUBMISSIONS OF THE PARTIES

48. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in this Section IV of the award.

A. Submissions of the Appellant / New Club Entity

49. The Appellant made the following requests for relief:

"a) preliminary, in first instance, to set aside the Appealed Decision, ruling that FIFA Dispute Resolution Chamber had no jurisdiction to handle the matter;

b) preliminary, in second instance, to set aside the Appealed Decision as the Player's claim before FIFA DRC was inadmissible as it lacked existent petitum and causa petendi;

c) subsidiarily, in first instance on the merit, in case it deems that FIFA DRC had jurisdiction to handle the matter and thus enters into the merit of the dispute, to set aside the Appealed Decision, acknowledging that the Employment Contract has ceased under force majeure;

d) subsidiarily, in second instance on the merit, in case it deems that Employment Contract has not ceased under force majeure to reduce the compensation recognized to the Respondent by FIFA DRC, taking into account that the Respondent failed to comply with his duty to mitigate the damages for several months, as well as the value of his new employment contract and that no request of additional compensation set forth at Article 17.1, lit. ii) FIFA RSTP was made by the Player to FIFA DRC that ruled ultra petita;

e) in any case, to condemn the Respondent to pay all the procedural costs of the present proceedings as well as the legal costs and fees incurred by the Appellant."

50. With respect to the FIFA DRC's alleged lack of jurisdiction, the Appellant submitted *inter alia* as follows:

a) Pursuant to Article 22(b) of FIFA RSTP, the FIFA DRC has jurisdiction to determine "*employment-related disputes between a club and a player of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decoded by an independent tribunal that has been established at national level within the framework of the association*".

b) For the purpose of determining which body has jurisdiction over disputes between the contracting parties, the Employment Contract makes a distinction between football disputes and non-football disputes. Clause 12.4.1 [*recte*, 11.4.1] states that "*For any footballing matters* [...]*the relevant and sole deciding authorities shall be in the order of hierarchy: the IFA, AIFF, FIFA and CAS*" while clause 12.4.2 [*recte*, 11.4.2] states that "*For any non-football matters the relevant deciding authority and jurisdiction will be the Court of Law in India*".

c) The dispute between the Player and the First Respondent is a non-football dispute as it concerns the principle of force majeure which, unlike other issues relating to contractual stability, is not addressed in the FIFA RSTP. Accordingly, in accordance with the Employment Contract and the mutual intent of the Appellant and First Respondent, the dispute should have been determined by the Indian courts.

d) FIFA and CAS jurisprudence supports the Appellant's position, including: (i) FIFA DRC decision of 24 March 2021 in the case of Deac Ioan Ciprian vs FC

Aktobe (Ref. n. 20-00410); (ii) FIFA DRC decision of 19 November 2020 in the case of Badaliy Dago vs Neftçi PFK (Ref. n. 20-01338); (iii) FIFA DRC decision of 22 September 2020 in the case of Micael Martins Sequiera vs Al Nasser Ref. n. 20-00521; (iv) CAS 2019/A/6569; and (v) the Swiss Federal Tribunal ("STF") decision of 22 January 2018 (STF 4A_432/2017) with respect to CAS 2016/A/4554.

51. With respect to the argument that the Player's claim before the FIFA DRC was inadmissible, the Appellant submitted, *inter alia*, that Article 14bis of FIFA RSTP allows a player to terminate an employment contract where the club has failed to pay their salary for at least two months. However, Article 14bis was not relevant in this instance as the Employment Contract ceased to have effect as from 30 April 2020, meaning that the Former Club Entity's obligation to pay salary to the Player had ceased. Accordingly, the Player's claim before the FIFA DRC "*was inadmissible as it lacked existent causa petendi and petitum*".

52. With respect to the Appellant's argument, subsidiarily in the merit, that the Appellant had validly terminated the Employment Contract due to force majeure, the Appellant submitted, *inter alia*, as follows:

a) Clause 1.1.12 of the Employment Contract states as follows: "***Force majeure*** *shall mean, in relation to a Party, any act, event or circumstance beyond the reasonable control of that Party which affects the performance of its obligations under this Agreement including but not limited to fire, flood, explosion, war, riots, act of Government Authorities (as defined below) or any event or circumstance analogous to the foregoing.*"

b) Clause 12.1 of the Employment Contract states as follows: "*Force Majeure: No Party shall be liable to the other Party for delay or failure to perform caused by an event or occurrence of Force Majeure. The Party whose performance is affected by an event of Force Majeure shall promptly notify the other Parties of the existence and cessation of such event. The Parties shall take all reasonable steps within their power to recommence performance of the Agreement following an event of Force Majeure after it expires or is no longer in effect. The period of time during which any Party is prevented or delayed in the performance or fulfilling any obligations due to unavoidable delays caused by a Force Majeure Event, compliance with any directive, order, or regulation of any governmental authority or representative thereof acting under claim or colour of authority, or for any reason beyond such Party's reasonable control, whether or not similar to the foregoing shall be added to such Party's time for performance thereof; and such Party shall have no liability by reason thereof.*"

c) Pursuant to FIFA jurisprudence and FIFA's "COVID-19 Football Regulatory Issues FAQs", the existence or otherwise of a force majeure situation was a matter of fact and local law. The Indian government had recognised the COVID-

19 pandemic as a force majeure event. Accordingly, the Employment Contract had ceased due to force majeure.

