IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION (LODG.) NO. 28685 OF 2024

WITH

INTERIM APPLICATION (LODG.) NO. 28770 OF 2024

IN

COMMERCIAL ARBITRATION PETITION (LODG.) NO. 28685 OF 2024

Hindustan Petroleum Corporation Ltd. ..... PETITIONER

: VERSUS :

Om Constraction on behalf of Om Constraction
Nice Projects Limited JV .... RESPONDENT

Mr. Zubin Behramkamdin, Senior Advocate with Mr. Vijay Purohit, Mr. Pratik Jhaveri and Mr. Samkit Jain i/b. P & A Law Offices, for the Petitioner.

Mr. Akshay Ringe with Mr. Akash Menon and Ms. Anjana Vijay, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

JUDG. RESD. ON : 5 JANUARY 2026.

JUDG. PRON. ON : 19 JANUARY 2026.

JUDGMENT :

1) By this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**), Petitioner challenges Award of the learned sole Arbitrator dated 18 June 2024. By the impugned Award, the Arbitral Tribunal has allowed the claim of the Respondent in the sum of Rs.19,82,79,601/- alongwith interest @12% p.a. till the date of the

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Award. The Arbitral Tribunal has further directed release of hold on the amount of security deposit and retention amount. The Tribunal has also granted post Award interest @ 15% p.a. from 1 September 2024.

FACTS

2) Petitioner is a State-owned oil company and a Government of India Undertaking. The Respondent is a Joint Venture of Om Constraction and Nice Projects Ltd. The Petitioner issued tender for execution of civil, structural and piping work at the second-generation Ethanol Bio Refinery, Bathinda on 30 April 2021 and corrigendum dated 18 May 2021. A Joint Venture **(JV)** was executed between Om Constraction and Nice Projects Ltd. on 31 May 2021. Om Constraction is a proprietary concern of Mr. Satya Pal Yadav whereas Nice Projects Ltd. is a company registered under the provisions of Companies Act, 1956. The Joint Venture /Consortium Agreement dated 31 May 2021 was executed by Mr. Sartaj Ali in his capacity as Director of M/s. Nice Projects Ltd. The name of JV was indicated as 'Om Constraction-Nice Projects Ltd.(JV)'. The JV submitted its bid in pursuance of tender notice. Respondent claims that another JV Agreement was executed on 2 July 2021, in which the share of Om Constraction in the JV was indicated as 75% and of Nice Projects Ltd. as 25%. According to the Petitioner said JV Agreement dated 2 July 2021 was not submitted to it.

3) The National Company Law Tribunal, New Delhi Bench (**NCLT**) had passed order dated 12 February 2021 under Section 14 of the Insolvency and Bankruptcy Code, 2016 admitting Company Petition No.3042/ND/2019 and had initiated Corporate Insolvency Resolution Proceedings **(CIRP)** against Nice Projects Ltd. According to the Petitioner, this information was suppressed by the Respondent, and the JV Agreement dated 31 May 2021 was signed by the suspended director of M/s. Nice Projects Ltd. and not by the Interim Resolution Professional appointed vide Order dated 12 February 2021.

4) The Respondent-JV emerged as successful bidder and the Petitioner issued Purchase Order dated 15 July 2021 for execution of the work. On the same day, Petitioner also issued Letter of Award to the JV for the amount of Rs. 111,40,31,358/-. The Respondent commenced execution of the work. On 17 August 2021, 20 August 2021, 3 September 2021 and 1 October 2021, Petitioner issued show cause notices to the JV alleging slow progress of the work. On 30 May 2022, the date of completion of work expired. On 1 June 2022, the Respondent applied for extension of time. On 7 June 2022, the Petitioner extended the time till 14 July 2022. On 17 June 2022, the Petitioner issued final show cause notice to the JV. On 24 August 2022, the Respondent further requested for extension of time. However, on 26 August 2022, Petitioner terminated the contract. On 7 September 2022, the Respondent invoked arbitration clause. The Respondent filed application under Section 11 of the Arbitration Act on 21 October 2022 seeking appointment of the Arbitrator. In that application, the Respondent disclosed that one of the JV partners Nice Projects Ltd. was undergoing CIRP. By Order dated 12 December 2022, this Court constituted arbitral tribunal of learned sole Arbitrator. The Respondent filed its Statement of Claim. The Petitioner filed application dated 3 February 2023 challenging *locus standi* of Om Constraction to prosecute the claim in absence of Nice Projects Ltd. On 23 March 2023, the Arbitrator rejected the application preferred by the Petitioner challenging *locus standi* of the Respondent.

5) On 12 April 2023, the Respondent filed application under Section 17 of the Arbitration Act seeking interim measures of *status-quo* at the project site. The Tribunal passed order directing the parties to maintain *status-quo* till decision on application filed under Section 17 of the Arbitration Act. Petitioner filed Statement of Defence alongwith compilation of documents on 31 July 2023. On 18 August 2023, Petitioner changed its Advocate. The Arbitral Tribunal directed both the sides to complete the process of inspection of the documents, to file list of witnesses alongwith affidavit of evidence by 15 September 2023.

6) The Petitioner claims that by end of August-2023, it discovered that the Respondent had participated in the tender process by suppression of initiation of CIRP against Nice Projects Ltd. The Petitioner addressed email dated 1 September 2023 to the learned Arbitrator seeking stay of arbitral proceedings alleging fraud and false declaration by the Respondent. It is Petitioner's case that the Tribunal prevented it from filing any further application on the issue of jurisdiction and only permitted filing of written submissions on the objection of jurisdiction. Accordingly, on 13 September 2023, Petitioner filed written submissions. On 16 September 2023, the Tribunal passed Procedural Order No.9 rejecting Petitioner's objection of jurisdiction under Section 16 and 32 of the Arbitration Act. The Petitioner filed Writ Petition No.3553 of 2023 before this Court on 29 September 2023 challenging order dated 16 September 2023. The Petition was however dismissed by judgment and order dated 17 October 2023.

7) Petitioner thereafter sent email to the learned Arbitrator on 25 October 2023 seeking stay of proceedings till filing of application for amendment of Statement of Defence for incorporating the ground of suppression of information relating to initiation of CIRP against Nice Projects Ltd. and fraud played in securing the contract. The request was rejected by the Arbitrator vide order dated 25 October 2023 holding that no application for amendment would be permitted. Petitioner nonetheless filed one more application for amendment of Statement of Defence on 1 November 2023, which was rejected by Procedural Order No.11 dated 1 November 2023 referring to the previous decision dated 25 October 2023. The Petitioner filed application alleging bias against the learned sole Arbitrator on 18 December 2023, which was rejected on 18 December 2023.

8) The Arbitral Tribunal thereafter heard the counsel appearing for the parties and declared Award dated 18 June 2024. By the impugned Award dated 18 June 2024, the Arbitral Tribunal has

awarded claim of the Respondent in the sum of Rs.19,92,79,827/-. The Tribunal has also awarded counterclaim in favour of the Petitioner in the sum of Rs.10,00,226/-. Accordingly, the net sum awarded in favour of the Respondent is Rs.19,82,79,601/-. The Arbitral Tribunal has directed release of hold on the amounts towards security deposit and retention amount w.e.f. 14 July 2023. The Petitioner is barred from executing any work at risk and cost of the Respondent by invoking the clause 12 of the Agreement. The Arbitral Tribunal has awarded interest @ 12 % per annum upto the date of making of the Award and post Award interest @15% per annum from 1 September 2024. Aggrieved by the impugned Award, the Petitioner has filed the present Petition under Section 34 of the Arbitration Act. By order dated 21 August 2025 this Court has unconditionally stayed the Award. The Petition is taken up for hearing and disposal with the consent of the learned counsel appearing for the parties.

SUBMISSIONS

9) Mr. Behramkamdin, the learned Senior Advocate appearing for the Petitioner has raised four broad objections to the impugned Award viz., (i) that the purchase order, letter of Award, Arbitration Agreement and the Arbitral Award are vitiated by fraud allegedly committed by the Respondent in not disclosing initiation of CIRP against M/s. Nice Projects Ltd., (ii) that the Arbitral Tribunal erred in allowing claims of Respondent in absence of any evidence on record (iii) that the Arbitral Tribunal has denied the opportunity of leading evidence to the Petitioner and (iv) that the Arbitral Tribunal was biased against the Petitioner.

10) So far as the first ground of the Award being vitiated by fraud is concerned, Mr. Behramkamdin would submit that well before publication of tender notice dated 30 April 2021, one of the constituent partners of JV- Nice Projects Ltd. was subjected to CIRP by order dated 12 February 2021 by admission of Company Petition. That Joint Venture

Agreement executed on 31 May 2021 by the director of Nice Projects Ltd. was *ab initio void* as the said director had no authority to execute the Agreement on behalf of the Company. That the tender notice specifically stipulated declaration about non-pendency of any insolvency proceedings. That Nice Projects Ltd. submitted declaration dated 11 June 2021 that it was not undergoing CIRP, which was clearly false. That the Petitioner was not aware about order dated 12 February 2021 passed by the NCLT and the said information was suppressed both, by M/s. Nice Projects Ltd. as well as by JV. That M/s. Nice Projects Ltd. was the lead member of JV, which is clear not only from JV Agreement dated 31 May 2021 but also from affidavit dated 3 July 2021. That purchase order dated 15 July 2021 also recorded that M/s. Nice Projects Ltd. was lead partner of JV. That when the Petitioner had challenged maintainability of arbitral proceedings on account of lack of proper authority from M/s. Nice Projects Ltd. for institution of arbitration and had filed application for impleadment of M/s. Nice Projects Ltd.. That application filed by the Respondent under Section 11 of the Arbitration Act vaguely made disclosure of initiation of CIRP proceedings against M/s. Nice Projects Ltd. without disclosing the date of order admitting the company petition. That from said disclosure made in Section 11 Petition, it was impossible for the Petitioner to note that M/s. Nice Projects Ltd. was subjected to CIRP well before execution of JV Agreement and before issuance of tender notice. That Petitioner acquired knowledge about the said factum for the first time in the end of August 2023. Accordingly, the Petitioner filed Applications under Section 16 and 32 of the Arbitration Act, which has been erroneously rejected by the Arbitral Tribunal.

