IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO.419 OF 2024

Lloyds Realty Developers Limited ....Petitioner
V/S
Oakwood Asia Pacific Limited ....Respondent

Mr. Navroz Seervai, Senior Advocate with Mr. Tushar Hathiramani, Ms. Lizum Wangdi, Mr. Abhishek Kale, Ms. Shalvika Nachankar, Mr. Aditya Ojha and Ms. Meenakshi Krishna i/b M/s. Naik Naik & Co. *for the Petitioner.*

Mr. Ashishchandra Rao with Mr. Manav Nagpal and Ms. Anuli Mandlik i/b M/s. Economic Law Practice *for Respondent.*

CORAM : SANDEEP V. MARNE, J.

JUDG. RESD. ON: 19 NOVEMBER 2025.
JUDG. PRON. ON: 27 NOVEMBER 2025.

J U D G M E N T :

1) The Petition seeks to challenge Award of the Arbitral Tribunal dated 8 April 2024 under Section 34 of the Arbitration and Conciliation Act, 1996 **(Arbitration Act)**. By the impugned Award, the learned sole Arbitrator has dismissed all claims raised by the Petitioner and has awarded costs of Rs.59,85,733.75/- in favour of the Respondent.

2) Petitioner, which was formerly known as Aristo Realty Developers Ltd., is a company incorporated under the Companies Act and engaged in the business of real estate and construction. Petitioner owned Plot No.B, CTS No.1498, A/3 situated off M.V. road, Chimatpada, Marol, Andheri (East), Mumbai- 400056. It was desirous of constructing five star quality hotel/service apartments on the said plot. Respondent is a company incorporated in Labuan and registered in Republic of Singapore. Respondent is engaged in the business of planning, designing, decorating, furnishing and equipping, promoting, managing and operating hotels around the globe. For the purpose of setting up five star quality hotel/service apartments on its plot, Petitioner decided to procure services of the Respondent and executed a Letter of Intent **(LOI)** dated 4 September 2007 to record the intent of the Respondent or its affiliates entering into Management Agreement, Offshore Technical Service and Marketing Agreement and Trademark License Agreement with the Petitioner. According to the Respondent, till execution of formal agreements, the rights and obligations between the parties were governed by the terms of LOI. The LOI was subsequently amended on 25 September 2009 to reflect change in the number of units contemplated. The parties later executed the three agreements on 21 March 2013. The Management Agreement was executed between the Petitioner and Oakwood Management Services India Pvt. Ltd. Offshore Technical Services and Marketing Agreement **(OTSMA)** was executed between the Petitioner and Respondent. A separate Trademark License Agreement was also executed between the Petitioner and the Respondent. According to the Petitioner, Respondent commenced providing technical services to the Petitioner from March/April 2008 in absence of formalised contract. Petitioner claims to have raised loans aggregating INR 120 crores from various banks in anticipation of commencement of hotel business.

3) Subsequent to execution of OTSMA, FSI available on the plots stood revised and the number of units proposed in the hotel were reduced from 199 to 165 units. Petitioner submitted plans and designs of the proposed hotel to the Respondent, who made suggestions and modifications in the designs from time to time. According to the Petitioner, due to deficiency and non-provision of services, the proposed hotel could not come up and only a super structure sans top floor was erected on the plot. In January 2016, Petitioner and Respondent engaged in discussions for selling the unfinished hotel to MapleTree, which transaction could not fructify. According to the Petitioner, it arranged to sell the unfinished hotel to MASA Hotels Private Limited **(MASA)** in September/October 2016 and out of agreed consideration of Rs. 265 crore, MASA paid only Rs.195 crores citing the reason of engagement of the Respondent in setting up of the hotel. In the above background, Petitioner terminated the Management Agreement executed with Oakwood Management Services India Pvt. Ltd. on 20th March 2017. By a separate letter dated 20th March 2017, OTSMA as well as Trademarks Agreement were also terminated stating that they were co-terminus with the Management Agreement. By letter dated 27 March 2017, Respondents sought liquidated damages of USD 2,490,800 under the Management Agreement and also claimed USD 37,500 as technical service fees under the OTSMA. By registered sale deed dated 21 March 2017, Petitioner sold the plot along with unfinished construction to MASA.

4) Oakwood Management Services India Pvt. Ltd. invoked arbitration under the Management Agreement on 7 August 2017 seeking liquidated damages from the Petitioner. By Advocate's letter dated 30th October 2017, Petitioner highlighted breaches of OTSMA committed by the Respondent. On 17th December 2017, Petitioner issued notice

invoking arbitration under OTSMA and nominated the arbitrator. Petitioner filed Arbitration Petition No. 7 of 2018 before the Supreme Court under Section 11(6) of the Arbitration Act seeking appointment of arbitrator. By order dated 17 October 2022, the Supreme Court made over the disputes to Mumbai Centre for International Arbitration (MCIA) for nomination of arbitrator. In the meantime, in the arbitration invoked by Oakwood Management Services India Pvt Ltd, Arbitral Tribunal passed award dated 30 April 2019 directing Petitioner to pay liquidated damages to the tune of USD 5,00,000 for unilateral termination of Management Agreement. Petitioner has challenged the award dated 30 April 2019 by filing Commercial Arbitration Petition No. 941 of 2019 which has been admitted by order dated 5 September 2019 by granting stay on execution of the award.