53. The Appellant also submitted that, if Indian law is considered not to apply for determining force majeure issues then Swiss law should apply. The Appellant further submitted as follows:

a) Article 119 of the Swiss Code of Obligations provides that "*An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor.*"

b) In CAS 2015/A/309, the Panel considerd the principle of force majeure and found as follows:

"*Under some extraordinary and limited circumstances, a party who does not fulfil a contractual obligation could be excused for his breach in case he proves that such breach is due to the concurrence of an event or an impediment that is not only beyond his control (and that he cannot avoid to overcome) but also that could not have been reasonably expected or taken into account when he assumed the relevant obligation that has been breached.*"

c) The COVID-19 pandemic was an event beyond the parties' control which could not have been reasonably be expected or taken into account when the Employment Contract was signed. It resulted in the AIFF suspending football season 2019/20 and, in light of this, the Employment Contract had ceased due to force majeure pursuant to Swiss law. The following CAS jurisprudence supports this contention: CAS 2014/A/3463 and 3464.

54. If the Employment Contract was not considered to have ceased due to force majeure, then the Appellant submitted as follows in the alternative:

a) The Employment Contract was entered into between the Player and the Former Club Entity, not the Player and the sporting club itself (SC East Bengal). FIFA regulations on sporting succession should not operate to transfer the obligations of a private company to a club.

b) Accordingly, with effect from the date that the Former Club Entity ceased to own rights in the sporting club (i.e. 30 April 2020), the Employment Contract ceased to have effect and the Player ceased to have any contractual right to receive a salary.

c) Accordingly, there were no outstanding payments due to the Player and Article 17.1 of FIFA RSTP should not have been applied by the FIFA DRC.

d) Furthermore, by failing to acknowledge that the Employment Contract had ceased as of 30 April 2020 and instead continuing to seek to enforce its terms

for seven months, the Player had failed to comply with his duty to mitigate his losses as he could have spent this time seeking employment with another club. Several other players under contract with the Former Club Entity had done so successfully.

55. By way of a further alternative argument, the Appellant submitted that, even if it is determined that there were overdue payables:

a) The FIFA DRC should not have awarded "Additional Compensation" to the Player pursuant to Article 17.1(ii) of FIFA RSTP as this was not included in the Player's request for relief.

b) The FIFA DRC failed to account fully for the New Employment Contract when calculating the damages payable to the Player. Article 17.1(ii) of the FIFA RSTP provides that "*in case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the "Mitigated Compensation")*". The residual value of the Employment Contract in the period from 1 May 2020 (i.e. the date on which the Former Club Entity ceased paying salary to the Player) to 31 May 2021 (i.e. the date on which the Employment Contract was due to expire) was US $94,791.71 (i.e. 13 months of salary at US $7,291.67 per month). The Player entered into the New Employment Contract on 6 January 21 and in the period from commencement of the New Employment Contract to the expiry date of the Employment Contract, the Player was paid US $53,000, in the form of: (i) a signing-on fee of US $18,000; and (ii) five months of salary at US $7,000 per month. Accordingly, the maximum amount of "Mitigated Compensation" to which the Player was entitled was US $94,791.71 less US $53,000 which equals US $41,791.71. Additionally the Player received flight tickets and accommodation from CA Palmaflor under the New Employment Contract which should have been taken into account by the FIFA DRC.

B. Submissions of the First Respondent

56. The First Respondent made the following requests for relief:

"*In view of all the documentation as well as the factual and legal considerations mentioned above, the Respondents herein respectfully request the Court of Arbitration for Sport to rule as follows:*

1. To dismiss the appeal filed by the Club against the Player with respect to the Decision passed by the FIFA DRC on 29th April 2021, with reference No. 20-01863, communicated to the Parties with the grounds on 4th June 2021.

2. *To condemn the Appellant to the payment of the entire CAS administration cost and the Arbitrators fees.* (sic)

3. *To fix a sum of 15,000 CHF to be paid by the Appellant to the Respondent to help the payment of his legal fees covering the costs of his legal representation in front of the Court of Arbitration for Sport.*"

57. With respect to the Appellant's claim that the FIFA DRC lacked the necessary jurisdiction to make the Appealed Decision, the First Respondent submitted, *inter alia*, as follows:

a) The Appellant failed to challenge the FIFA DRC's jurisdiction when it initially had the opportunity to do so and, accordingly, the Appellant had forfeited the right to do so in front of the CAS. The First Respondent cited CAS 2012/A/2899 in which the Panel determined as follows at paragraph 55:

"*According to the law of the seat of the present arbitration, namely Swiss law, a plea of lack of jurisdiction must be raised prior to any defence on the merits (Article 186 para. 2 of the Swiss Federal Statutes on Private International Law). Therefore, it is not accepted that a party which did not raise any objection to the jurisdiction of FIFA while it could have done so in the course of the first instance procedure before its Players' Status Committee, could object to the jurisdiction of FIFA in a subsequent CAS procedure.* [....] *a party proceeding before the FIFA Players' Status Committee without raising any objection on the jurisdiction of FIFA must be deemed to have waived its right to challenge such jurisdiction in appeals.*"

b) Even if CAS does have the *de novo* power to consider the FIFA DRC's jurisdiction, the FIFA DRC in any event had jurisdiction in this case. Although Article 22(b) of the FIFA RSTP allows contracting parties to select an alternative dispute resolution forum, the parties had not done so in this instance. The Employment Contract provides for non-football related matters to be determined by the Indian courts. However, any dispute between a professional football player and a football club over the implementation of an employment contract is a football-related dispute and the Employment Contract provides as follows for football-related matter: "*the relevant and sole deciding authorities shall be in the order of hierarchy: the IFA, AIFF, FIFA and CAS.*"

c) While the Employment Contract contains an apparent hierarchy of dispute resolution *fora* for football-related matters (i.e. the IFA, AIFF, FIFA, CAS), the Appellant has not argued, or produced any evidence to establish, that the IFA or AIFF should have had jurisdiction instead of the FIFA DRC.

d) The jurisprudence cited by the Appellant is not relevant to the current case as the contracts considered in the relevant cases explicitly and unambiguously provided for disputes to be determined in non-FIFA dispute resolution fora. In

contract, the Employment Contract only excluded FIF's jurisdiction for non-football matters.