11) Mr. Behramkamdin would further submit that since M/s. Nice Projects Ltd. was admitted into CIRP on 12 February 2021, the very contract awarded in favour of the JV is an outcome of fraud. That therefore there existed no valid arbitration agreement between the parties. That the Arbitral Tribunal perversely rejected Petitioner's application under Sections 16 and 32 of the Arbitration Act by order

dated 16 September 2023 holding that the Petitioner ought to have verified correctness of undertaking given by M/s. Nice Projects Ltd. and that fraud gave right to criminal action, which could not be decided in arbitration. That the Arbitral Tribunal has erroneously held that the JV is an independent legal entity and that the entity was not in CIRP. That JV Agreement itself makes it clear that the JV is not a separate or independent legal entity. That therefore Order dated 16 September 2023 is patently illegal. He would submit that dismissal of Writ Petition No. 3553 of 2023 does not come in the way of the Petitioner challenging correctness of order dated 16 September 2023 as this Court has left the said challenge open to be raised in Section 34 Petition.

12) Mr. Behramkamdin would further submit that the alleged Memorandum of Understanding dated 31 May 2021 and two JV Agreements dated 2 July 2021 and 16 July 2021 are contrary to clause 5.3(3)(c) of Invitation for Bid, which prevented parties from effecting any changes in the JV Agreement. That, in any case, said MoU and two JV Agreements were never brought to the notice of the Petitioner. That the same are executed after award of the contract and are otherwise meaningless. He would submit that the entire contractual agreement between the parties i.e. purchase order, letter of award and the tender, being outcome of fraud, cannot be given effect to. He would rely upon judgments of the Apex Court in ***Avitel Post Studioz Pvt. Ltd and others V/s. HSBC PI Holdings (Mauritius) Ltd.***[1] and ***A.V. Papayya Sastry and others Vs. Government of Andhra Pradesh and others***[2].

13) Mr. Behramkamdin would further submit that the Arbitral Tribunal has perversely allowed the claims of the Respondent in absence of any evidence. That Respondent produced several third-party documents and unilateral documents without any reference to the same in the pleadings but did not lead evidence to prove them. That Arbitral

[1] 2021 (4) SCC 713
[2] 2007 (4) SCC 221

Tribunal erroneously proceeded to rely on the said documents without the same being proved. To illustrate, he would submit that the learned Arbitrator has allowed Respondent's claim qua supply of material holding that the Petitioner consumed the supplied material and that therefore measurements given by the Respondent must be accepted as true and correct. Relying on Clause-12 of the general terms of contract, he would submit that the parties had agreed for joint measurements and that Respondent had failed to come forward for joint measurements. That the Arbitral Tribunal has fallen in grave error in relying on Respondent's documents for supply of goods in absence of evidence. He would rely upon judgments of the Apex Court in ***Bharat Coking Coal Ltd. Versus. L.K.Ahuja***[3], ***Associate Builders Versus. Delhi Development Authority*** [4] and ***PSA Sical Terminals Pvt. Ltd. Versus. Board of Trustees VOCPT and Others.***[5] He would submit that even while awarding costs, the Arbitral Tribunal did not have Affidavit of Respondent. That though costs were not granted in Section 11 Application, the Arbitral Tribunal proceeded to award the same. Similar is the position for awarding costs in respect of Writ Petition filed by the Petitioner.

14) Mr. Behramkamdin would further submit that the learned Arbitrator refused to allow Petitioner to lead evidence. That Petitioner had objected to the request of the Respondent to proceed with final arguments without leading evidence. That Petitioner was required to raise the issue of fraud by filing application under Sections 16 and 32 of the Arbitration Act reserving its right to lead evidence. That thereafter, Petitioners made attempt to amend the Statement of Defence to bring on record fraud committed by the Respondent. After rejection of application for amendment of Statement of Defence and application alleging bias, the Arbitral Tribunal straightaway proceeded to hear final arguments without giving an opportunity to the Petitioner to lead evidence.

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[3] 2004 (5) SCC 109
[4] 2015 (3) SCC 49
[5] 2023 (15) SCC 781

15) Mr. Behramkamdin would further submit that the learned Arbitrator clearly exhibited bias against the Petitioner. He would cite the instances of Arbitral Tribunal (i) refusing to conduct physical hearings, (ii)passing procedural orders, (iii)not accurately capturing the transpired events, (iv)not video recording the proceedings, (v)calling upon parties to confirm in writing of provision of full opportunity and following of procedure specified in Arbitration Act (vi)not accommodating the request made by the Counsel for the Petitioner in respect of the dates for final arguments while giving leeway to the Counsel for the Respondent in the matter of fixation of dates for final arguments, (vii)suo-moto grant of extension of time for filing Statement of Claim, (viii)threatening to impose costs on the Petitioner which was payable to the Arbitrator himself, (ix)making personal remarks against Senior Advocates appearing for the Petitioner, (x) allowing Respondent to produce documents over email and by way of screen sharing, etc. He would submit that Petitioner's application alleging bias filed on 18 December 2023 was rejected on the same day without considering any submissions. That though the Arbitrator recorded that he would pass final decision on application after considering reply of the Respondents, neither any reply was filed nor any separate order was passed but findings recorded in procedural order dated 18 December 2023 are reiterated in the final arbitral award. Mr.Behramkamdin would submit that the learned Arbitrator was grossly biased against the Petitioner and has misconducted throughout the arbitral proceedings and on this ground also, the arbitral Award deserves to be set aside.

16) On above broad submissions, Mr. Behramkamdin would pray for setting aside the impugned arbitral Award.

17) Mr. Ringe, the learned counsel appearing for the Respondent would oppose the Arbitration Petition contending that the Petition is filed and argued as if it is an appeal over an arbitral award. That Petitioner is seeking reevaluation of facts and evidence which is impermissible under

Section 34 of the Arbitration Act. That Petitioner has raised new grounds in Section 34 Petition by manufacturing new causes of action and by introducing a new case, which was never argued before the Arbitral Tribunal.

18) Mr. Ringe would submit that the Petitioner was always aware of initiation of CIRP against Nice Projects Ltd. That pendency of CIRP against Nice Projects Ltd. was disclosed in Section 11 application filed on 19 October 2022. After learning about pendency of CIRP against Nice Projects Ltd., Petitioner did not raise any objection to validity of contract or validity of arbitration agreement but chose to file an application objecting to the authority of person filing Statement of Claim and seeking impleadment of Nice Projects Ltd.. Thus, the factum of Nice Projects Ltd. undergoing CIRP was used only for the purpose of questioning authority of person filing Statement of Claim. To satisfy the query, the Respondent produced authority of IRP on behalf of Nice Projects Ltd. Petitioner thereafter filed Statement of Defence on 31 July 2023 and once again did not raise any objection about jurisdiction. That it is only after change of advocate of the Petitioner that repeated applications were filed by the Petitioner *inter-alia* under Section 16 of the Arbitration Act. That order passed by the Arbitral Tribunal on application under Section 16 was challenged before the Division Bench of this Court and by a detailed judgment, the Division Bench has dismissed the said petition. That the Division Bench has not accepted the objection to the jurisdiction of the Arbitral Tribunal sought to be raised by the Petitioner. That the findings of the Division Bench have attained finality.

19) Mr. Ringe would also rely upon JV Agreement dated 16 July 2021, which was executed by Resolution Professional on behalf of Nice Projects Ltd. That the said Agreement was available with the Petitioner and the Petitioner was fully aware of initiation of CIRP against Nice Projects Ltd. He would submit that in any case, tender conditions required absence of insolvency proceedings against the bidder, which in

the present case was JV. That there was no requirement for submitting any declaration for pendency of insolvency proceedings against the constituent member of JV. That the Arbitral Tribunal has rightly considered this aspect for the purpose of holding that initiation of CIRP against Nice Projects Ltd. did not have any effect on either the contract or the arbitration agreement. He would submit that pendency of insolvency proceedings against Nice Projects Ltd. is not a reason for termination of contract. That Petitioner has deliberately raised an objection unrelated to the termination since it has no case on the main issue of termination of contract. He would therefore submit that no interference is warranted in the order passed under Section 16 of the Arbitration Act or in the impugned Award only on account of initiation of CIRP against a minor constituent member of the JV.

20) So far as the objection of absence of evidence is concerned, he would submit that there was ample documentary evidence before the Arbitral Tribunal. That the claims have been allowed on the basis of available documentary evidence. He would submit that the claims for purchased materials etc. are clearly evidenced by documents available on record. That leading of oral evidence was not necessary in the facts and circumstances of the case. That strict rules of evidence do not apply to arbitral proceedings. That parties in the present case have permitted the Arbitral Tribunal to decide the claims and counterclaims on the basis of documentary evidence and oral arguments. That since the findings recorded by the Arbitral Tribunal are well supported by documentary evidence on record, no interference in the Award is warranted.

21) Mr. Ringe would further submit that despite grant of opportunity, Petitioner has failed to lead evidence. He would submit that by order dated 3 August 2023, both the parties were directed to file their Affidavits of evidence. That Petitioner chose not to file evidence and instead filed repeated applications for delaying the arbitral proceedings. After the applications were rejected, Petitioner still did not choose to lead

evidence nor filed any application before the Tribunal for leading of any oral evidence. That Petitioner willingly participated in arguments in absence of any request for leading oral evidence. He would therefore submit that the objection of refusal to grant opportunity to lead evidence raised by the Petitioner is baseless deserving outright rejection.

22) Mr. Ringe would further submit that the objection of bias raised against the learned Arbitrator is completely misplaced. That the Arbitral Tribunal has given every possible opportunity to the Petitioner to present its case. That principles of natural justice have been followed to the hilt by the Arbitral Tribunal. That the final arguments were presented by the Petitioner's Counsel on as many as 11 dates. He would therefore submit that the allegation of bias was raised only for sabotaging the arbitral proceedings.

23) Mr. Ringe would further submit that the Arbitral Tribunal has considered the entire material on record and has thereafter rendered the Award. That the Award is well reasoned and considers the arguments submitted by both the sides. That the Arbitral Tribunal has rightly appreciated the position that Petitioner was responsible for non-completion of work within the stipulated time. That Petitioner itself had directed stoppage of work for substantial period of time and thereafter unreasonably rejected Respondents' request for extension. The Tribunal has recorded a finding of fact that Petitioner is responsible for breach of contract. Such finding of fact cannot be disturbed by Court exercising power under Section 34 of the Arbitration Act merely because another view is also possible. That insufficiency or inadequacy of reasons cannot be a ground for setting aside the Award as held in ***OPG Power Generations Pvt. Ltd. Versus. Enexio Power Cooling Solution India Pvt. Ltd. And Another*** [6]. He would accordingly pray for dismissal of the Petition.