5) On 30 November 2022, MCIA nominated the learned sole Arbitrator to arbitrate the disputes between the parties. Petitioner filed Statement of Claim before the learned sole Arbitrator claiming an amount of Rs.71,73,06,920/- split into 4 sub-claims and 2 sub-claims for interest. Respondent filed its Statement of Defence. Parties led evidence in respect of their respective cases. The learned Sole Arbitrator has made Award dated 8 April 2024, rejecting all the claims raised by the Petitioner and has awarded cost of Rs.59,85,733.75/- in favor of the Respondent. Aggrieved by the Award dated 8 April 2024, the Petitioner has filed the present Petition under Section 34 of the Arbitration Act.

6) Mr. Seervai, the learned Senior Advocate appearing for the Petitioner, would submit that the Award is challenged essentially on two substantial grounds (i) the Arbitrator rewriting the terms of OTSMA by treating time to be the essence of contract, and by looking into Letter of Intent not forming part of contract, and (ii) the Arbitrator has

erroneously rejected the claim for damages on the ground of failure to set forth breaches committed by Respondent in writing in contemporaneous communications while terminating contract.

7) So far as the first ground of challenge is concerned, Mr. Seervai would submit that the Award imports time as being the essence of the OTSMA, despite recording a finding in para 123 of the Award that time was never to be treated as essence of OTSMA. That the time is treated as essence of contract by construing the terms of LOI dated 4th September 2007, as the learned Arbitrator has held that the 24 months period expressed in Clause D of the LOI can be taken as a good guide for parties' mutual expectation of time within which services were to be performed. Based on that premise, the Award invokes para 3 of Section 55 of the Indian Contract Act to disentitle the Petitioner from claiming damages holding that Petitioner expected belated performance of OTSMA without reserving its right to claim damages. This finding, according to Mr. Seervai, is contrary to the public policy of India as OTSMA contains the 'entire agreement' clause, thereby precluding consideration of any other document executed between the parties prior to execution of OTSMA. He would rely upon judgment of the Apex Court in ***Joshi Technologies v. Union of India and Others***[1]**.** Relying upon judgments of the Apex Court in ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)***[2] and ***Associate Builders vs Delhi Development Authority***[3], Mr. Seervai would submit that ignorance of law laid down by superior court constitutes contravention of fundamental policy of Indian law. Mr. Seervai would further submit that by treating time as an essence of OTSMA, the learned Arbitrator has altered and re-written the terms of contract between the

1 (2015) 7 SCC 728
2 (2019) 15 SCC 131
3 (2015) 3 SCC 49

parties, which is something impermissible, as held by the Apex Court in ***Ssangyong*** (supra) and ***PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others***[4]. In support of contention that no document outside the contract can be looked into for interpreting the terms of contract, reliance is placed on judgment of this Court in ***Konkan Railway Corporation Ltd. Vs. M/s SRC Company Infra Pvt. Ltd.***[5]

8) Mr. Seervai would further submit that even if it is assumed that it was permissible for the Arbitral Tribunal to look into the terms of the LOI, the findings recorded in para-124 of the Award are otherwise contrary to the fundamental policy of Indian law. Relying on the judgment of the Apex Court in ***Hind Construction Contractors v. State of Maharashtra***[6], he would submit that extension of time on payment of fine or penalty on the expiry of time stipulated in the contract makes time not to be the essence of contract. That Clause D of the LOI specifically provided for payment within stipulated time after expiry of period of 24 months. That even otherwise, the learned Arbitrator has erred in holding that in construction contract, time can never be the essence of contract. He would rely upon judgments of the Apex Court in ***M.P. Housing Board v. Progressive Writers & Publishers***[7] and ***McDermott International Inc. vs. Burn Standard Co. Ltd.***[8]

9) Mr. Seervai would further submit that the issue of time being the essence of OTSMA was neither pleaded nor argued by the Respondent and accordingly, Arbitral Tribunal has violated the principles of natural justice by dealing with the issue which was never raised. That

4 2021 SCC OnLine SC 508
5 Commercial Arbitration Petition No. 646 of 2021 decided on 14 November 2025
6 (1979) 2 SCC 70
7 (2009) 5 SCC 678
8 (2006) 11 SCC 181

therefore, the Award deserves to be set aside for violation of principles of natural justice as held in ***Ssangyong Engineering*** and ***PSA SICAL Terminal*** (supra).

10) So far as the second ground of challenge is concerned, Mr. Seervai would submit that the learned Arbitrator has erroneously held that there was no contemporaneous allegation of breach made by the Petitioner. That the said finding is factually incorrect as Petitioner's letter dated 30 October 2017 contains detailed allegations of delay and defaults on the part of the Respondent. That even otherwise, the said finding is in contravention of fundamental policy of Indian law as it ignores the law laid down by the Apex Court in ***Juggilal Kamlapat v. Pratapmal Rameshwar***[9] as followed in ***Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) v. Datar Switchgear Ltd***[10]***.*** He would submit that the Apex Court has held that law permits justification of repudiation on any ground which existed at the relevant time and such ground need not be stated in the correspondence. On the above submissions, Mr. Seervai would pray for setting aside the impugned Award.