58. With respect to the Appellant's argument that the Player was not entitled to terminate the Employment Contract with just cause pursuant to Article 14bis of the FIFA RSTP as the Employment Contract had already ceased due to force majeure, the First Respondent made, *inter alia*, the following submissions:

a) The Employment Contract was terminated by the Player on 26 November 2020 due to overdue salaries, not on 30 April 2020 as a consequence of force majeure.

b) Notwithstanding that the Former Club Entity notified the Player on 25 April 2020 that the Employment Contract would cease to have effect on 30 April 2020 due to force majeure, the Former Club Entity also sent the Player a mutual termination agreement on 6 May 2020. This was evidence that the Former Club Entity understood the Employment Contract could not be terminated without firstly obtaining the Player's agreement. Likewise, the Player continued to consider the Employment Contract to be in effect after 30 April 2020 (evidenced by the notice he sent to the Former Club Entity on 13 May 2020, requiring it to fulfil its obligations).

59. The First Respondent submitted that the New Club Entity is the sporting successor to the Former Club Entity. He argued this on the following grounds:

a) The FIFA DRC made this determination in the Appealed Decision. Paragraph 42 of the Appealed Decision states as follows:

"*The* [FIFA] *DRC noted that All India Football Federation confirmed that SC East Bengal is the sporting successor of Quess East Bengal FC and Kingfisher East Bengal FC. SC East Bengal is affiliated with the AIFF through its state association, i.e., Indian Football Association, and participates in competitions organized under the auspices of the All India Football Federation.*"

b) The Former Club Entity itself referred to the sporting succession which had occurred. For example, in its e-mail of 14 May 2020 it commented as follows:

"[....] *the football rights of East Bengal, which is currently residing with Quess East Bengal FC, will be transferred back to East Bengal Club on or before 31st May 2020* [....]. *The football rights of East Bengal Club, post-transfer back to the sole owner (East Bengal Club) will reside with a new Corporate entity to be formed by East Bengal Club. This new entity will be registered with AIFF/AFC/FIFA as the sole owner of all subsequent football rights and liabilities of East Bengal Club for the subsequent Indian Football season (2020-21) and onwards thereon.*"

c) Article 15.4 of the FIFA Disciplinary Code provides as follows: "*Criteria to assess whether an entity is to be considered as the sporting successor of another entity are, among others, its headquarters, name, legal form, team colours, players, shareholders or stakeholders or ownership and the category of competition concerned.*" In this case, the names and logos of both clubs are very similar, the playing shirts of both clubs adopt the same colour scheme of red and yellow and both clubs share the same founding date.

d) In CAS 2020/A/7183, the Panel advised that both objective and subjective factors should be taken into account when considering whether one entity is the sporting successor of another entity. The First Respondent submitted that "[…] *the* [New Club Entity] *did create the impression that it wants to be legally bound by the obligation of its predecessor by listing on its website and social media the same history as the Former Club* [Entity]. *It also took the federative rights of the Former Club [Entity], which was confirmed many times in its emails. It took many players from the Former Club* [Entity] *and said in public it would honor all the existing contracts of the players, which can be seen in many news reports. All Indian Federation allowed the* [New Club Entity] *to continue to play in the same division (the top division in India) and confirmed the* [New Club Entity] *is the sporting successor of the Former Club* [Entity]."

60. The First Respondent went on to submit as follows:

a) Pursuant to CAS jurisprudence including CAS 2018/A/5618, "*the sporting successor of a former, no longer existing club can, as a matter of principle, be liable to meet the financial obligations of that Former Club notwithstanding that the successor is not a party to any agreement, arrangement or understanding pursuant to which the financial obligation arose or a privy of any of the parties to any such agreement, arrangement or understanding and regardless of whether there has been a change of management or corporate structure or ownership of the club in question.*"

b) Accordingly, as the sporting successor of the Former Club Entity, the New Club Entity should have paid the Player's salary pursuant to the Employment Contract.

61. Based on the fact that the Player was not paid salary from 1 April 2020 to 26 November 2020, the First Respondent also submitted as follows:

a) By failing to pay the player for almost eight months, despite the Player's requests for it do so, the New Club Entity breached the doctrine of *pacta sunt servanda* (i.e. the doctrine that agreements must be respected by the parties in good faith). CAS jurisprudence (for example, CAS 2017/A/5213) has established that this doctrine is enshrined in both FIFA Regulations and Swiss law.

b) The Player had a clear right to terminate the Employment Contract with just cause pursuant to Article 14bis of the FIFA RSTP which provides as follows:

"*In the case of a club unlawfully failing to pay a player at least two monthly salaries on their due dates, the player will be deemed to have a just cause to terminate his contract, provided that he has put the debtor club in default in writing and has granted a deadline of at least 15 days for the debtor club to fully comply with its financial obligation(s).* [...]"

62. The First Respondent submitted that the Player had validly terminated the Employment Contract in accordance with Article 14bis of the FIFA RSTP as he notified the Former Club Entity in writing of the overdue salaries and granted it 20 days to remedy its breach, which it failed to do.