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[6] 2025 (2) SCC 417

REASONS AND ANALYSIS

24) The disputes between the parties arose out of performance of contract awarded by the Petitioner to the Respondent for civil, structural and piping work including the reinforced cement concrete works at second generation Ethanol Bio-Refinery, Bathinda alongwith associated facilities. The contract was awarded vide Purchase Order dated 15 July 2021 and Letter of Award dated 15 July 2021. Respondent is a JV between two entities viz (i) Om Constraction, a proprietary concern and (ii)Nice Projects Ltd., a public limited company. The JV between the two entities is formed after issuance of tender notice. The contract is awarded to the JV named 'OM Constraction- Nice Project Ltd. JV'. As per Letter of Award dated 15 July 2021, the total delivery value of the purchase order was Rs.111,40,31,358/- inclusive of GST @ 18% p.a. The contract period was for 10.5 months from the date of issuance of Letter of Acceptance and accordingly the scheduled date of completion of contract was 30 May 2022. By revised Purchase Order dated 7 June 2022, the contract period was extended upto 14 July 2022 beyond which no further extension of time was granted. Petitioner had appointed Technip India Ltd as a Consultant for the Project.

25) During execution of the work, disputes arose between the parties and the work could not be completed during the contract period of 10.5 months or even during the extended period of 12 months upto 14 July 2022. On account of non-completion of work during the contract period and extended period, Petitioner terminated the contract vide notice dated 26 August 2022. The arbitration clause was invoked by the Respondent on 7 September 2022 and on account of non-appointment of Arbitrator by the Petitioner, Respondent filed application in this Court under Section 11 of the Arbitration Act. By order dated 12 December 2022, the Arbitral Tribunal was constituted.

26) The Arbitral Tribunal has made Award dated 18 June 2024 allowing the claim of the Respondent in the sum of Rs.19,92,79,827/-. The Tribunal also allowed counterclaim of the Petitioner in the sum of Rs.10,00,226/-. Accordingly, the net amount awarded in favour of the Respondent is Rs.19,82,79,601/-. The amount awarded in favour of the Respondent is under several heads as discussed in para-83 of the Award which reads thus :-

CLM	Claim Description	Claim Amount	Award
1	Compensation for breach of contract by respondent	Rs. 12,30,65,251/-	34830068
2	extra item / extra cost incurred for supply of specific quality bolts	Rs 18,00,400/-	16,94,351/-
3	TMT reinforcements steel brought at site	Rs. 1,91,67,852/-	1,55,50,141/-
4	Civil work items that have been executed & verified by HPCL but un-paid (S/D Hold amount from 24 RA bills)	RS.1,23,54,283/-	1,23,54,283/-
5	Structural steel brought Rs at site, consumed in works ready for consumption in works and fresh available at site	Rs.13,19,22,009/-	6,30,59,230/-
6	Deleted	NIL	NIL
7	Civil works executed pending verification by HPCL	Rs. 28,20,526/-	28,20,526/-
8	Idle cost on account of underutilization of staff, T&P and temporary facilities created to the extent of 50% of mobilization at site	Rs. 10,77,30,164/-	1,17,49,549/-
9	Supply of NP2 hume pipes in place of NP3	Rs. 10,47,617/-	10,03,965/-
10	Supply of stone boulder	Rs. 15,93,800/-	13,60,751/-
11	Supply of sand	Rs. 5,53,827/-	5,30,751/
12-15	Deleted	NIL	NIL
16	Release of CPBG	Rs. 1,11,40,314/-	1,11,40,314/-
17	Release of unqualified holds	Rs. 1,95,42,590/-	1,57,92,209/-

18	Interest on extra CPBG value	Rs. Rs 10,02,655/-	Nil
19	Damages on account of Rs maintenance required for cost T&P rendered idle & mental harassment caused	Rs. 19,88,27,755/-	Nil
20	interest from due dates till 18.6.24	At actual s	23393689 /-
21	Cost of litigation	At actuals	40,00,000/-
	TOTAL CLAIM	Rs 63,25,69,045/-+ interest + cost	Rs 19,92,79,827/-

27) The breakup of the counterclaim awarded in favour of the Petitioner is as under :-

CLM	Claim Description	Claim Amount	Award
1	Differential amount for works completed through other agencies at risk and cost of claimant. Overheads expenses for getting the works completed	Rs. 35,79,20,108 /-	Nil
2	Statutory payments made on claimant's behalf to his workmen, office staff etc	Rs. 8,23,891 /-	823891
3	Idle capital interest from Oct2022 to June 2023	Rs. 28,56,81,311 /-	1,76,335 /-
	TOTAL COUNTER CLAIM	Rs 64,44,25,310/-+ interest + cost	Rs 10,00,226 /-

28) Thus, out of the total sum of Rs.63,25,69,045/- claimed by the Respondent, the Tribunal has awarded claim in the sum of Rs.19,92,79,827/-. On the other hand, Petitioner's main counterclaim was for differential amount for getting the works completed through other agencies of Rs.35.79 crores and the same is rejected and counterclaim is sanctioned only in respect of statutory payments made to the workmen of the Respondent and for idle capital interest aggregating Rs.10,00,226/-. The Arbitral Award also directs release of all the holds on amounts of security deposits and retention amounts after expiry of defect liability period. The Award also bars the Petitioner from executing any

work at the risk and costs of the Respondent and from invoking provisions of Clause-12 of the contract. The Award grants interest @ 12% p.a. till the date of the Award and post award of interest @ 15% p.a. The sum awarded in favour of the Respondent also includes costs of Rs.40 lakhs. The operative directions in para-86 reads thus :-

> **86. SUMMARY OF ARBITRAL AWARD**
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> For the reasons and findings mentioned under the decisions /orders passed above against each specific claim of the claimant and each counter claim of the Respondent, the Arbitral Tribunal passes the final arbitral award as under:
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> 1. From the facts & evidence on record, it is established that the works under the subject contract had expired on 14.07.2022 and that thereafter the letter of termination dt 26.08.2022 issued by the Respondent was not valid as respondent had not granted any time extension beyond 14.7.2022. The contract stands fore-closed on 14.7.22 by efflux of time. The parties having failed to arrive at a settlement that was mutually acceptable and to the satisfaction of both the parties, the matter was referred to Arbitration for adjudication of disputes.
>
> 2. The Arbitral Award is admitted for a payable amount of Rs 19,92,79,827/-
>
> (Rupees Nineteen Crores Ninety two Lacs Seventynine Thousand and Eight hundred twenty seven Only) in favour of the Claimant.
>
> 3. However, the AT awards counterclaim of Rs. 10,00,226/-(Rupees Ten Lacs Two Hundred and Twenty six only) in favour of the Respondent.
>
> 4. Net arbitral award amount admitted after reducing the admitted Counter Claim is Rs. 19,82,79,601/- (Nineteen Crores Eightytwo Lacs Seventynine Thousand Six hundred one only) is payable to the Claimant.
>
> 5. Respondent has not appended any list of defects in his pleadings or arguments, nor he has any counter-claim on the Claimant on account of any defect whatsoever. Hence all the hold amount of Security deposits and retention amount stand released wef. 14.7.23 ie on the date of expiry of defect liability period of 12 months from expiry date of contract of 14.7.22.
>
> 6. As per the facts & evidence on record, it has been established that the Respondent has breached various terms of the contract, he was solely responsible for the delay and non-completion of work, he terminated the contract, encashed CPBG and consumed claimant's left out material, unlawfully. He is therefore barred from executing any work at risk & cost of the Claimant and from invoking any provision of CLAUSE-12.

7. Although, in case of any breach, the contract CLAUSE-5f mandates for payment of interest @24% p.a. and the Respondent has himself insisted for payment of interest in his pleadings and his arguments @24% p.a, the AT has decided to award interest @12% p.a. only till the date of publishing award.

8. The above stated award shall be paid by respondent to claimant latest by 31.8.2024. GST & CST shall be borne by claimant.

9. If respondent does not pay the award amount within the said period, the awarded amount of Rs. 19,82,79,601/- shall be payable with simple Interest @15% p.a. from 1.9.2024 upto the date of actual payment to claimant.

10. The above award is the full and final settlement of all the claims and counter claims of both parties that have been placed before the Arbitral Tribunal.

29) Now I proceed to deal with each of the four objections to the Award raised by the Petitioner.

PETITIONER'S ALLEGATION OF FRAUD AND MISREPRESENTATION

30) The first objection to the arbitral Award raised by the Petitioner is that the contract as well as arbitration agreement are vitiated by fraud and misrepresentation. According to the Petitioner, the bid was submitted in the name of JV of Om Constractions and Nice Projects Ltd. on the strength of JV/Consortium Agreement dated 31 May 2021 and that well before execution of the said JV agreement, Nice Projects Ltd. was subjected to CIRP by order dated 12 February 2021 passed by NCLT. Petitioner therefore contends that the Director of Nice Projects Ltd. could not have entered into JV agreement nor could have participated in the bidding process on behalf of the JV. It is Petitioner's contention that the JV not only suppressed NCLT's order dated 12 February 2021, but gave a false declaration of non-pendency of insolvency proceedings.

31) There is no dispute to the position that by order dated 12 February 2021, NCLT admitted Company Petition (IB) No.

3042/ND/2019 filed by Varun Shuttering Stores and passed orders under Sections 9 and 14 of Insolvency and Bankruptcy Code, 2016 appointing Interim Resolution Professional in respect of Nice Projects Ltd. The moratorium was imposed and the Board of Directors of Nice Projects Ltd. were suspended.

32) Despite CIRP being initiated against Nice Projects Ltd., JV was entered into between Om Constractions and Nice Projects Ltd. vide Consortium Agreement dated 31 May 2021, which was signed by the director of Nice Projects Ltd., Mr. Sartaj Ali. I have gone through JV/Consortium Agreement dated 31 May 2021, which contained following stipulation:

> "The Leading partner for the tender will be Nice Projects Ltd. and in event of allotment of work, Nice Projects Ltd will not withdraw from work."

33) After formation of JV, the bid was submitted on behalf of JV on 1 June 2021, in which several documents were signed by Mr. Sartaj Ali, director of Nice Projects Ltd. To illustrate, self-certification was executed and submitted by Mr. Sartaj Ali in the capacity as director of Nice Projects Ltd declaring that none of the documents were false/forged or fabricated. Several other documents such as Letter of waiver, declaration of not being banned and declaration of general information were also submitted by the director of Nice Projects Ltd. The JV relied upon Certificate of Chartered Accountant dated 16 February 2021 in respect of Nice Projects Ltd, which did not disclose the fact that CIRP was initiated against it. More importantly, when queries in respect of the bid were raised and the JV was directed to submit further documents by the Petitioner, following declaration dated 11 June 2021 was submitted:-

PEROFORMA FOR DECLARATION ON NCLT/NCLAT/DRT/DRAT/COURT

RECEIVERSHIP/LIQUIDATION (to submitted in Bid Documents)

Tender No: 21000025-HD-10170

Bidder Name: NICE PROJECTS Ltd.

I/ We hereby declare that I/We /M/s NICE PROJECTS LTD, declare that:

(1)I /We am/are not undergoing insolvency resolution process or liquidation or bankruptcy proceeding as on date.