11) The Petition is opposed by Mr. Rao, the learned counsel appearing for the Respondent. He would submit that no valid ground of challenge is made out by the Petitioner to the well-considered Award passed by the learned Arbitrator. That the first ground of challenge of Tribunal wrongly holding that the time was essence of contract based on a stipulation from LOI is misconceived. That the said ground is attempted to be created on the very narrow reading of paragraph 124 of the Award. That the Arbitrator has merely referred to the provisions of the LOI as the LOI governed the rights and obligations of the parties till OTSMA was executed in 2017. That the learned Arbitrator has held in

9 (1978) 1 SCC 69
10 (2018) 3 SCC 133

paragraph 123 of the Award that the time was clearly not treated to be the essence of the OTSMA. That the reference to LOI was necessary to hold that even under the LOI, though period of 24 months was provided for performance of obligations, Petitioner had accepted performance without any reservations of services under the OTSMA. He would submit that the learned Arbitrator has not attempted to rewrite the terms of the contract. Without prejudice, he would submit that the question as to whether time was of essence or not is immaterial because the learned Arbitrator, on appreciation of evidence, has found that the Petitioner has not been able to prove any delay or breaches on the part of the Respondent in its performance of OTSMA or even performance under the terms of the Award. He would therefore submit that the first ground of challenge is totally misconceived, deserving its outright rejection.

12) So far as the second ground of challenge about permissibility to justify termination on every ground irrespective of its reflection in the correspondence, Mr. Rao would submit that the judgments of the Apex Court in ***Juggilal Kamlapat*** (supra) and ***MSEDCL*** (supra) apply only when there is repudiation of contract by one party on the basis of default/abandonment by other party. That in the present case, there is no repudiation of the contract by any of the parties. That the Arbitrator has categorically held that Petitioner could not prove any breaches or delays on the part of Respondent. In fact, in cross-examination of CW1, specific admission was given that no dispute was perceived when termination was effected. That therefore in absence of proof of breaches as alleged, Petitioner cannot be heard to say that it had repudiated the contract.

13) Mr. Rao would further submit that after appreciating the evidence on record, the learned Arbitrator has correctly held that there was no causal link between the alleged breaches and the alleged losses

suffered by the Petitioner. That therefore the learned Arbitrator has correctly held that the allegation of breaches as a reason for termination was raised as an afterthought by the Petitioner. He would rely upon judgment of the Apex Court in ***Bhagwati Oxygen Ltd. vs. Hindustan Copper Ltd.***[11] in support of his contention that once a party has accepted performance, it is deemed to have waived or abandoned its right to allege a breach. Mr. Rao accordingly would submit that no case is made out for interference in the impugned Award. He would pray for dismissal of the Petition.

14) Rival contentions of the parties now fall for my consideration.

15) Petitioner was the owner of the land on which it proposed to construct a star category hotel and decided to engage services of Respondent. Initially the contractual relations between the parties were governed by the LOI dated 4 September 2007, as amended on 25 September 2009, under which Petitioner commenced construction of the hotel and Respondent began providing technical services including assistance on design and layout of the units. The construction of the hotel thus started in 2007. There is no dispute to the position that even the payments were made to the Respondent by the Petitioner for services provided by it under the LOI. While the construction work of the hotel was under progress, parties decided to formalize the arrangement by execution of three different agreements. On 21 March 2013, for managing the hotel Management Agreement was executed between Petitioner and Oakwood Management Services India Pvt. Ltd., which is also part of Oakwood Group of Companies. So far as Respondent is concerned, two Agreements were executed on 21 March 2013 i.e.,

11 (2005) 6 SCC 462

OTSMA and Trademark License Agreement. All three Agreements were coterminous. Thus, after 21 March 2013, performance of services by Respondent continued under the terms and conditions agreed in OTSMA. According to Petitioner there is an 'entire agreement' clause in OTSMA, meaning thereby that all contractual relationships were governed by terms and conditions of OTSMA, thereby preventing the contracting parties from looking into any other document for determining contractual obligations, including the LOI dated 4 September 2007. The Petitioner initially terminated Management Agreement executed with Oakwood Management Services India Private Limited on 20 March 2017 which has led to invocation of arbitration by the Operator against the Petitioner and Arbitral Award dated 30 April 2019 has been passed against the Petitioner in respect of termination of Management Agreement and a sum of USD 5,00,000/- is awarded in favour of Oakwood Management Services India Pvt. Ltd. The said Award is subject matter of challenge in pending Arbitration Petition in this Court.

16) In the meantime, the Petitioner has sold the unfinished hotel to MASA in March 2017.

17) The termination notice of 20 March 2017 issued by Petitioner to Respondent terminated OTSMA as well as the Trademark License Agreement. There is no dispute to the position that in the termination notice dated 20 March 2017, Petitioner did not allege any breaches on the part of the Respondent and terminated all the three Agreements stating *"due to certain circumstances, we are unable to complete the construction of proposed structure under construction…."*

18) While the arbitration proceedings *qua* termination of Management Agreement were initiated by Oakwood Management

Services India Pvt. Ltd., the instant Arbitration Petition concerning termination of OTSMA are at the instance of the Petitioner who was the Claimant before the learned sole Arbitrator. Petitioner claimed a sum of Rs.71,73,06,920/- from Respondent comprising of claims towards: (i) loss of Rs.36,37,37,000/- due to sale of property by the claimant below market value (ii) reimbursement of payment made to Respondent under OTSMA of Rs.76,73,199/-, (iii) payment made by Petitioner to various agencies as per directions of Respondent under OTSMA Rs.6,55,34,900/-, (iv) damages for loss of reputation and goodwill due to negligence and default of Respondent Rs.20,00,00,000/-. Claimant also claimed interest at the rate of 18% on various amounts and this is how total claim of Rs.71,73,06,920/- was raised by the Claimant.