63. With respect to the Appellant's claim that the FIFA DRC had wrongly calculated the damages payable to the Player pursuant to Article 17.1 of the FIFA RSTP, the First Respondent Appellant submitted, *inter alia*, as follows:

a) The Employment Contract continued in force until terminated by the Player on 26 November 2020. Accordingly, the Player was entitled to be paid salary for the period from 1 April 2020 to 26 November 2020 – i.e. US $58,333.

b) The Player was under no obligation to mitigate his losses during this period. Had the Former Club Entity engaged with the Player in good faith during this period then the Player could have acted sooner in terminating the Employment Contract with just cause and seeking alternative employment. After terminating the Employment Contact, the Player did mitigate his losses by entering into the New Employment Contract.

c) The Player was fully entitled to be awarded three months of additional compensation as provided for in Article 17.1(ii) of the FIFA RSTP which states, *inter alia*, that "*subject to the early termination of the contract being due to overdue payables, in addition to the Mitigated Compensation, the player shall be entitled to an amount corresponding to three monthly salaries.*"

C. Submissions of the Second Respondent

64. The Second Respondent made the following requests for relief:

"*FIFA respectfully requests CAS to issue an award on the merits:*

(a) *rejecting the reliefs sought by the Appellant;*

(b) *confirming the Appealed Decision;*

(c) *ordering the Appellants to bear the full costs of these arbitration*

proceedings;

(d) *ordering the Appellant to make a contribution to FIFA's legal costs.*"

65. With respect to the Appellant's claim that the FIFA DRC lacked the necessary jurisdiction to make the Appealed Decision, the Second Respondent submitted, *inter alia*, as follows:

a) While Article 22 of the FIFA RSTP sets out exceptions to FIFA's jurisdiction, including where the parties have expressly opted for disputes to be decide by an alternative arbitration tribunal:

"[…] *in order for a jurisdictional clause inserted in a contract to be triggered, the lack of jurisdiction of the seized tribunal has to be raised by a party, as the [FIFA] DRC will limit its ex officio examination to the question as to whether it is competent to hear the claim on the basis of Article 22 RSTP. If it is competent and the parties do not raise any issue related to jurisdictional matters despite having been granted the opportunity to do so, the* [FIFA] *DRC will conclude that the parties have accepted to seize it regardless of what they might have stipulated contractually at a previous stage.*

In other words, if a claim arising out of a contractual relationship has been lodged before a tribunal which a party considers lacking jurisdiction by virtue of a jurisdictional clause contained in the contract, the jurisdiction of the seized tribunal has to be challenged by said party from the outset. If that party does not do so, it is understood that it has tacitly waived the said clause and accepted the jurisdiction of the seized tribunal."

b) This position is supported by: (i) CAS jurisprudence, including CAS 2012/A/2899 and CAS 2015/A/4083; and (ii) the procedural rules of other international arbitration regime, including Article II(3) of the New York Convention and Article 8(1) UNCITRAL Model Law on International Commercial Arbitration.

c) The Appellant's failure to respond to the Player's claim before the FIFA DRC, was "*tantamount to a tacit acceptance of the* [FIFA] *DRC's competence and, by the same token, a waiver of a jurisdictional clause included in the contract at the basis of the dispute. Consequently* [….] *the* [FIFA] *DRC rightly assumed the jurisdiction to entertain the claim….*"

In any event, Article 12.4.2 of the Employment Contract (which provides for the jurisdiction of the Indian courts for non-football related matters) was not applicable to this case as the Player's claim is football-related. Specifically, the Second Respondent submitted as follows

> "*The dispute at stake is a typical football-related dispute, whereby one of the parties prematurely terminated the employment relationship due to a contractual breach. The fact that the Club attempts to portray its stance as lawful in light of the outbreak of the Covid-19 pandemic and an alleged status of force majeure does not change the nature of the claim.*"

66. Like the First Respondent, the Second Respondent challenged the relevance of the jurisprudence cited by the Appellant. It submitted, *inter alia*, as follows:

> "[....] *the Appellant's reference to previous decisions of the* [FIFA] *DRC is misplaced, not only because it does not take into account that the* [FIFA] *DRC decides on a case-by-case basis, but most importantly because it misses a crucial point. None of the jurisdictional clauses contained in the employment contracts at the basis of the recalled cases shared the main trait of the one at stake in the present proceedings, namely, limiting the jurisdiction of the domestic courts to non-football related matters.* [.....] *The same goes for the Appellant's reference to CAS 2019/A/6569* [....] *Given that a dispute initiated by a player claiming a breach of contract without just cause by his club is a football-related claim, regardless of the justification that the club adduces for its stance, Article 12.4.2 does not apply.*"

67. With respect to the Appellant's subsidiary argument that the Player was not entitled to terminate the Employment Contract with just cause pursuant to Article 14bis of the FIFA RSTP as the Employment Contract had already ceased due to force majeure, the Second Respondent commented, *inter alia*, as follows:

> "[...] *it is frankly difficult to fathom how such a claim before the* [FIFA] *DRC could be deemed to be inadmissible in light of the* [FIFA] *RSTP. Moreover, FIFA observes that it is ultimately irrelevant which party terminated the contract as a termination without just cause by a club and a termination with just cause by a player are essentially two sides of the same coin. In other words, whether it was the Player terminating with just cause in November 2015 or it was the Club terminating without just cause a few months before, in April 2015, would always lead to compensation to be paid in favour of the Player for unlawful breach of contract.*"

68. Having put forward its arguments in support of the FIFA DRC's jurisdiction, the Second Respondent submitted that there was no further basis for FIFA to be sued by the Appellant as, pursuant to Swiss law and CAS jurisprudence, a respondent in arbitration proceedings may only be sued if a remedy is being sought against it. The Second Respondent cited CAS 2015/A/4000 in support of its position in which the Panel determined as follows:

> "*According to the well-established CAS jurisprudence* [...], *FIFA has no standing to be sued where it is only involved in the dispute between two parties (such as a player and a club as in the present case) merely as the adjudicating body having issued the appealed decision and the parties cannot bring an actual claim against FIFA*".

69. The Second Respondent opted not to address the Appellant's subsidiary claims as they concerned the contractual relationship between the Appellant and Player. However, the Second Respondent felt compelled to address the Appellant's submission that FIFA had declared the COVID-19 pandemic to be a force majeure situation. In fact, FIFA's Circular 1720 stated as follows:

"[FIFA] *did not determine that the COVID-19 outbreak was a force majeure situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of force majeure. For clarity: clubs or employees cannot rely on [a FIFA] decision to assert a force majeure situation (or its equivalent). Whether or not a force majeure situation (or its equivalent) exists in the country or territory of an MA is a matter of law and fact, which must be addressed on a case- by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement* [....]."