Or,

Note:- Strike out which is not applicable.

It is understood that if this declaration is found to be false, HINDUSTAN PETROLEUM CORPORATION Ltd. shall have the right to reject my/our bid, and forfeit the EMD. If the bid has resulted in a contract, the contract will be liable for termination without prejudice to any other right or remedy (including black listing or holiday listing) available to HINDUSTAN PETROLEUM CORPORATION Ltd.

For NICE PROJECTS LTD.

Place:DELHI

Date: 11/06/2021

Signature of Bidder

Name of Signatory

(emphasis supplied)

34) Thus, a specific declaration was submitted that Nice Projects Ltd was not undergoing insolvency resolution process. In that declaration, Nice Projects Ltd. was described as the bidder. The declaration stated that if the information was found to be false, HPCL had the right to reject the bid. Thus, a blatantly false declaration was submitted by the lead consortium member that Nice Projects Ltd. was not undergoing insolvency proceedings. This is sought to be explained by Mr. Ringe suggesting that the declaration was not on behalf of JV and that the JV was not undergoing CIRP. The explanation also appears to have been accepted by the Arbitral Tribunal. However, suggestion appears to be *prima-facie* misplaced as JV is not a legal entity and mainly not a

company capable of being subjected to CIRP. The JV was formed for limited purpose for bidding and performance of contract with joint and several liability of the consortium members. The other entity in the JV, Om Constractions is a proprietary concern and was not governed by the provisions of the Companies Act,2013 or IBC. Only Nice Projects Ltd is a limited company, who could be subjected to corporate insolvency proceedings. Therefore there was no question of pendency of CIRP against the JV and the declaration was submitted with full knowledge that the same was in respect of a lead consortium member. It thus *prima-facie* appears that a false declaration was made about Nice Projects Ltd not being subjected to insolvency resolution process while submitting the bid.

35) Upon further queries, the Certificate dated 18 June 2021 was issued by the Chartered Accountant of Nice Projects Ltd. once again not disclosing initiation of CIRP against Nice Projects Ltd. Furthermore, an Affidavit-cum-undertaking dated 3 July 2021 was signed and executed by Mr. Sandeep Kumar, Assistant General Manager of Nice Projects Ltd. stating inter-alia that Nice Projects Ltd. was the prime member of Consortium and was solely responsible for all aspects of the bid including due execution of all tasks and performance of consortium. Nice Projects Ltd. also undertook not to withdraw from consortium at any stage of the work. Nice Projects Ltd. further undertook to perform the work alone if the consortium failed to execute the same. Nice Projects Ltd. also accepted full liability in respect of any failure of the consortium to comply with the terms and conditions of contract.

36) The above documents clearly shows that Nice Projects Ltd. was the lead member of the consortium and participated in the tender process as a consortium member without disclosing initiation of CIRP against it. This was possibly done as HPCL would have disqualified the bid if the disclosure of CIRP was made. Initiation of insolvency process reflects on financial capacity of the bidder. The Respondent-JV knew well

that if HPCL was made aware of the fact that the lead consortium member was undergoing insolvency process, it would not have taken the risk of awarding contract to the JV.

37) To salvage the situation, Mr. Ringe has relied upon copy of another JV agreement dated 2 July 2021, under which extent of participation between the consortium members was shown to have been altered as 98.9% for Om Constractions and 1.1% for Nice Projects Ltd. However, there is nothing on record to indicate that the said Consortium Agreement dated 2 July 2021 was ever produced before Petitioner-HPCL. The said JV agreement is also contrary to the Affidavit filed by Nice Projects Ltd. on 3 July 2021 that it was the lead consortium partner. Thus far from producing the JV Agreement dated 2 July 2021 before Petitioner-HPCL, an undertaking was filed by the JV on 3 July 2021 that Nice Projects Ltd. was the lead consortium member. Respondent is thus accused of creating documents to get rid of consequences arising out of suppression.

38) Oblivious of the fact that the leading consortium partner-Nice Projects Ltd. was undergoing CIRP, HPCL proceeded to award contract in favour of JV on 15 July 2021.

39) It is an admitted position that till the contract was terminated on 26 August 2022, the JV or Nice Projects Ltd. made no efforts to intimate Petitioner-HPCL that Nice Projects Ltd. was undergoing CIRP. Long after termination of contract and when Section 11 application filed on 21 October 2022, following disclosure was made :-

> 31. It is submitted that the present petition is being filed by the lead partner of the JV namely the Applicant and that for the record purposes only it is stated that the 2nd partner to the JV by the name and style of M/s Nice Project Ltd is a minority partner to the JV in accordance to the JV and the MOU signed between the two partners on dated 31.05.2021, further the 2nd partner is not empowered to

represent in any legal affairs and that **presently** Nice Projects Ltd is under CIRP.

(emphasis supplied)

40) It is Petitioner's case that use of the word 'presently' in the above declaration under Section 11 application made Petitioner-HPCL believe that CIRP was initiated at the time of filing of Section 11 application. I find some force in this submission as the disclosure was not clear and the application did not disclose that CIRP was initiated on 12 February 2021. Since only partial disclosure of CIRP was made in Section 11 application, Petitioner initially decided to challenge *locus-standi* of only Om Constraction in prosecuting the arbitration proceedings in absence of other JV partner-Nice Projects Ltd. It also sought impleadment of Nice Projects Ltd. to the arbitral proceedings. To get over that objection, 'no objection' of Nice Projects Ltd. was submitted before the Tribunal. The Arbitral Tribunal passed order dated 23 March 2023 holding, *inter-alia* that the JV was correctly represented by the claimant therein in accordance with the Memorandum of Understanding dated 31 May 2021. The Tribunal also relied on NOC issued by Nice Projects Ltd. It is Petitioner's case that the so-called MOU dated 31 May 2021 was never submitted to it and was produced for the first time alongwith Section 11 application. The MOU also appears to be contrary to the Affidavit submitted before the Petitioner on 3 July 2021.

41) It is Petitioner's case that for the first time by end of August 2023, it discovered the factum of Nice Projects Ltd. facing CIRP before issuance of tender and before execution of JV. This position is contested by the Respondent, and the arbitral tribunal has also found favour with Respondent's contention that once disclosure of CIRP was made, it was for Petitioner to make inquiries about the date of initiation of CIRP. I am unable to agree. It is the duty of a litigant to make full and complete disclosure of all facts. It is not for a litigant to decide how much to

disclose. In ***Bhaskar Laxman Jadhav v. Karamveer Kakasaheb Wagh Education Society***[7], the Supreme Court has held thus:

> 44. It is not for a litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the facts of a case and leave the decision-making to the court. True, there is a mention of the order dated 2-5-2003 in the order dated 24-7-2006 passed by the JCC, but that is not enough disclosure. The petitioners have not clearly disclosed the facts and circumstances in which the order dated 2-5-2003 was passed or that it has attained finality.

In the present case, Respondent made partial disclosure about CIRP of Nice Projects Ltd. Failure on Petitioner's part to disclose of the fact that the CIRP was pending against Nice Projects Ltd. even prior to issuance of tender clearly gave room to the Petitioner to contend that it discovered the said aspect only by end of August 2023.

42) Also, the issue of failure to disclose complete details of initiation of CIRP was relevant only for explaining the delay on the part of the Petitioner in raising the objection of invalidity of contract and absence of arbitration agreement. In such circumstances, instead of condemning the Respondent for failing to make full discourse, the arbitral tribunal grossly erred in holding Petitioner responsible for not making inquiries about the date of initiation of CIRP against Nice Projects Ltd.

DECISION OF PETITIONER'S OBJECTION TO JURISDICTION

43) After discovery of the factum of Nice Projects Ltd. facing CIRP even before award of contract, Petitioner wrote email dated 1 September 2023 to the learned Arbitrator stating *inter-alia* that it discovered initiation of CIRP against Nice Projects Ltd. vide order dated 12 February 2021 after conducting investigations on the website of NCLT. The Petitioner contended that the award of tender, letter of acceptance and purchase orders issued in favour of JV were void and the

[7] (2013)11 SCC 531

arbitration agreement was also void. It was contended that the arbitration proceedings could not proceed further. Petitioner therefore requested the Tribunal not to pass any further directions in the Reference. Paras-11 to 13 of the email dated 1 September 2023 read thus:-

> 11. In view of the foregoing, the Tender/ letter of acceptance/purchase order awarded to the JV is void as it has been obtained fraudulently and is contrary to the provisions under the Code. The arbitration agreement contained therein is void and therefore, the present arbitration proceedings before the Arbitral Tribunal cannot proceed further.
>
> 12. The Respondent is in process of initiating appropriate legal proceedings against all the parties who have committed a serious fraud against the Respondent.
>
> 13. In view of the foregoing, we request this Arbitral Tribunal to not pass any further directions in the above refence. Without prejudice to the rights and contentions of the Respondent, the Respondent reserves its rights to comply with the directions passed by the Arbitral Tribunal on 3rd August 2023.

44) What was filed by the Petitioner on 1 September 2023 was not an application under Section 16 questioning jurisdiction of the Arbitral Tribunal. However, the said email was responded by the Respondent vide email dated 7 September 2023 alongwith which No Objection Certificate of IRP dated 21 February 2023 was produced to show as if IRP of Nice Projects Ltd. did not have any objection for conduct of arbitral proceedings. On 8 September 2023, the Arbitral Tribunal sent email to both the parties and in para-3 thereof, the learned Arbitrator directed as under:-

> No further applications on this issue shall be filed by any party. If any, shall be included in the written /oral arguments/counter arguments of the main trial on the case as a whole later.