19) By his detailed Award, the learned Arbitrator has declined all claims of the Petitioner.

20) Challenge to the impugned Award is mounted by the Petitioner only on two grounds: viz. (i) denial of damages to the Petitioner by Arbitral Tribunal on erroneous assumption of time being essence of contract, which inference is drawn by taking into consideration clauses of LOI, which does not form part of OTSMA and ii) denial of claims of Petitioner on the ground that the Petitioner did not raise the allegation of breaches on the part of Respondent contemporaneously in the correspondence while terminating OTSMA.

21) So far as the first ground of challenge to the impugned Award is concerned, the Arbitral Tribunal is accused of alteration of terms of OTSMA for the purpose of holding that the time was essence of contract. It is contended that the Tribunal has taken into consideration stipulations of the LOI for inferring that time was essence of contract.

According to Petitioner the Arbitral Tribunal has held in paragraph 123 of the Award that time was not the essence of OTSMA. Findings in paragraph 123 of the Award reads thus:

> 123. From the terms of the OTSMA, in particular Articles 7, 9 and 13 thereof it is clear that though in the contractual scheme agreed between the Parties, upon the achievement of the Soft Opening Date under the OTSMA, the Hotel would be handed over to OMS under the MA, and the Soft Opening Date was a date to be mutually agreed between the Parties but not being later than 1 February 2015, the Operating Term of the OTSMA was to subsist until the termination of the OTSMA by agreement of the Parties or the termination of the MA, whichever was earlier. **Time was clearly not treated to be of the essence of the OTSMA.**
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> *(emphasis added)*

Thus the Arbitral Tribunal concluded upon holistic consideration of all clauses of OTSMA and Addendum that the hotel was to be handed over to Oakwood Management Services (Operator) after achievement of soft opening date and that the soft opening date was to be as mutually agreed between the parties, not being later than 1 February 2015. By recording this finding, the Arbitral Tribunal concluded that time was not the essence of OTSMA. Petitioner has not challenged this finding before me and has accepted the same, though this finding completely destroys its claims.

22) According to Petitioner however, in paragraph 124 of the Award, the Arbitral Tribunal took into consideration the time stipulated in clause D of the LOI for the purpose of holding that time was the essence of contract. Findings in paragraph 124 of the Award read thus:

> 124. **Although the OTSMA does not make time the essence of the contract or specify definitive timelines for the completion of the offshore technical services, in the Tribunal's view, the 24 month period expressed at Clause D of the LOI should be taken to be a good guide for the Parties mutual expectation of the time within which offshore technical services would be performed and the Soft Opening Date would be achieved**, and this is corroborated by the projections provided by the Respondent to the

> Claimant at or about the time when the LOI was executed. It is obvious from the record that the services under the OTSMA were not completed within the said period of 24 months from the date of the LOI, but were continued for almost 7 further years. In the Tribunal's view, the extension of time over which offshore technical services were provided by the Respondent does not, without more, establish that the Respondent breached the OTSMA.
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> *(emphasis added)*

Here what the Arbitral Tribunal has done is to look into the timeline specified in the LOI for seeking guidance in respect of 'mutual agreement' between the parties as expressed in the OTSMA for soft opening date. It has concluded that conduct of parties after execution of LOI was such that even 24 month timeline stipulated in LOI could not be treated as the 'mutually agreed' time period for soft opening date under OTSMA. While this inquiry in para 124 of the Award was aimed at finding out whether Petitioner made out a case of failure to provide 'timely' services by the Respondent, Petitioner is now seeking to make a mountain out of molehill by contending that Arbitral Tribunal could not have construed terms of OTSMA by referring to LOI.

23) In my view, Petitioner's assumption that the Arbitrator has treated time as essence of contract is totally misconceived and is based on skewed and myopic reading of the findings recorded in paragraphs 123 and 124 of the Arbitral Award. The Arbitrator was dealing with the allegation of breaches alleged against the Respondent in discharging obligations under OTSMA. In paragraph 123 of the Award, the learned Arbitrator held that time was not treated as essence of OTSMA and thereby absolved Respondent of allegations of delay. In absence of time being essence of OTSMA, the Arbitral Tribunal proceeded to examine whether there was breach of any stipulation of the LOI on the part of Respondent. This exercise was actually not really necessary as Petitioner never pleaded or argued that time was essence of LOI. However, with a

view to assist the Petitioner (and not Respondent), the Arbitral Tribunal proceeded to examine the conduct of the parties with reference to the terms of LOI. This was possibly done as the work of construction of the hotel had substantially progressed before execution of OTSMA and contractual obligations between parties were governed for over 7 years under the LOI. Thus, the exercise of consideration timeline prescribed in the LOI was undertaken by the Arbitral Tribunal for deciding the allegation of non-provision of timely services for construction of hotel leveled by the Petitioner. The construction activity of the hotel was majorly governed by LOI and to a lesser extent, governed by OTSMA. The Arbitral Tribunal could have very well stopped at holding that time was not the essence of OTSMA. But to assist the Petitioner, it went into the aspect of alleged delay in provision of services by Respondent in construction of hotel under the terms of LOI.