V. JURISDICTION

70. Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body."

71. The Appealed Decision was made by the FIFA DRC pursuant to Article 24.2 of the FIFA RSTP which provides as follows:

"*Decisions reached by the DRC or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS).*"

72. Article 58 (1) of the FIFA Statues provides as follows:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question."

73. The Parties do not dispute the jurisdiction of CAS and confirmed it by signing the Order of Procedure.

74. It follows that the CAS has jurisdiction to decide the present dispute.

VI. ADMISSIBILITY

75. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties."

76. Article 58 (1) of the FIFA Statues requires appeals to be lodged within 21 days of receipt of the decision in question.

77. The FIFA DRC rendered the Appealed Decision on 29 April 2021 and notified its grounds to the parties on 4 June 2021. The last day of the 21 day period by which the Appellant was required to have filed the Statement of Appeal was therefore 25 June 2021. The Appellant submitted its appeal on 24 June 2021 and it was therefore submitted in a timely manner.

78. Accordingly, the Appellant's appeal to CAS is admissible.

VII. APPLICABLE LAW

79. Article R58 of the Code provides as follows:

"*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

80. While the Parties' submissions all addressed the issue of applicable law differently, based on a careful analysis of those submissions, the Sole Arbitrator considers the following to constitute common ground among the Parties:

a) The applicable regulations for the purpose of Article R58 of the CAS Code are the various rules and regulations of FIFA, including the FIFA RSTP.

b) In line with established CAS jurisprudence (including CAS 2015/A/3910) the rules and regulations of FIFA are to be interpreted according to Swiss law.

c) Application of the "*rules of law chosen by the parties*" is limited to issues not otherwise covered by the rules and regulations of FIFA.

d) Pursuant to Clause 11.1 of the Employment Contract, Indian law applied for "*non-footballing matters*" and the rules and regulations of the IFA, AIFF, FIFA and CAS applied for "*all footballing matters*".

81. There is no consensus among the Parties, however, as to what constitutes a footballing or non-footballing matter and whether or not the issues primarily in dispute are footballing or non-footballing matters. Unfortunately the terms of the Employment Contract offer no guidance on these terms are to be interpreted. However, the Sole Arbitrator notes, and is persuaded by, FIFA's submissions on this point which can be summarised as follows:

a) If the matter falls within the scope of FIFA regulations then it should be deemed to be a footballing matter. Conversely, if the matter falls outside the scope of FIFA regulations then it should be deemed to be a non-footballing matter.

b) This approach accords with a key objective of FIFA's globally applicable regulations (i.e. to create a standard set of rules which all football stakeholders are subject to and can rely on) and is consistent with the principle of *lex sportiva* recognized in CAS jurisprudence, including CAS 2005/A/983 and CAS 2005/A/984.

82. Accordingly, the Sole Arbitrator determined that the position with respect to applicable laws is as follows:

a) Primarily, the various regulations of FIFA are applicable to this Appeal (including the FIFA RSTP) and such regulations shall be interpreted in accordance with Swiss law.

b) Indian law shall apply subsidiarily to the extent necessary to fill a gap or lacuna in FIFA regulations (if any).

VIII. PRELIMINARY ISSUE

83. On 8 September 2021, the Appellant requested the production of the New Employment Contract by the Respondents and the CAS Court Office granted the Respondents five days within which to provide their responses.

84. On 8 September 2021, the First Respondent objected to the production request on the basis that the New Employment Contract was available to the Appellant within the file prepared for the Appealed Decision.

85. On 10 September 2021, the Second Respondent advised the CAS Court Office that it did not have any comment on the production request and, in any event, the First Respondent was better placed to comply with the request should the Sole Arbitrator grant it.

86. The Sole Arbitrator noted that: (i) the New Employment Contract was relevant to the case as it went to the issue of mitigation of losses by the Player; (ii) such document exists, as confirmed by the First Respondent himself; and (iii) it was not unduly onerous for the First Respondent to comply with the production request. Accordingly, on 27 September 2021, the Sole Arbitrator granted the Appellant's production request and ordered the First Respondent to produce a copy of the New Employment Contract within seven days, which it duly did.

IX. MERITS

87. According to Article R57 par. 1 of the Code, the Sole Arbitrator has "*full power to review the facts and the law*". As repeatedly stated in the CAS jurisprudence (e.g. CAS 2007/A/1394), by reference to this provision the CAS appeals arbitration procedure entails a *de novo* review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is the function of the Sole Arbitrator to make an independent determination as to merits.

88. In light of the facts and the circumstances of the case, as well as considering the Appellant's contentions in support of its claims, the Sole Arbitrator observes that the main issues to be resolved are the following:

a) Did the FIFA DRC have the necessary jurisdiction to determine the Appealed Decision?

b) If the FIFA DRC did have the necessary jurisdiction, was the Former Club Entity entitled to terminate the Employment Contract with effect from April 2020?

c) If the Former Club Entity was not entitled to terminate the Employment Contract with effect from April 2020, did the New Club Entity assume the Former Club Entity's obligations under the Employment Contract as its sporting successor?

d) If the New Club Entity assumed the Former Club Entity's obligations under the Employment Contract, did the Player validly terminate the Employment Contract with just cause on 26 November 2021?

e) If the Player validly terminated the Employment Contract with just cause, was the level of compensation awarded to the Player in the Appealed Decision correct?

89. Before turning to these issues, the Sole Arbitrator must determine the issues of the burden of proof and the standard of proof.