45) This is how the learned Arbitrator prevented the Petitioner from filing application under Section 16 of the Arbitration Act questioning its jurisdiction. The Tribunal followed unusual process,

unknown to law, by deciding the request made for deferment of arbitral proceedings vide email dated 1 September 2023 as if that email was objection to its jurisdiction and directed parties to file their submissions/written arguments by his email dated 8 September 2023. The Tribunal thereafter proceeded to pass order dated 16 September 2023 treating Petitioner's email as application under Section 16 and 32 of the Arbitration Act and rejected the objection to its jurisdiction by holding as under:-

> 1. While the pleadings stand completed on 31.7.23 and that the proceedings are at the stage of arguments, notwithstanding the fact that no new pleading or defence from either party other than those mentioned in the pleadings /defence through the SOD and the SOC can be taken up at this stage, the Respondent has again filed applications on 1.9.23 and dt 13.9.23 under Sec 16 and 32 of 'Arbitration Act', for terminating the present arbitration proceedings due to pending NCLT case against 'Nice Projects' as a judgment debtor, which were not a part of his pleadings/defence.
>
> 2. However, the Tribunal has extended full opportunity and time to Respondent to showcase and explain if the pleadings/issues being raised now form a part of his pleadings/defence that have been already submitted.
>
> 3. The aforesaid applications filed by the Respondent are not accepted for following reasons:
>
> 3.1 The bidder in the present contract, ie. joint venture (IV) namely 'OM Construction-Nice Projects Ltd', which as per documents placed on record, is an independent legal entity, has an independent PAN, bank account and GST registration. The Respondent entered into Contract with an entity "JV" and not with 'Nice Projects' alone.
>
> 3.2 It was respondent's responsibility to verify credentials of the bidders before entering into the contract. Notwithstanding the fact that the aforesaid applications filed by respondent are not related to the bidder JV, the contractual term vide document 7 on which respondent relied, provides him only two options in case of allegation of 'fraud'; one being that of rejecting the bid and the second being that of terminating the contract on such ground. Respondent admitted that none of these is the case. The Respondent could not cite any other provision of contract which stipulates that contract is voidable if one party is found to be a defaulter. Tribunal cannot travel beyond the terms of contract.
>
> 3.3 It is well settled law by H'ble Supreme Court that a defaulter cannot take advantage of his own default.
>
> 3.4 Respondent had already raised similar preliminary issue on 3.2.23, which was dismissed. It was directed vide PO-6 that, no

further preliminary issues shall be entertained and those shall be included in SOD, due to time deadline stipulated in 'Arbitration Act'. Respondent failed to include the present issue in SOD.

3.5 Respondent filed his SOD and counterclaims unconditionally on 31.7.23, which completed the pleadings. Hence, it is his deemed acceptance to continue and complete the arbitration proceedings and waiver of his right under Sec-4 of the 'Arbitration Act' to press new issues.

3.6 Respondent for moving his application under section-16 / Sec 32 has relied on the third-party disputes of 'Varun Shuttering Store' and 'Nice Projects who are not independently the parties in the present arbitration of the contract.

3.7 Respondent failed to establish that there exists any CIRP proceedings on the joint venture and the present agreement. The issues of consequent "Fraud" and "void contract" if any, are criminal matters and are to be decided by a competent Court. Any discussion/decision on those is beyond the jurisdiction of this forum.

3.8 While the Claimant vide Para-31 of his Sec 11 petition before H'ble BHC mentioned the fact that his JV associate is under CIRP, the Respondent cannot be allowed to claim ignorance at this stage of arguments.

3.9 The present arbitration proceeding is initiated consequent to H'ble Bombay High Court order. There is no 'Stay' order from any competent Court.
3.10 It is well settled law by H'ble Supreme Court that in terminated contracts, arbitration clause survives and disputes are arbitrable.

In view of the above, both the applications of respondent are sans merit and are dismissed.

The arbitration proceedings therefore shall continue.

46) Before considering the correctness of order dated 16 September 2023 rejecting Petitioner's challenge to jurisdiction, it would be necessary to note that the Petitioner was advised to file Writ Petition No. 3553 of 2023 before this Court challenging the order dated 16 September 2023. The Petition has been dismissed by the Division Bench by detailed judgment and order dated 17 October 2023. The findings recorded by the Division Bench in respect of order dated 16 September 2023 read thus :-

29. As far as the challenge by the Petitioner to the said Order dated 16th September 2023 passed by the Arbitrator, under the provisions

of Section 16 of the Arbitration Act, is concerned, it is to be noted that, in the proceedings in the said Application under Section 11 of the Arbitration Act, the Petitioner accepted the existence of an Arbitration Agreement. The same is recorded in paragraph 1 of the said Order dated 12th December 2022. The Petitioner also did not seriously dispute that disputes and differences had arisen between the parties that needed to be resolved by Arbitration. The Petitioner and Respondent No.1 were not agreeable as to whom to appoint as an Arbitrator and, therefore, by the said Order dated 12th December 2022, an Arbitrator was appointed by an Hon'ble Judge of this Court. Thereafter, admittedly, the Petitioner participated in the Arbitration Proceedings before the Arbitrator so appointed. The Petitioner did all this with full knowledge of the fact that Respondent No.2 was under CIRP and also the fact that only Respondent No.1 would be participating in the arbitration proceedings. It was only subsequently that the Petitioner filed Applications contending that the Agreement between the parties was obtained by fraud and was void, therefore, no agreement or arbitration agreement exists between the parties, and, therefore, the Arbitrator has no jurisdiction. In other words, the Petitioner was calling upon an Arbitrator, who had been appointed by an Hon'ble Judge of this Court, under Section 11 of the Arbitration Act, to hold that he had no jurisdiction as the Arbitration Clause under which he was appointed was void ab-initio and did not exist. For the reasons given by him in the said Order dated 16th September 2023, the Arbitrator has rejected the said contention of the Petitioner by holding inter-alia that he could not do so as he was appointed under Section 11 of the Arbitration Act. The Arbitrator has also given other reasons in the said Order dated 16th September 2023 for rejecting the contentions of the Petitioner, which have been set out above.

30. As is clear from the position of law set out by us hereinabove, a Writ Court, exercising its jurisdiction under Articles 226 and 227 of the Constitution of India, can entertain a Petition challenging an Order passed by an Arbitrator, under Section 16 of the Arbitration Act, rejecting the contention that he has no jurisdiction, only in exceptionally rare cases and for the few exceptions as mentioned above. We will therefore have to consider whether the case in the present Writ Petition is such an exceptional case which falls within one of the said exceptions.

31. As far as the exception of lack of inherent jurisdiction is concerned, it cannot be said that the Arbitrator did not have jurisdiction to pass the said Order dated 16th September 2023. As stated hereinabove, the Arbitrator was appointed by an Hon'ble Judge of this Court, under the provisions of Section 11 of the Arbitration Act, by the said Order dated 12th December 2022. Having been so appointed, the Arbitrator definitely had jurisdiction to decide an Application under Section 16 of the Arbitration Act. In fact, the said Order dated 12th December 2022 appointing the Arbitrator also mentions that the Respondent would be at liberty to raise all questions of jurisdiction, under Section 16 of the Arbitration Act, before the Arbitrator, which necessarily means that the Arbitrator had jurisdiction to decide these questions of jurisdiction. Even otherwise, in the absence of the said Order dated 12th December 2022 being set aside, it could not be contended that the Arbitrator

lacked inherent jurisdiction. In these circumstances, we are of the view that the exception of lack of inherent jurisdiction does not apply to the present case.

32. Further, the exception, of a party being left without a remedy, is also not applicable to the present case. In the present case, the Petitioner is not left without any remedy to challenge the said Order dated 16th September 2023 passed by the Arbitrator. It is settled law that, under the provisions of the Arbitration Act, the Petitioner can challenge the said Order dated 16th September 2023 whilst challenging the award passed by the Arbitrator under the provisions of Section 34 of the Arbitration Act. Section 37 of the Arbitration Act consciously provides an Appeal against an order passed by an Arbitrator, under Section 16 of the Arbitration Act, accepting that he has no jurisdiction, and does not provide for an Appeal against an order passed by an Arbitrator, under Section 16 of the Arbitration Act, holding that he has jurisdiction. The obvious intention is non-interference of judicial authorities in arbitration proceedings so that arbitration proceedings can be expeditiously completed and that arbitration is an efficacious and speedy alternate dispute resolution mechanism. For this reason also, we are not inclined to exercise our writ jurisdiction to entertain the present Petition challenging the said Order dated 16th September 2023 passed under Section 16 of the Arbitration Act.

33. As far as the exception of a party acting in bad faith is concerned, the same cannot be decided at this stage in the writ jurisdiction of this Court. Further, whether, Respondent No.1, in invoking Arbitration, has acted in bad faith, is something which cannot be decided by a Writ Court, especially since the same would involve disputed questions of fact. For this reason also, we are not inclined to exercise our writ jurisdiction.

34. Mr. Behramkamdin has also relied upon the exception of perversity and has submitted that this Court should exercise its writ jurisdiction as the Arbitrator's findings are totally perverse. In the case of IDFC first Bank Ltd. (supra), the Delhi High Court has held that interference under Articles 226 and 227 of the Constitution of India is permissible only if the order passed by the Arbitrator is completely perverse, i.e., that the perversity must stare in the face. In our view, the Arbitrator's finding that, since he was appointed as the Arbitrator under Section 11 of the Arbitration Act by an Order of an Hon'ble Judge of this Court, under the arbitration clause contained in the agreement between the parties, he cannot hold that he has no jurisdiction on the ground that the said agreement and the said Arbitration Clause are void, cannot be considered to be perverse so as to merit interference under Articles 226 or 227 of the Constitution of India.

35. For all the aforesaid reasons, we are of the view that the present case of the Petitioner is not one of those exceptionally rare cases where interference with an order passed under Section 16 of the of the Arbitration Act is justified under Articles 226 and 227 of the Constitution of India. For all these reasons, we are not inclined to exercise our writ jurisdiction to entertain a challenge to the said

Order dated 16th September 2023 passed by the Arbitrator under Section 16 of the Arbitration Act.

47) Thus, though the Writ Petition is dismissed, this Court specifically observed that Petitioner had the remedy of challenging the order dated 16 September 2023 while challenging the Award. It therefore cannot be contended that the order dated 16 September 2023 has attained finality. The Division Bench has refused to interfere in the same by holding that the case was not a rare one warranting interference by writ Court in order passed under Section 16 of the Arbitration Act. Therefore, Respondent's contention that correctness of order dated 16 September 2023 cannot be examined in present proceedings warrants rejection.

48) In my view, the Arbitral Tribunal adopted an unusual process of treating a mere e-mail dated 1 September 2023 requesting the Tribunal not to proceed ahead in the proceedings as if it was an application under Section 16 of the Arbitration Act and preventing the Petitioner form filing such application. Be that as it may, the manner in which the said objection is decided is also not convincing. It is seen that the objection of jurisdiction is rejected essentially on the grounds that (i) JV is an independent legal entity and the contract is not executed with Nice Projects Ltd. alone, (ii) it was Petitioner's responsibility to verify the credentials of the bidders, (iii) Petitioner neither rejected the bid nor terminated the contract on the ground of fraud, (iv) Petitioner, being defaulter, cannot take advantage of its own default, (v) similar preliminary issue was already decided on 3 February 2023 (vi) statement of defence and counterclaim were filed unconditionally on 31 July 2023 resulting in deemed acceptance of jurisdiction and waiver under Section 4 of the Arbitration Act, (vii) third party disputes between Varun Shuttering Stores and Nice Projects Ltd. had no relevance to the arbitration, (viii) the issue of fraud was a criminal matter and beyond the jurisdiction of the Arbitral Tribunal, (ix) disclosure was made under

Section 11 application about CIRP against Nice Projects Ltd., (x) there was no stay order by any Court and (xi) arbitration clause survives even in respect of a terminated contract.