24) It was the Petitioner who had accused the Respondent of delaying provision of offshore technical services and therefore, the enquiry into the timeline prescribed in LOI was undertaken essentially for examining Petitioner's case rather than for examining the defence of the Respondent. It ought to have been Petitioner's case that time was the essence of contract and that Respondent failed to provide services in a timely manner and thereby committed breach of obligations under OTSMA. The Tribunal after holding that time was not essence of OTSMA, proceeded to show some latitude in favour of the Petitioner to find out as to whether some timeline could be gathered for performance of contractual obligations and in the process went to examine the timeline stipulated in the LOI. It held that though LOI provided for 24 month period in clause D, which could be taken as a good guide in performance of offshore technical services and soft opening date, the

conduct between the parties indicated that the offshore technical services were provided by Respondent to the Petitioner for seven long years after issuance of LOI. The Tribunal thus concluded that extension of time during which offshore technical services were provided by Respondent did not establish that Respondent breached the OTSMA. It is therefore erroneous on the part of Petitioner to assume that the learned Arbitrator has held that the time was the essence of the contract.

25) Thus, the assumption by the Petitioner that the Arbitral Tribunal has rewritten the terms of OTSMA by looking into the stipulations of LOI is fundamentally erroneous. Having accused Respondent of not providing timely services thereby delaying construction of the hotel, it is rather bizarre that the Petitioner is criticizing the Arbitrator for considering the timeline prescribed in the LOI for examining the allegation of delay in performance of services. It was Petitioner who accused Respondent of not providing timely services thereby delaying construction of the hotel. Petitioner's contentions have been summarized by the Arbitral Tribunal in Para 105 of the Award as under:

> The case of the Claimant is that the Respondent has by its gross negligence miserably failed in discharging their obligations under the OTSMA and miserably failed in providing **timely** and qualitative Technical advice to the Claimant and that the Respondent has been solely responsible and liable for the Hotel/Serviced Apartments not being completed, furnished and equipped due to the Respondent's gross negligence and complete failure on the part of the Respondent to perform its obligations under the OTSMA. The Claimant states that on account of the Respondent's breaches and defaults under the OTSMA, the Claimant was prevented from completing the Project and was instead forced to sell the Property with the unfinished construction to MASA at a loss of Rs. 3,667.67 Lakhs (relative to the Ready Reckoner rate) and that on account of the failure of the Project, the Claimant was entitled to a refund of the sum of Rs. 76.73 lakhs paid to the Respondent and a reimbursement of a sum of Rs.655.35 Lakhs paid to third party service providers. The Claimant further claims a loss of

> reputation and goodwill in the sum of Rs. 2,000 Lakhs and pre-reference interest @ 18% and interest pendente lite.
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> *(emphasis and underlining added)*

26) In his Affidavit-of-Evidence, Petitioner's witness deposed as under:

> That, due to the breach committed by the Respondent, the construction of the Hotel/ Serviced Apartments could not be completed in time and was substantially delayed.

Thus, Petitioner was seeking to accuse Respondent of causing delay in providing timely services for construction of the hotel. However, construction of hotel did not commence after execution of OTSMA and majority of services were provided by Respondent before execution of OTSMA. The activity of construction of building took place for 6 long years before execution of OTSMA and on the basis of terms and conditions of LOI. Therefore the Tribunal proceeded to examine whether Respondent delayed provisions of services during whole period of construction, including the period when obligations were governed by LOI. If Petitioner was to restrict its accusation of delay only after execution of OTSMA, there would have been no occasion to look into terms and conditions of LOI. However, it is Petitioner who drove the Arbitral Tribunal in the direction of examining the allegation of delay prior to execution of OTSMA. It would be apposite to reproduce some of the averments in the Statement of Claim, which read thus:

> 11. Even though transaction Agreements were not executed, the Respondent enquired with the Claimant in February, 2008 whether the Respondent can commence the Technical Services and also asked for upfront part payment of USD 27,000 which was promptly paid by the Claimant in March, 2008. The Claimant states that from March/ April,

> 2008 the Respondent commenced providing Technical Services to the Claimant. … … …
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> 20. The Respondent kept extending soft opening dates through various projections time and time again as under:
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> a. 1st Projection dated April, 2007 soft opening in September, 2009;
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> b. 2nd Projection dated March 2008 soft opening in January, 2011;
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> c. 3rd Projection dated June, 2011 soft opening in June, 2014;
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> d. 4th Projection in August, 2015 (i.e. more than 2 years after execution of the three Agreements) soft opening in June, 2017.
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> 34. … … As stated hereinbefore, right from the year 2005 the Respondent approached the Claimant the Respondent's pace of work, method of working, frequent changeover of top officials and key personnel, frequent delay and changes in drawings etc. led to inordinate delays in completing the structure and achieving the soft opening date.

Thus, the allegations of delay made by the Petitioner were not restricted post execution of OTSMA and Petitioner accused Respondent of delay even when the relations were governed by LOI. Therefore the Arbitrator has considered the conditions of LOI and held that though LOI prescribed timeline of 24 months for soft opening of hotel, Petitioner permitted Respondent to provide services well past the period of 24 months and therefore was precluded from alleging breaches by Respondent.

27) Also, this is not a case where breach of obligations under OTSMA was proved, but Arbitral Tribunal took assistance of stipulations of LOI for absolving Respondent of consequences of such breaches. Petitioner has thoroughly failed to prove breach of any obligation by Respondent under OTSMA. Therefore a stray observation made by the Arbitral Tribunal in para 124 of the Award cannot be plucked by the Petitioner for contending that the Arbitral Tribunal has rewritten the terms of LOI by considering the terms of LOI.