90. The concept of burden of proof has been considered in many CAS decisions and is well established CAS jurisprudence. It was set out in CAS 2007/A/1380 as follows:

"*According to the general rules and principles of law, facts pleaded have to be proved by those who plead them, i.e., the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proved by those against whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based.* [...] *It is well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based.* [...] *The two requisites included in the concept of "burden of proof" are (i) the "burden of persuasion" and (ii) the "burden of production of the proof". In order to fulfil the burden of proof, the Club must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequence envisaged by the Club. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party*" (see also CAS 2005/A/968 and CAS 2004/A/730).

91. It follows therefore that each party must fulfil its burden of proof to the required standard by providing and referring to evidence to convince the Sole Arbitrator that the facts it pleads are established.

92. As to the question of what the standard of proof is, the Sole Arbitrator observes that neither party has expressed any position in its written submissions. The Sole Arbitrator also notes that the applicable rules do not appear to contain any explicit standard and neither was any standard agreed upon between the parties. In this context, both legal authorities (see the chapter "Evidentiary Issues Before CAS" by Rigozzi/Quinn in "International Sports Law and Jurisprudence of the CAS - 4th Conference CAS & SAV/FSA Lausanne 2012, Editions Weblaw 2014" edited by Bernasconi M.) and relevant CAS case-law concur that the applicable standard of proof should be the comfortable satisfaction standard. The Sole Arbitrator sees no reason to apply a different standard in the present case.

A. Did the FIFA DRC have the necessary jurisdiction?

93. In considering this issue, the Sole Arbitrator considers the following to be highly pertinent:

a) Article 22(b) of the FIFA RSTP which provides contracting parties with a clear option to choose an arbitration tribunal unrelated to FIFA; and

b) Article 12(3) of the FIFA Rules governing the Procedures of the Players' Status Committee and Dispute Resolution Chamber which states as follows:

"*Any party claiming a right on the basis of an alleged fact shall carry the burden of proof. During the proceedings, the parties shall submit all relevant facts and*

evidence of which they are aware at that time, or of which they should have been aware if they had exercised due care."

c) CAS 2015/A/4083 in which the three person Panel found as follows:

"[....] *there is no indication in the rules that the DRC would have to go beyond a mere assessment of its competence ratione materiae et personae as outlined in Article 22 of the RSTP. The wording "unless an independent arbitration tribunal [....] has been established at national level" does not dispose of the question whether it is the DRC's task to assess the jurisdiction of anther dispute resolution body ex officio without a respective plea by one of the Parties".* See paragraph 106.

"A combined reading of Article 22(b) of the RSTP ("unless") and Article 12(3) of the DRC Procedural Rules suggests that the Appellant was obliged to actively point the DRC to the potential jurisdiction of Norwegian labour courts or an arbitral tribunal at national level, not only by objecting to the competence of FIFA but also by providing material which would have allowed the DRC to assess whether the arbitral tribunal at national level fulfilled the requirements set out by FIFA. [.....]". See paragraph 108.

"[...] *this Panel shares the assessment expressed in CAS 2012/A/2899 which rejected the view that a party which did not raise any objection to the jurisdiction of FIFA while it could have done so in the course of the first instance procedure before the Players' Status Committee, could object to the jurisdiction of FIFA in a subsequent CAS procedure (cf. CAS 2012/A/2899, para. 55)".* See paragraph 110.

94. It is clear that FIFA DRC had *prima facie* jurisdiction to hear this case pursuant to Article 22(b) of the FIFA RSTP as it is an employment-related dispute between a club and a player of an international dimension (given that the Player is Spanish and the Appellant is Indian).

95. Consistent with CAS jurisprudence, as long as the FIFA DRC had *prima facie* jurisdiction, it was not obliged to adopt a proactive approach in considering whether the parties have agreed in writing for the case to be determined by an alternative arbitration tribunal.

96. The Sole Arbitrator acknowledges that the Appellant had the following potential grounds of challenge to the FIFA DRC's jurisdiction:

a) The dispute related to a non-footballing matter and consequently the Indian courts should have had jurisdiction in accordance with clause 11.4 of the Employment Contract.

b) In the alternative, the dispute related to a footballing matter and consequently the IFA or AIFF should have had jurisdiction in accordance with clause 11.4 of the Employment Contract.

97. It is unnecessary for the Sole Arbitrator to consider the merits of either of such grounds as the Appellant failed to challenge the FIFA DRC's jurisdiction at the appropriate time (or indeed to respond to the Player's claim at all). However, for completeness the Sole Arbitrator notes that he is not persuaded by the Appellant's argument that this case concerns a non-footballing matter. The subject matter of this case clearly relates to football – i.e. the early termination of a football employment contract. The mere fact that a party relies on a non-football related legal argument (in this instance that the Appellant was entitled to terminate the Employment Contract on grounds of force majeure), does not make the subject matter of the case non-footballing.

98. As: (i) the FIFA DRC had *prima facie* jurisdiction over the case; and (ii) the Appellant failed to challenge their jurisdiction at first instance; then on the basis of the reasoning adopted in CAS 2015/A/4083, the Sole Arbitrator is satisfied that the FIFA DRC had jurisdiction to consider the case and make the Appealed Decision.

B. Was the Former Club Entity entitled to terminate the Employment Contract?

99. The First Club claims that it was entitled to terminate the Employment Contract with effect from 30 April 2020 on grounds of force majeure. The Employment Contract includes a very clear definition of "Force Majeure" which, in the absence of any submission to the contrary, the Sole Arbitrator considers to be of most relevance to the matter at hand. That defines Force Majeure as "[...] *any act, event or circumstance beyond the reasonable control* [of a party] *which affects the performance of its obligations under this Agreement including but not limited to fire, flood, explosion, war, riots, acts of Government Authorities* [...] *or any events or circumstances analogous to the foregoing*".