49) Perusal of the findings recorded by the arbitral tribunal in order dated 16 September 2023 would indicate that the reasons recording by it for rejecting the objection to jurisdiction are grossly perverse, patently illegal and disclose absence of judicious approach. I proceed to discuss each of the reasons:

The *first* reason of JV being a legal entity is against fundamental policy of India as a joint venture formed for securing the contract and for execution of work is never a legal entity in itself. Only those joint ventures, which are incorporated become legal entities. Also, the JV Agreement itself made it clear that the JV was not the legal entity as Clause 8 provides for joint and several liability of both the consortium members towards the Employer. Though the contract was awarded to JV, it was based on false declaration that the lead member (Nice Projects) was not undergoing CIRP. Also JV, by itself, cannot be subjected to CIRP as the same is not a corporate entity and therefore the declaration is applied to the only corporate entity in the JV, being Nice Projects Ltd.

The *second* reason of Petitioner's responsibility of verifying credentials of bidders is outrageous and proceeds on an assumption that if a bidder suppressing vital facts is not caught by the Employer, he can get away under a specious plea that it was Employer's responsibility to catch him. The principle applied by the Tribunal is again in complete conflict with the fundamental policy of Indian law. Application of this principle to employments would mean that candidate suppressing material information can claim immunity on the ground that it was appointing authority's responsibility to verify his credentials. Respondent and

particularly Nice Projects Ltd. gave a specific undertaking that if any information was found false, the bid was liable to be rejected. Therefore it was responsibility of the JV to make correct declaration and not the responsibility of Petitioner to verify credentials.

The *third* reason of non-rejection of bid or non-termination of contract on the ground of fraud is recorded in ignorance of the fact that the information about Nice Projects Ltd. undergoing CIRP was disclosed for the first time after termination of contract.

The *fourth* reason of impermissibility for Petitioner to take advantage of its own fault, being a defaulter, is again shocking. How the Arbitral Tribunal prejudged on 16 September 2023 that Petitioner is at fault in terminating the contract? How Petitioner's inability to discover suppression of CIRP against Nice Projects Ltd. would amount to a 'fault' on its part? Apart from the findings being preposterous, they have given a room for Petitioner to allege bias against the Tribunal.

The *fifth* reason of similar issue being decided on 3 February 2023 is again grossly perverse. What was decided on 3 February 2023 was the issue of lack of *locus* for claimant to maintain the claim in absence of impleadment of Nice Projects Ltd., which issue had no reflection on the issue of jurisdiction of the Tribunal.

The *sixth* reason of unconditional filing of statement of defence on 31 July 2023 is again recorded in ignorance of position that the Petitioner had alleged that it discovered the alleged fraud towards end of August 2023. The Tribunal has not recorded any finding of fact that the Petitioner was aware of Nice's CIRP since inception at the time of filing of statement of defence. What it was aware of at

that time was only declaration made in Section 11 application that Nice was 'presently' undergoing CIRP.

The *seventh* reason of irrelevancy of third-party disputes between Nice Projects Ltd. and Varun Shutters to arbitral proceedings again indicates perversity due to consideration of irrelevant factor. Which party initiated CIRP against Nice Projects Ltd. is an irrelevant factor. The relevant issue is whether the contract would have been awarded to the JV, whose lead member was undergoing insolvency proceedings?

The *eighth* reason of fraud being beyond jurisdiction of arbitral tribunal since it was a criminal matter indicates gross ignorance of fundamental principles of law on the part of the Tribunal. Whether contract is vitiated by fraud under the Contract Act is a civil dispute capable of being decided by the Arbitral Tribunal.

The *ninth* reason of disclosure of CIRP in application filed under Section 11 is again recorded in ignorance of Petitioner's claim that the knowledge about the exact date of initiation of CIRP was gained by it by end of August 2023.

The *tenth* reason of absence of stay order by any Court indicates the perfunctory manner in which the objection of jurisdiction is dealt with. This reason stems out of a fundamental error committed by the Tribunal in treating mere email for deferment of proceedings as an objection to jurisdiction. This wrong approach has resulted in mixing the issues of prayer for stay (in email) and objection to jurisdiction.

The last and the *eleventh* reason recorded by the Tribunal of survival of arbitration clause in respect of terminated contract is perverse as Petitioner never contended that the arbitration

agreement came to an end due to termination of contract. What it contended was that the arbitration agreement became void and non-existent due to fraud in securing the contract.

50) Thus, the manner in which Petitioner's objection to jurisdiction is dealt with by the Tribunal and the reasons recorded for rejection of the objection clearly indicates lack of judicial approach, absence of objectivity and ignorance of fundamental principles of Indian law on the part of the Tribunal.

51) Also, the issue of non-existence of arbitration agreement in the present case hinges on the issue of validity of contract. Therefore, the issue of jurisdiction ordinarily ought to have been decided after deciding the issue whether the contract remained valid due to non-disclosure of CIRP against the lead JV member. Respondent is accused of suppressing the position of pendency of CIRP against one of the constituent consortium members, who was described as the lead member. What effect such suppression would have on the validity of contract could have been decided only at the time of final award. The agreement to arbitrate being rendered void thus fully depended on ability of Petitioner to demonstrate whether the contract was obtained by fraud and whether the same was rendered void on account of suppression. In such circumstances, the Tribunal ought not to have hurriedly proceeded to decide mere request of the Petitioner for deferment of proceedings as an objection to its jurisdiction. It rather ought to have permitted Petitioner to amend pleadings, raise issue of validity of contract and then permit Petitioner to raise objection as to jurisdiction. What is done in the present case is that the Tribunal first ruled on its jurisdiction by holding that there is agreement to arbitrate and thereafter prevented the Petitioner from raising the main issue of invalidity of the main contract. This is clear from the observations in the paragraphs to follow.

DECISION OF PETITIONER'S APPLICATION FOR AMENDMENT

52) After rejection of Petitioner's objection to jurisdiction by treating e-mail dated 1 September 2023 as application under Section 16 of the Arbitration Act and after dismissal of Writ Petition No. 3553 of 2023 on 17 October 2023, Petitioner immediately moved the Arbitral Tribunal by sending email dated 25 October 2023. By that email, the Petitioner informed the Arbitral Tribunal that it was proposing to amend the Statement Of Defence and Counterclaim. It would be apposite to reproduce the email dated 25 October 2023, which reads thus :-

> Dear sir,
>
> We write under the instructions of the Respondent, Hindustan Petroleum Corporation Limited, in the subject arbitration,
>
> In reference to our email dated 20 October 2023, the Hon'ble Bombay High Court ("Court") passed a judgement in Writ Petition (L.) No. 26940 of 2023 on 17 October 2023. The Court has dismissed the writ petition strictly on the ground of maintainability without making any observations on the merits.
>
> Please note that the Respondent is considering filing an application under Section 23 (3) of the Arbitration and Conciliation Act, 1996, to supplement and amend the Statement of Defence/Counter-Claim filed by the Respondent on 31 July 2023, to bring on record the recently discovered fraud, misrepresentation and suppression of facts and documents by the Claimant/ JV in the present Arbitration after the filing of the Statement of Defence on 31 July 2023.
>
> The Respondent states that the Sole Arbitrator has sufficient time under the Arbitration and Conciliation Act 1996, to consider the proposed. Application of the Respondent and to allow the Claimant to file a response to the proposed Application, instead of rushing into final hearing, without following the procedure of Admission and Denial of Documents and filing of evidence, pursuant to the recent developments which have occurred since 1" September 2021
>
> In view of the foregoing, we request you to not proceed with the final hearing in the arbitration scheduled today ie, 25 October 2023 at 4:00 PM and grant the Respondent a period of two (2) weeks, to file the appropriate application before the Sole Arbitrator.

53) Thus, all that was done by the Petitioner by email dated 25 October 2023 was to request the Arbitral Tribunal not to proceed further

with arbitration since it was proposing to file application for amendment of Statement of Defence and Counterclaim. The Arbitral Tribunal once again adopted procedure unknown to law by treating the email dated 25 October 2023 as if it was an application for amendment and proceeded to reject the same on the same day by Procedural Order No.10 dated 25 October 2023, which reads thus :-

> Following issues were discussed, heard and decided.
>
> 1. The Respondent has filed repeat application on 25.10.23 not to proceed with the final hearing and that to allow him 2 weeks' time to amend his SOD and counterclaims. This was already dismissed vide PO-9 dt 16.9.23. Claimant vehemently objected to this application.
>
> 1.1. Further, Respondent took up the same issue against the arbitrator's order PO-9 before H'ble Bombay HC vide his WP under Art. 226/227, which stands dismissed by the H'ble HC.
>
> 1.2. As per Sec 23(4), the pleadings were to be completed within six months ie. by 21.6.23, which on respondent's request was extended upto 15.8.23. Hence, he could have filed the amendment to SOD by that date; but he failed.
>
> 1.3. As stated in PO-9, the pleadings stood completed by both the parties unconditionally on 31.7.23. Parties have submitted their pleadings after being well aware of the facts and circumstances of the case.
>
> 1.4 Pursuant to arguments dt 7.9.23 & 13.9.23, it has already been settled vide PO-9 that there is no CIRP or IRP on the bidder 'JV'.
>
> 1.5. Since arbitration is a mechanism of speedy resolution of disputes, such request for amendment beyond the time limit stipulated in the 'Arbitration Act' defeats the very purpose of arbitration. Hence no amendment in pleading /defence from either party can be allowed at this stage.
>
> 1.6. At the stage of argument, parties are directed to restrict their submissions in accordance with the pleadings already placed on record by them. However, they are permitted to supplement their claims/counterclaims during arguments.
>
> 1.7. For all the aforesaid reasons, respondent's application dt 25.10.23 is therefore dismissed.
>
> 1.8. For the same reasons claimant's additional documents filed 25.10.23 are not taken on record.
>
> 2. Respondent requested for holding the hearings physically. Claimant wanted to hold on-line hearings.

It is decided to start with on-line hearings and if difficulties are experienced, then resort to physical hearings in future.

Both parties agreed that first claimant will complete his arguments on all the issues and thereafter respondent will complete his arguments.

4. It was decided to hold next on-line hearings on 1.11.23 and 3.11.23 at 4 pm. However subsequent hearings will be held on every Tuesday and Friday at 4 pm. meet.google password will be same "vxs-shde-trv".

5. Both parties are once again advised to refrain from using any derogatory or hurting language or adverse personal remarks against each other.