28) Thus, the learned Arbitrator has not held that time was the essence of contract even as per the LOI and on the contrary, has held that Respondent was permitted to render offshore technical services for seven long years contrary to the period of 24 months provided in the LOI. Therefore, the first ground raised by the Petitioner is premised on erroneous assumption that the learned Arbitrator treated time as essence of the contract. Therefore, the objection of impermissibility to rely on terms of LOI in the light of OTSMA being 'entire Agreement' raised by Petitioner by placing reliance on judgment of the Apex Court in ***Joshi Technologies*** (supra) is misconceived. Since the judgment in ***Joshi Technologies*** is not applicable, Petitioner's further contention that ignorance of law declared in Supreme Court judgment constitutes a valid ground under Section 34 of the Arbitration Act is also meaningless. Therefore, reliance on judgments in ***Ssangyong Engineering*** and ***Associate Builders*** (supra) is inapposite. The further argument that the Arbitrator has re-written terms of contract is again misconceived as the Arbitrator has not held time to be the essence of contract. The finding of the Arbitral Tribunal that neither OTSMA nor LOI treated time as essence of contract is in accordance with the terms and conditions of OTSMA and LOI. The Arbitral Tribunal has not rewritten the terms of OTSMA by relying on LOI. Reliance in this regard on judgments of the Apex Court in ***Ssangyong Engineering***, ***Associate Builders*** and ***PSA SICAL Terminal*** (supra) is therefore clearly misplaced. Equally inapplicable is the ratio of judgment of this Court in ***Konkan Railway Corporation Ltd.*** (supra) wherein it is held that terms of contract cannot be interpreted with reference to contents of file notings. In the present case, the Arbitral Tribunal has not interpreted OTSMA with reference to the stipulations of LOI.

29) Petitioner has also raised a without prejudice contention that even if terms of LOI are permitted to be read as part of contract, time could still not be treated as essence of LOI on account of clause D of LOI providing for consequences of payment at the rate of USD 4,000 per month. As observed above, the learned Arbitrator has not held that time was the essence of contract as per the LOI and on the contrary, has held that Respondent was permitted to render offshore technical services for seven long years contrary to the period of 24 months provided in the LOI. Therefore, reliance on the judgment of the Apex Court in ***Hind Construction Contractors*** (supra) holding that time cannot be essence of contract which contemplates extension of time for payment of fine or penalty post-expiry of time stipulated in the contract is unwarranted.

30) Further contention raised on behalf of the Petitioner that time can never be treated as essence of a construction contract is again misconceived since the Arbitrator has not held that either OTSMA or LOI treated time to be essence of contract. Therefore, reliance on judgments in ***Madhya Pradesh Housing Board*** and ***McDermott*** (supra) is meaningless.

31) The further objection that principles of natural justice were violated in recording finding of time being essence of contract, in absence of any pleading by the Respondent, is again misconceived as the learned Arbitrator has not treated time as essence of contract in any manner.

32) So far as second ground of challenge raised by the Petitioner is concerned, the same relates to the finding of the Arbitral Tribunal in paragraph 138 of the Award, wherein it is held that even if there was

delay on the part of the Respondent in providing services under OTSMA, the claimant did not contemporaneously attribute delay as being the cause for termination.

33) One of the grounds on which the Arbitral Tribunal has rejected Petitioner's allegation of delay on the part of Respondent for termination of OTSMA is failure on the part of Petitioner to contemporaneously blame Respondent for delay. As observed above, the termination letter dated 20 March 2017 did not contain any allegations of delay on the part of the Respondent and the Petitioner proceeded to terminate OTSMA alongwith two other Agreements by citing the reason of *"due to certain circumstances, we are unable to complete the construction of proposed structure under construction…"*. The Arbitral Tribunal has recorded following findings in paragraphs 137 to 140 of the Award:

> 137. It appears to the Tribunal that contemporaneously, on its part, the Claimant did not blame the Respondent for the delay in the completion of construction of the hotel, even in the letter dated 20 March 2017 by which it terminated the OTSMA, nor did it do so in its letter dated 5 June 2017. The Tribunal notes the Claimant's submission that "...that a repudiation of a contract can subsequently be justified on any ground existing at the time of the repudiation though that ground was not the one stated while repudiating the contract...". It is common ground between the Parties that the OTSMA was not terminated 'for cause' by the Claimant, but as a consequence of the unilateral termination of the MA. In the Tribunal's opinion, the termination of a co-terminus agreement on a unilateral basis as has been done in the present case cannot *ipso facto* prevent the Party claiming breach from making out a case of a breach in the usual way.
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> 138. As to the above, the Tribunal would expect the Claimant to have made assertions of delays/breaches by the Respondent contemporaneously or at or about the time the OTSMA was terminated. The Tribunal notes that the first ever vague and unspecified complaint of the Respondent's failures and defaults being the cause of the losses which forced the sale of the hotel was made by the Claimant in its letter of 22 April 2017 but even in that instance, the Claimant was merely attempting to fend off a claim under the MA and stated that it had already paid the Respondent for whatever services had been provided by the Respondent. It is only on 30 October 2017 that the Claimant made detailed allegations of delays and defaults on the part of the Respondent. By that time, the arbitration under the MA was already in

progress. In the Tribunal's opinion, even if there were delays on the part of the Respondent in providing services under the OTSMA, the Claimant did not contemporaneously attribute the Respondent's delay as being the cause of the delay in the completion of the project or of the loss it claims in this arbitration.