100. Clause 12.2 of the Employment Contract provides as follows (emphasis added):

"*No Party shall be liable to the other Party for delay or /failure to perform caused by an event or occurrence of Force Majeure. The Party whose performance is affected by an event of Force Majeure shall promptly notify the other Parties of the existence and cessation of such event. The Parties shall take all reasonable steps within their power to recommence performance of the Agreement following an event of Force Majeure after it expires or is no longer in effect. The period of time during which any Party is prevented or delayed in the performance or fulfilling any obligation due to unavoidable delays caused by a Force Majeure Event, compliance with any directive, order, or regulation of any governmental authority or representative thereof acting under claim or colour of authority, or for any reason beyond such Party's reasonable control, whether or not similar to the forgoing, shall be added to such Party's time for performance thereof, and such Party shall have no liability by reason thereof.*"

101. The Sole Arbitrator makes the following observations:

a) Clause 12.2 excuses a party from performing its obligations to the extent it is prevented from doing so as a consequence of "Force Majeure". No reference is made to the relevant party being entitled to terminate the Employment Contract.

b) The COVID-19 pandemic and the response of the Indian authorities to the pandemic (the "Relevant Events") were undoubtedly events or circumstances beyond the control of the Former Club Entity. However, for the Relevant Events to be considered as events of "Force Majeure" the Appellant must also show that they affected the performance of the Former Club Entity's obligations under the Employment Contract.

c) While the Employment Contract placed numerous obligations on the Player, the Former Club Entity's obligations were limited essentially to the following (the "Club Obligations"): (i) to engage the Player as a professional footballer in official competitions in which the club was participating until 31 May 2021 (see clause 2); and (iii) to pay the Player certain monetary amounts and provide the Player with other benefits in lieu of the services provided by the Player to the Club (see clause 3).

d) The Appellant's submissions made generic references to the ongoing impact of the Relevant Events in India, but did not explain or evidence how the Relevant Events prevented the Former Club Entity from fulfilling the Club Obligations.

e) During the hearing, the Appellant acknowledged that neither the Former Club Entity nor the New Club Entity had taken any steps to comply with the procedural steps set out under Clause 12.2 upon the occurrence of the alleged Force Majeure event.

102. The Appellant claimed that CAS 2014/A/3463 & 3464 supported its position. However, the Sole Arbitrator does not consider that case to be analogous. The Panel was required to consider the date on which the Egyptian football season 2012/13 had ended for the purpose of quantifying compensation due by one party to the other in circumstances where: (i) the relevant employment contract expired "*at the end of football season 2012/13*"; and (ii) the football season had been prematurely ended as a consequence of the Egyptian civil war. The Panel considered the Egyptian civil war to be a force majeure event which prematurely ended football season 2012/13 and, consequently, the relevant employment contract. Given the fact-specific nature of CAS 2014/A/3463 & 3464, the Sole Arbitrator does not consider it to be persuasive to the current case.

103. The burden of proof clearly sits with the Appellant to establish that the Relevant Events: (i) prevented the Former Club Entity from performing the Club Obligations; and (ii) accordingly justified the Former Club Entity terminating the Employment Contract. However, the Appellant failed to: (i) establish a nexus between the Relevant Events and

the Former Club Entity's failure to perform the Club Obligations; and/or (ii) provide a legal basis upon which the Relevant Events justified termination of the Employment Contact by the Former Club Entity.

104. Accordingly, the Sole Arbitrator finds that the Former Club Entity was not entitled to terminate the Employment Contract on grounds of force majeure.

C. Did the New Club Entity assume the Former Club Entity's obligations?

105. In its requests for relief, the Appellant did not request that the Appealed Decision be set aside on the basis of the New Club Entity not having assumed the contractual obligations of the Former Club Entity. However, the Appellant's written submissions sought to make this argument and, accordingly, the Sole Arbitrator will address it for completeness.

106. The First Respondent's submissions clearly explained the concept of sporting succession and the criteria by which one entity is deemed to be the sporting successor of another entity pursuant to Article 15.4 of the FIFA Disciplinary Code. The First Respondent also explained in detail why the New Club Entity should be deemed to be the sporting successor of the Former Club Entity with respect to the East Bengal club.

107. The Appellant sought to argue that FIFA's rules on sporting succession do not apply to this case on the basis that the Former Club Entity was a private company rather than the sporting club itself and that "*it is not possible, even under the concept of sporting succession of FIFA Regulations, to allocate on a club the legal position towards players of agreement signed by private company*".

108. The Sole Arbitrator is not persuaded by the Appellant's argument for the following reasons:

a) The terms of the Employment Contract imply that the private company and the sporting club were one and the same. In introducing the parties, the Employment Contract states that the Former Club Entity is to be "*hereinafter referred to as "Company/Club/QEBFC"*. The recitals then proceed to describe the "*Club*" (i.e. the Former Club Entity) as the entity affiliated to the IFA, AIFF and AFC which particpates in official football competitions. The relevant language in the recitals is as follows:

"*A. The Club affiliate member applicant with the Indian Football Association ("IFA"), All India Football Federation ("AIFF") and the Asian Football Confederation ("AFC") to participate in the league and/or any other competition organized by and/or held under the aegis of the AIFF and AFC.*

B. The Player is a footballer of repute and is desirous of representing the Club in the above mentioned IFA, AIFF and AFC competitions.

C. [...]"

b) The Appellant provides no basis for his contention that FIFA regulations on sporting succession do not apply "*towards players of agreement signed by private company*". Indeed, this contention is contrary to established CAS jurisprudence. In CAS 2016/A/4550, the three person Panel found that "*A club is a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it. Thus, the obligations acquired by any of the entities in charge of the club's administration in relation with its activity must be respected. [.....] Hence, the prevalence of the continuity and permanence in time of the sporting institution in front of the entity that manages it has been recognised, even when dealing with the change of management companies completely different from themselves*".