6. Parties to pay their next instalment of arbitrator's fee by 31.10.23.

54) The Arbitral Tribunal thus prevented the Petitioner from filing application for amendment on the ground that arbitration is a mechanism for speedy resolution of disputes and that therefore request for amendment beyond the time limit stipulated in the Arbitration Act could not be allowed. Thus, before application for amendment could be filed, the Arbitral Tribunal pre-decided the issue and ruled that no amendment in the pleadings would be permitted. Nonetheless, Petitioner rightly filed application for amendment of Statement of Defence and Counterclaim on 1 November 2023. I have gone through the schedule of proposed amendment. As observed above, it is Petitioner's case that it was not aware about initiation of CIRP against Nice Projects Ltd. prior to issuance of tender and prior to execution of JV and acquired knowledge about the same only towards end of August 2023. Thereafter, Petitioner first requested for deferment of proceedings by stating that the arbitration agreement was void. That request was treated as if the same was an objection to jurisdiction and the request was rejected vide order dated 16 September 2023. Petitioner was advised to file Writ Petition challenging the said order. After the Writ Petition was dismissed on 17 October 2023, Petitioner immediately wrote an email dated 25 October 2023 conveying to the Arbitral Tribunal that it was proposing to file

application for amendment. Such application was filed on 1 November 2023.

55) In the above circumstances, the application for amendment ought to have been decided by the Arbitral Tribunal by recording proper reasons. Instead of doing so, the Arbitral Tribunal proceeded to reject the application by recording following observations in Procedural Order No.11 dated 1 November 2023 :-

> 1. The Respondent has filed repeat application on 1.11.23 alongwith amendment to his SOD etc. This was already dismissed vide PO-10 dt 26.10.23. Claimant vehemently objected to this application.
>
> 2. Parties unconditionally completed pleadings by 31.7.23. Respondent was having time upto 15.8.23 for filing amendment as per PO-7 dt 20.7.23, in which he failed. For the first time he filed application before arbitrator on 25.10.23 for granting him two weeks' time for filing amendment etc, which was quite late in view of time limitations stipulated vide Sec 23(4) and Sec 29-A of 'Arbitration Act'. Hence his application was dismissed vide PO-10.
>
> 3. Further, Respondent took up the same issue before H'ble Bombay HC vide his WP under Art. 226/227 and prayed in the prayer clause (g) that, Quote: "to issue an appropriate writ, order or direction in the nature of Mandamus directing the Sole Arbitrator to allow the Petitioner to amend its Statement of Defence to place the additional facts on record, to file its admission and denial, to re-frame / amend the issues based on the amended Statement of Defence, to permit the Petitioner to lead evidence".
>
> Unquote: The whole WP was dismissed by the H'ble HC.
>
> 4. Hence for the reasons stated above and in PO-10, respondent's application dt 1.11.23 is dismissed. The amendment and all other documents filed alongwith are therefore not taken record.

56) This is how the application for amendment of statement of defence and counterclaim was rejected by holding that parties had unconditionally completed the pleadings and that Petitioner had time upto 15 August 2023 for filing amendment application as per procedural order dated 20 July 2023. However, while holding so, the Arbitral Tribunal did not decide the contention of the Petitioner that it acquired knowledge of suppression only by the end of August 2023. The Tribunal

also referred to Procedural Order No.10 dated 25 October 2023, in which it had not permitted the Petitioner to amend the pleadings. The Arbitral Tribunal also referred to prayer clause (g) in the Writ Petition, in which it had prayed for amendment of Statement of Defence and held that the Petition was dismissed in the entirety.

57) In my view, the manner in which the Arbitral Tribunal proceeded to decide Petitioner's request for amendment of statement of defence and counterclaim shows complete irrationality and lack of judicial approach. It is not that the Arbitral Tribunal has recorded a finding that Petitioner was aware of initiation of CIRP against Nice Projects Ltd. before filing of statement of defence. It has not questioned correctness of Petitioner's contention that it acquired such knowledge towards the end of August 2023. Once this contention of the Petitioner is not rejected, the application for amendment of statement of defence and counterclaim ought to have been allowed by the Arbitral Tribunal. Dismissal of Writ Petition including prayer for amendment did not pose a hurdle in granting amendment by the Tribunal. This Court merely decided the issue of challenge to order dated 16 September 2023 and even that issue was kept open to be decided while challenging the award. Therefore it cannot be assumed that the prayer for amendment of statement of defence was rejected by this Court.

58) Also of relevance is the fact that the issue of validity of contract goes to the root of the matter as it also reflects on the validity of arbitration agreement. If contract itself is declared as void for having been secured by fraud, Petitioner's liability to pay under a void contract becomes questionable. The issue of validity of contract determines the entitlement of Respondent to claim amounts from Petitioner. If the contract is declared valid, Respondent's claims towards work performed, material purchased, damages, compensation, loss of profits etc. can be adjudicated. However, if the contract is held as having been procured by suppression and misrepresentation, the whole approach towards

adjudication of claims of Respondent would change and even if the termination is held to be invalid, the Tribunal would then consider and decide the issue whether a party indulging in suppression and misrepresentation can be awarded damages, loss of profits, etc. In my view therefore, the issue of suppression of initiation of CIRP against Nice Projects Ltd. having effect on validity of contract goes to the root of the matter and was one of the most vital issues which ought to have been adjudicated by the Arbitral Tribunal. Since suppression and misrepresentation about pendency of CIRP against the lead consortium member was writ large, the Tribunal has egregiously and patently erred in refusing to decide the said issue by not permitting Petitioner to amend the pleadings. The Arbitral Tribunal has erroneously closed the doors on the Petitioner by rejecting application for amendment of statement of defence and counterclaim. The manner of dealing with request for amendment and the reasons recorded for rejection of Petitioner's amendment application clearly reflects non-judicious approach on the part of Arbitral Tribunal.

59) Thus, the claims of the Respondent are adjudicated by the Arbitral Tribunal by skirting the vital issue of validity of contract in the light of suppression of pendency of CIRP against Nice Projects Ltd. Adjudication of claims of claimant by not permitting the opposite party to raise a valid defence, going to the root of the matter, is clearly in conflict with public policy of India. It is clearly against the most basic notions of justice to disallow a party to raise the defence of validity of contract after it discovers the act of suppression. As observed above, the conduct of arbitral proceedings by the Tribunal exhibits lack of judicious approach and objectivity on the part of the Arbitral Tribunal. In my view, therefore the impugned Award cannot be sustained for this reason.

AWARD OF CLAIMS OF RESPONDENT IN ABSENCE OF ORAL EVIDENCE

60) Even if the issue of validity of the contract in the light of suppression of CIRP initiated against Nice Projects Ltd. is to be momentarily ignored and some leeway is granted to the Respondent in the matter by holding that Respondent's claims could be adjudicated on the basis of unamended pleadings, it is seen that claims are awarded by the Arbitral Tribunal in absence of oral evidence by any of the parties. Respondent did not lead evidence even a single witness. It took the chance of pressing claims for damages, loss of profits, etc without leading oral evidence. Though it produced various documents, which included third party documents and unilateral documents, it did not lead evidence of any witness to prove them. The Tribunal has awarded claims in favour of the Respondent in absence of oral evidence. The effect of absence of evidence on fingings recorded by the Arbitral Tribunal is discussed in the latter part of the judgment.

61) Before proceeding to determine the effect of absence of oral evidence on award of claims by the Arbitral Tribunal, this Court notices another unusual course of action adopted by the Arbitral Tribunal, once again exhibiting lack of fundamental knowledge of procedure and non-judicious approach.

DIRECTING PARTIES TO FILE EVIDENCE BEFORE FRAMMING OF ISSUES

62) After Petitioner filed its Statement of Defence on 31 July 2023, the Tribunal passed Procedural Order No.8 dated 3 August 2023, which reads thus :-

> Procedural Order No. 08 dt. 3.8.23
>
> The respondent filed Statement of Defence (SOD) on 31.7.23 together with supporting documents. With this filing, pleadings of both the parties stand concluded. Hence following directions are issued to the parties for furtherance of the proceedings.

1. Claimant to confirm within a week, whether he wants to file rejoinder, and if so, to file it by 16.8.23.

2. Both parties to confirm 'Admissions and denials' of the annexures of SOC and SOD, by 31.8.23. Such admitted documents shall be considered as valid 'Exhibits' for arguments.

3. For 'Documents Denied', parties shall be eligible for demanding inspection of original documents in possession of the other party and other party shall co-operate for such inspection.

4. Both parties to issue 'Notices to produce documents', if any, which are not in their possession, but may be available with the other party, by 31.8.23.

5. Both the parties to file draft issues for arguments by 31.8.23.

6. Both parties, if they wish to produce witnesses, to file a list of witnesses by 31.8.23 and to file "Affidavit" duly notorised, in lieu of Examination-in-Chief", by 15.9.23.

63) Thus, after receipt of Statement of Defence, the Arbitral Tribunal did not settle the issues. Instead, it straightaway directed the parties to 'file draft issues for arguments by 31.8.23'. Simultaneously, parties were granted liberty to file list of witnesses by 31 August 2023 and to file Affidavits of evidence by 15 September 2023. Thus, before the issues could be framed, parties were directed to file Affidavits of evidence. None of the parties filed Affidavits of evidence and the next dates of hearing were conducted on 7 September 2023 and 13 September 2023, which led to passing of Procedural Order No.9 dated 16 September 2023, in which the Arbitral Tribunal noted that none of the parties had filed notice to produce documents or list of witnesses. The Tribunal observed in paras-6, 7 and 8 as under :-

6. No party filed 'Notice to produce documents' to each other by 31.8.23.

7. No party filed a list of their witnesses by 31.8.23. Hence no examination-in-chief and cross-examination is necessary.

8. With this, all necessary procedural formalities stand completed before commencing final arguments on the case as a whole.

64) Thereafter, the Arbitral Tribunal proceeded to frame issues for final arguments in para-9 of the order:-

> 9. Following issues are framed for final arguments:
>
> i) Any preliminary issue, other than the previously raised issues?
>
> ii) Whether initial execution plan was provided by respondent as to how to
>
> iii) Whether respondent timely made available hindrance free work site?
>
> iv) Whether respondent released timely construction drawings and corresponding to the contracted quantities?
>
> v) Whether respondent imposed holds or kept decisions pending, causing delay in work and idle resources of claimant ?
>
> vi) Whether respondent made timely payments to claimant for the works executed?
>
> vii) Whether claimant deployed adequate resources required to complete the work in time?
>
> viii) Which party was responsible for non-completion of work?
>
> ix) Whether respondent granted EOT within expiry of contract period or the extended contract period?
>
> x) Whether any party committed breach of contract and by violating which provisions of agreement or law?
>
> xi) Whether contract was terminated by respondent within the validity of the contract and lawfully as per procedure stipulated in agreement ?
>
> xii) Whether respondent was justified in getting the balance work executed at the risk and cost of claimant?
>
> xiii) Whether respondent was justified in consuming / disposing off /preventing claimant to take out his material / machineries available at site ?
>
> xiv) What claims / counterclaims are arbitrable / admissible?
>
> xv) Whether interest is admissible on claims / counterclaims ?
>
> xvi) Whether cost is admissible ?
>
> xvii) Any other valid arbitrable issue and relief admissible ?