139. In the circumstances, the Tribunal concludes that delay in the completion of construction of the Hotel is not sufficiently explained by the Claimant to have been caused solely and entirely by the Respondent.

140. In the Tribunal's view, the Claimant accepted the belated performance of the offshore technical services by the Respondent without any reservation of a right to claim the consequences of the delay. In the Tribunal's view, such actions of the Claimant must necessarily have the consequence provided for in the third paragraph of Section 55 of the Contract Act, 1872, namely that the Claimant must be treated to have given up its right to to make a claim for any losses caused by the said delay. On this point, the Tribunal finds merit in the Respondent's reliance on the judgement of the Supreme Court in *Bhagwati Oxygen Ltd v Hindustan Copper Ltd. (2005) 6 SCC 462*, where the court held that where contemporaneously a party does not make any complaint of non-performance but continues to accept performance without avoiding the contract on the ground that there was a breach by the other party, the first party must be treated to have waived or abandoned its right to claim damages for breach. In the present case, the ratio of the judgement of the Supreme Court must apply to the Claimant's right to claim damages for the Respondent's delay.

34) Petitioner contends that the above findings of the Arbitral Tribunal are in conflict with the fundamental policy of Indian law as it ignores the law laid down by the Apex Court in ***Juggilal Kamlapat*** and ***MSEDCL*** (supra). In ***Juggilal Kamlapat*** (supra) the Apex Court has held in paragraph 23 as under:

23. It was also contended that the defendant not having raised the plea in their correspondence with the plaintiff that the delivery orders tendered were defective was estopped from justifying their requisition of the contracts on that ground. As the High Court has pointed out no case of estoppel was pleaded by the plaintiff and, therefore, it was the plaintiff who should be precluded from raising the question of estoppel. Apart from that, the law permits defendant to justify the repudiation on any ground which existed at the time of the repudiation on whether or not the ground was stated in the correspondence. (See Nune Sivayya v. Maddu Ranganayukulu 62 IA 89, 98 : AIR 1935 PC 67).

35) In ***Juggilal Kamlapat*** (supra), the issue was about estoppel against the Defendant who did not raise the plea of defect in delivery orders in contemporaneous correspondence. However, it appears that the ground of estoppel was also not pleaded by the Plaintiff. However, repudiation of contract was sought to be justified on the ground of defect by the Defendant. It is in the light of this factual position, where the plea of estoppel was not raised by the Plaintiff in the pleadings, the Supreme Court has held that it was open to Defendant to justify repudiation on all available grounds, irrespective of whether the defect was pointed out in correspondence or not. On account of use of the words 'apart from that' in the judgment, it is contended on behalf of Petitioner that the law laid down in the judgment is that in every case termination of contract can be justified on possible grounds, irrespective of whether the ground is raised in correspondence or not. The present case does not involve repudiation of contract. Repudiation is an act by one party to a contract showing that the party would not fulfill the obligations. Repudiation arises out of conduct. On the other hand, termination is the legal ending of the contract effected by express communication. In the present case, the contract has been terminated by express communication, that too by the Petitioner without alleging any breaches on the part of the Respondent. When a contract is terminated by citing reasons for termination, it is difficult to accept that the reasons not mentioned in termination letter could still be argued in litigation. Therefore, the ratio of the judgment in ***Juggilal Kamlapat*** (supra) would not apply to the facts of the present case.

36) ***MSEDCL*** (supra) follows the judgment in ***Juggilal Kamlapat*** (supra) in which it is held in paragraph 55 as under:

> 55. We have already referred to these findings hereinabove. The learned Senior Counsel appearing for Respondent 2 referred to the judgment of this Court in *Juggilal Kamlapat v. Pratapmal Rameshwar (1978) 1 SCC 69*

wherein it has been held that repudiation of a contract can be justified on the basis of any ground that existed in fact, even though not stated in the correspondence. The following passage from the said judgment needs a quote: (SCC p.83, para 23)

> "23. It was also contended that the defendant not having raised the plea in their correspondence with the plaintiff that the delivery orders tendered were defective was estopped from justifying their requisition of the contracts on that ground. As the High Court has pointed out no case of estoppel was pleaded by the plaintiff and, therefore, it was the plaintiff who should be precluded from raising the question of estoppel. Apart from that, the law permits defendant to justify the repudiation on any ground which existed at the time of the repudiation on whether or not the ground was stated in the correspondence. (See Nune Sivayya v. Maddu Ranganayukulu 1935 SCCOnLine PC 6 : (1934-35) 62 IA 89 at p.98 : AIR 1935 PC 67)."