109. Accordingly, the Sole Arbitrator considers the New Club Entity to be the sporting successor of the Former Club Entity and, furthermore, that the New Club Entity assumed the obligations of the Former Club Entity with respect to the Employment Contract.

D. Did the Player validly terminate the Employment Contract with just cause?

110. On 26 November 2020, the AFE sent a notice of termination on behalf of the Player to the New Club Entity which purported to terminate the Employment Contract with just cause in accordance with Article 14bis of the FIFA RSTP.

111. Article 14bis of the FIFA RSTP provides, *inter alia*, as follows:

"*In the case of a club unlawfully failing to pay a player at least two monthly salaries on their due dates, the player will be deemed to have a just cause to terminate his contract, provided that he has put the debtor club in default in writing and has granted a deadline of at least 15 days for the debtor club to fully comply with its financial obligation(s).*"

112. Accordingly, the following criteria are to be satisfied:

a) The Former Club Entity (and then the New Club Entity) must have unlawfully failed to pay the Player at least two monthly salaries on their due date. This criterion was clearly satisfied. The Former Club Entity (and then the New Club Entity) failed to pay the player seven monthly salaries on their due date prior to the Player terminating the Employment Contract and, as determined both by the FIFA DRC and in this Award, they had no lawful basis for this.

b) The Player must have put the Former Club Entity and/or the New Club Entity in default in writing and granted a deadline of at least 15 days for them to remedy the default. This criterion was also clearly satisfied, with the AFE sending two default notices on behalf of the Player, on 26 October 2020 and 18 November

2020 respectively, which provided the New Club Entity with cure periods of 15 days and five das respectively.

113. Accordingly, the Sole Arbitrator is satisfied that the Player validly terminated the Employment Contract with just cause pursuant to Article 14bis of the FIFA RSTP.

E. Was the level of compensation awarded to the Player correct?

114. The Sole Arbitrator is satisfied that the level of compensation awarded in the Appealed Decision was correct and was not persuaded by the arguments put forward by the Appellant to reduce the level awarded. Those arguments can be summarised as follows:

a) The Appellant argued that the Player should not have been awarded "Additional Compensation" pursuant to Article 17.1(ii) of FIFA RSTP because there were no overdue payables under the Employment Contract. This is obviously contrary to the findings of the Sole Arbitrator. The Appellant also argued, in the alternative, that the Player's request for relief did not request Additional Compensation and, accordingly, the FIFA DRC had no basis for awarding it. The Sole Arbitrator notes that Article 17.1(ii) of the FIFA RSTP creates an entitlement for a player to be awarded up to three months' compensation where a contract is terminated for overdue payables. Accordingly, the Sole Arbitrator is satisfied that the FIFA DRC had a clear regulatory basis for awarding Additional Compensation.

b) The Appellant argued that, by failing to acknowledge that the Employment Contract had ceased as of 30 April 2020 and continuing to seek to enforce its terms for seven months, the Player failed to mitigate his losses fully as he could have spent this time seeking employment with another club. However, the Sole Arbitrator has determined that the Employment Contract was not validly terminated with effect from 30 April 2020 and, in fact, continued in force until 26 November 2020. Accordingly, the Player had no mitigation obligations during this period.

c) The Appellant argued that the residual value of the Employment Contract should have been calculated from 1 May 2020, not from 1 April 2020. However, the Appellant provided no basis for this and, based on the submissions, the Sole Arbitrator's clear understanding is that the Player was not paid any salary for the month of April 2020.

115. Accordingly, the Sole Arbitrator is satisfied that the compensation awarded by FIFA was correct and shall not be reviewed.

X. Costs

116. Pursuant to Article R64.4 of the Code, the CAS Court Office shall, upon conclusion of the proceedings, determine the final amount of the costs of this arbitration, which shall

include the CAS Court Office fee, the costs and fees of the arbitrator, computed in accordance with the CAS fee scale, the contribution towards the costs and expenses of the CAS, and the costs of witnesses, experts and interpreters, if any. Article R64.4 of the Code provides as follows:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:
- *the CAS Court Office fee,*
- *the administrative costs of the CAS calculated in accordance with the CAS scale,*
- *the costs and fees of the arbitrators,*
- *the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,*
- *a contribution towards the expenses of the CAS, and*
- *the costs of witnesses, experts and interpreters.*

The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs."

117. In addition to the payment of the arbitration costs, the award shall also determine to the prevailing party or parties a contribution towards its legal fees and other expenses incurred in connection with the proceedings. Article R64.5 of the Code provides as follows:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties".

118. Following the outcome of these proceedings, the Sole Arbitrator finds that the arbitration costs of these proceedings, in an amount to be notified by the CAS Court Office, shall exclusively be borne by the Appellant.

119. Furthermore, pursuant to Article R64.5 of the Code, and in consideration of the outcome of the proceedings, the Sole Arbitrator finds that in view of the wide discretion conferred upon it, the Appellant shall pay a contribution to the expenses of the First Respondent incurred in the present proceedings in the amount of CHF 5,000 (five thousand Swiss Francs). Since FIFA was represented by its in-house Counsel, the Sole Arbitrator decides that FIFA shall bear its own costs and legal expenses.

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by East Bengal SC against the decision issued on 29 April 2021 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is dismissed.

2. The decision issued on 29 April 2021 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is upheld in its entirety.

3. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne by East Bengal SC in their entirety.

4. East Bengal SC is ordered to pay to Mr. Jaime Santos Colado a total amount of CHF 5,000 (five thousand Swiss Francs) as contribution towards the expenses incurred in connection with these arbitration proceedings. The Fédération Internationale de Football Association shall bear its own costs and expenses incurred in connection with these arbitration proceedings.

5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 31 August 2022

THE COURT OF ARBITRATION FOR SPORT

Patrick Stewart
Sole Arbitrator