37) ***MSEDCL*** (supra) also involved the issue of repudiation of contract. On the other hand, reliance by Mr. Rao on the judgment of the Apex Court in ***Bhagwati Oxygen Ltd.*** *(*supra) is apposite in which the Apex Court has held in paragraphs 18 to 21 as under:

> 18. In the light of rival contentions of the parties, in our opinion, three questions arise for our consideration:
>
> (1) Whether on the facts and in the circumstances of the case, the arbitrator was right in allowing the claim of BOL?
>
> (2) Whether the arbitrator had misconducted himself in passing the impugned award and by dismissing the counterclaim of HCL and whether the learned Single Judge and the Division Bench of the High Court were right in setting aside that part of the award by directing the arbitrator to reconsider the matter and decide it afresh? and
>
> (3) Whether the arbitrator had power to award interest at the rate of eighteen per cent per annum for pre-reference period, pendente lite and post-reference i.e. future interest from the date of award till the date of payment and whether the learned Single Judge and the Division Bench were justified in reducing the rate of interest from eighteen per cent to six per cent?
>
> 19. Now, so far as the first question is concerned, the arbitrator considered the matter in detail. He observed that after the agreement was entered into between the parties, BOL set up its plant and commenced supply of oxygen to HCL. It was the case of BOL that though oxygen was supplied to HCL,

no payment was made by HCL. It was alleged by HCL that oxygen supplied by BOL did not meet the purity standard of 99 per cent nor the minimum standard of 85 per cent but it varied between 45 per cent to 65 per cent. BOL was, therefore, not entitled to payment for the supply. It was also contended that clause 10.5 (referred to earlier by us) specifically provided that in case quantity of gas supplied goes down below the guaranteed purity, no payment would be made. Since the purity of oxygen gas was below 85 per cent, HCL was justified in refusing payment. It was also submitted that as per agreement, BOL was required to establish a 50,000 litres vacuum insulated storage tank (VIST) evaporation-and-distribution system in the plant and was to maintain constant stock of 50,000 litres of liquid oxygen but BOL failed to establish it. There was thus breach of condition by BOL. Keeping that fact in view, payment was not made by HCL and it could not have been held that HCL was wrong in not making payment. BOL, in view of breach of condition could not have asked for payment. The arbitrator, it was therefore submitted, was wrong in allowing the claim of BOL.

20. Now, the arbitrator has considered the contentions of both the parties. He observed that as per the contract, BOL had undertaken to provide a VIST for storage of liquid oxygen of 50,000 litres. It was not disputed that VIST was not established by BOL and there was no provision for storage of liquid oxygen. He, however, observed that HCL neither insisted for establishing VIST nor objected for not establishing it.

21. Regarding purity of oxygen, the arbitrator observed that HCL never complained regarding the fall of purity of oxygen during the relevant period. Referring to the letters written by HCL to BOL, the arbitrator observed that HCL continued to accept oxygen gas supplied by BOL without avoiding the contract on the ground that there was breach of agreement by BOL. The arbitrator observed that there was neither excess consumption of furnace oil nor drop in production by HCL. Referring to the decisions of this Court in Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh [(1968) 2 SCR 548 : AIR 1968 SC 933] and Brijendra Nath Bhargava v. Harsh Wardhan [(1988) 1 SCC 454] the arbitrator held that even if it was the case of HCL that there was non-compliance with certain terms and conditions by BOL, there was waiver and abandonment of the rights conferred on HCL and it was not open to HCL to refuse to make payment to BOL on that ground. In view of waiver on the part of HCL, it was incumbent on HCL to make payment and since no such payment was made, BOL was right in making grievance regarding non-payment of the amount and accordingly an award was made in favour of BOL. The learned Single Judge as well as the Division Bench of the High Court considered the grievance of HCL so far as the claim of BOL allowed by the arbitrator was concerned and upheld it.

38) Thus, in ***Bhagwati Oxygen Ltd.*** (supra), the Apex Court has held that the conduct of Respondent therein in not complaining about fall

of purity of oxygen during relevant period constituted waiver. It therefore cannot be contended that the Arbitral Tribunal has ignored the law or judgment of superior court.

39) What must also be noted in the present case is that the learned Arbitrator has not rejected the claim of the Petitioner only on account of failure to allege breaches in the contemporaneous correspondence. The Arbitral Tribunal has made in-depth inquiry into the allegations of breach and after appreciating the evidence on record, has arrived at a conclusion that there are no breaches at all. Failure to allege breaches in contemporaneous correspondence is merely an additional facet/reason for rejecting the claims of the Petitioner. Fundamentally, however, Petitioner has failed to establish any breach and it is not that despite proving breaches, the learned Arbitrator has turned down the plea of breaches only on account of failure to allege the same in the contemporaneous correspondence.

40) Petitioner has thus failed to make out any of the enumerated grounds under Section 34 of the Arbitration Act. The Award is sought to be challenged only on two grounds and both of them are found to be baseless. The Arbitration Petition is therefore liable to be dismissed. The Petition is found to be wholly misconceived warranting imposition of costs while dismissing the same. However, since the learned Arbitrator has already awarded costs of Rs.59,85,733.75/- in favour of the Respondent, I am not inclined to impose any further costs on the Petitioner while dismissing the Petition.

41) Accordingly, the Commercial Arbitration Petition is **dismissed** with no further order as to costs. The Prothonotary and Senior

Master shall encash the Bank Guarantee submitted by the Petitioner in pursuance of order dated 24 January 2025 and pay the realised amount to the Respondent.

(SANDEEP V. MARNE, J.)

42) After the judgment is pronounced, the learned counsel appearing for the Petitioner seeks stay of the order for encashment of bank guarantee for a period of four weeks. The request is opposed by the learned counsel appearing for the Respondent. Considering the nature of findings recorded, I am not inclined to grant stay on encashment of bank guarantee. The request is accordingly rejected.

NEETA SHAILESH SAWANT

Digitally signed by NEETA SHAILESH SAWANT
Date: 2025.11.27 20:20:13 +0530

(SANDEEP V. MARNE, J.)