65) Thus, the Tribunal adopted unusual course of action by directing parties to file evidence before framing of issues. After noticing that parties had not filed evidence, it then proceeded to frame issues on 16 September 2023. Thus, the parties were not given liberty to lead evidence on issues framed. The Respondent admittedly did not lead evidence of any witness and after some time was spent on adjudication of application for amendment etc, the Arbitral Tribunal straightaway proceeded with final arguments.

WHETHER FINDINGS OF TRIBUNAL ARE SUPPORTED BY EVIDENCE

66) Now I proceed to examine whether the claims could have been adjudicated by the Arbitral Tribunal in absence of oral evidence of parties.

67) The main issue before the Arbitral Tribunal was with regard to the validity of termination of contract. After recording brief factual background, the Tribunal straightaway proceeded to decide each of the 17 issues framed by it. I proceed to consider findings on each issue recorded by the Tribunal to examine whether they can be sustained in absence of oral evidence and whether atleast any documentary evidence is discussed while answering the same.

68) *Issue No. 1* was about preliminaries and findings recorded thereon need not be discussed.

69) *Issue No.2* was with regard to the provision of initial execution plan by the Petitioner and the same is answered by the Arbitral Tribunal in para-42 of the Award as under :-

> 42. Whether initial execution plan was provided by respondent as to how to complete the work in 10.5 months ?

Claimant's argument : (i)There was no initial execution plan provided by respondent regarding sequencing of activities in the bid documents or immediately on award of work, priority structures and activities to be completed on priority and dates of required completion of each activity in order to complete the entire work in 10.5 months.

Respondent's counter-argument : Could not sh ow any such provision in contract.

Arbitrator's findings and reasoning :
In construction sector the resources required to execute the items of work are specific and are defined according to the nature of items of work and therefore a detailed plan of the nature of item of work to be executed is required before start of work.
On perusal of the pleadings, the evidence and arguments placed on record by the parties, it is established that Respondent failed to establish that he had provided the Claimant with his priority of the finished structures required by him which would have established the item of work required to be executed in a given time and also pursue the Respondent for required GFC drawings and hindrance free work site to enable the Claimant to plan the resources mobilization required and the dates on which each activity to be completed as per respondent's priority.
I therefore hold that the Respondent failed to provide any initial execution plan, nor he can hold claimant responsible for not making front timely available to other agency of respondent.

Thus, the Arbitral Tribunal has not discussed any evidence (documentary or oral) to arrive at the conclusion that the Respondent failed to provide initial execution plan. The above quoted findings of the Arbitral Tribunal are thus without evidence.

70) *Issue No.3* related to making available hindrance free work site. The only reasoning recorded by the Arbitral Tribunal are to be found as under:

In accordance with the construction industry trade practice the client is required to provide hinderance free construction site to enable the contractor to perform and deliver the work as required and avoid any idle expense and utilize his mobilization most optimally to deliver the required schedule.

From the records it appears that partly hindrance free work site was not made available due to land owner's / farmers agitations and hindrances created by respondent's other agencies etc.

I therefore hold that the Respondent failed to provide partly hinderance free work site as required, which was one of the causes

> of delay in addition to the delay caused by the hold on the works imposed by Respondent, the world-wide pandemic, delay in issuing initial drawings to commence the works in full swing etc.

71) Again, for recording the above finding, the Arbitral Tribunal has not even taken into consideration any documentary evidence and has recorded the findings and has answered the issue against the Petitioner by recording a vague finding that that partly hindrance free work site was not made available due to land owner's / farmer's agitations and hindrances created by Respondent's other agencies etc. However, no document is discussed while recording this finding. The finding is thus based on no evidence and is grossly perverse.

72) *Issue No.4* related to timely release of construction drawings. The Tribunal's findings while answering the issue are to be found in para-44 of the Award, which are as under :-

> Arbitrator's findings and reasoning :
>
> In the construction sector, it is necessary that GFC drawings are required well in advance to enable the contractor to plan & mobilize his resources within a required time to deliver the goods within the contract period, and therefore it implies that the respondent was required to release all essential GFC drawings required to commence the works immediately in full swing on the day one of PO and thereafter the balance GFC drawings in about a month of PO, considering the short contract period of 10.5 months to complete all the works under the contract amounting to Rs 111 Cr. It is established from the records that respondent miserably failed in timely issuing the drawings so as to complete the work in time. Many drawings were not issued even after completion of contract period or even within the extended contract period. Respondent's contention that since works for which drawings were issued were not completed, it is not relevant to issue further drawings, is not correct. It is not correct to expect that immediately after issue of drawings works can be commenced next day. It requires lead time to receive the materials from suppliers, mobilise specific type of machineries, skilled labour etc., to suit the nature and quantum of work shown in the drawings. Hence next set of drawings is required well in advance for claimant to plan suitable adequate mobilisation of resources and to take care of required lead time for suppliers of materials etc.
>
> From the records the AT finds that, the Respondent has admittedly caused a delay in issue of various drawings including that by issuing revisions in the drawings as well, which were required to enable the

> Claimant to timely plan his required resources and also to avoid prolongation / rework. Structural drawings were issued only at the fag end of contract period.
>
> On the basis of records, I hold that respondent failed miserably in releasing the drawings timely and caused huge delay in issue of drawings, preventing claimant to plan / mobilise his resources suitably to complete the works smoothly within even the extended contract period. Many drawings were not even issued till initial contract completion date.

73) The Petitioner had specifically contended before the Arbitral Tribunal that the drawings to the extent of 94% of PO Value were issued, out of which the Respondent had completed only 14% work. From the above extracted findings in the arbitral award, it appears that though the Tribunal has noted this aspect, an absolutely vague and perverse finding is recorded that '*many drawings'* were not issued even after completion of contract period or even after extended contract period. The Arbitral Award does not discuss the dates on which particular drawings were required to be supplied, the dates on which they were actually supplied, how delay affected execution of work, etc. A shocking perversity is to be found in the finding that 'the Respondent has *admittedly* caused delay in issuance of various drawings'. While recoding this perverse finding, the Arbitral Tribunal has not referred to any particular document or pleading where such admission is given by the Petitioner. When a finding of admission of delay is recorded, the place where such admission is given must be discussed. However, there is nothing in the Award to indicate that the admission is either in pleadings or any particular document. In my view, the above findings are also not based on any evidence and are thus patently perverse.

74) The findings on *Issue No.5* relating to imposition of holds or keeping decisions pending causing delay in work and idling of resources are to be found in para-45 of the arbitral Award. The Arbitral Tribunal has answered Issue No.5 in favour of the Respondent and against the Petitioner holding Petitioner is responsible for placing on hold various

works for 140 days. Petitioner had raised a defence that Respondent had not completed the works for which drawings were issued when there was no hold and because of Respondent's own inadequate resource mobilization. It was also contended by the Petitioner that 'free hold drawings' to the extent of 94% were issued during the contract period, but Respondent could execute only 14% work. However, these defences of the Petitioner are not dealt with by the Arbitral Tribunal, who only took into consideration the hold placed for 140 days. The Arbitral Tribunal has not decided whether work on the basis of 94% drawings could have been executed by the Respondent. The Tribunal thus had two versions viz. (i) Respondent's version that Petitioner put hold on work and delayed decisions resulting in delay in execution of work and idling of resources and (ii) Petitioner's version that though 94% 'hold free drawings' were issued, Respondent executed only 14% work. In such circumstances, the Tribunals ought to have discussed, with reference to evidence on record, as to which version is correct and why. It ought to have recorded some findings as to whether Petitioner's claim of supply of 94% 'hold-free drawings' is correct or not. However, this exercise is not undertaken by the Tribunal and version of Respondent is blindly accepted without discussing any documentary evidence on record. Again, the finding that '*it is established that there was huge delay caused by the Respondent in issue of GFC drawings, revision of drawings....*' clearly appears to be perverse as the same is recorded in ignorance of the position that 94% of the drawings were issued to the Respondent.

75) *Issue No.6* relating to release of timely payments to the Respondent is answered by recording only following laconic finding:-

> Arbitrator's findings and reasoning:
>
> Timely full payment is a backbone of timely completion of works. From the arguments and evidences produced by the parties, it is clear that respondent retained the money arbitrarily more than what was provided in the contract and did not release it for long and held those for no valid reasons. This affected cash flow of claimant adversely,

causing delay in completion of works, due to respondent's defaults in holding payments uncontractually.

76) Thus, the Arbitral Tribunal has not bothered to consider any evidence for recording finding in favour of the Respondent on Issue No.6 and has recorded a perverse finding that Petitioner did not release payments for long time. The Arbitral Tribunal has merely recorded arguments of Respondent and of Petitioner and has recorded above extracted findings without bothering to refer to any documents, in absence of any oral evidence. It is settled law that mere reproduction of arguments of both sides and accepting as correct arguments of one side does not amount to recording of reasons. Reference in this regard can be made to the judgment of this Court in ***Board of Cricket Control of India Versus. Deccan Cgronicle holding limited*** [8]. I therefore find findings of the Arbitral Tribunal on Issue No.6 also to be perverse.

77) *Issue No.7* relating to deployment of adequate resources is answered by the Arbitral Tribunal in favour of the Respondent by undertaking mere arithmetic exercise without considering any evidence on record. The findings on Issue No.7 do not indicate that any particular document (in absence of oral evidence) is taken into consideration by the Arbitral Tribunal. Mere applying arithmetic percentage cannot decide the issue of timely deployment of adequate resources by the Respondent. The issue involving factual dispute ought to have been answered by the tribunal by discussing atleast some evidence available before it. I therefore find finding on Issue No.7 also to be perverse.

78) *Issue No.8* relating to responsibility for delay/non-completion of work is again answered by the Arbitral Tribunal by mere undertaking an arithmetic exercise. The findings recorded by the Arbitral Tribunal in this regard are to be found in para-48 as under :-

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Arbitrator's findings and reasoning:

In view of the detail reasons mentioned in preceding findings of AT at paras 43 to 47 above, it is established that the respondent was solely responsible for the delay in completion of work. Since respondent did not grant the EOT for justified hold of 215 days ie. upto 31.12.22, claimant could not complete the balance work,

It is noticed from the evidences placed before AT that respondent admitted having works under hold and delay attributable to them for 140 days. In addition, work was held up for 75 days due to breakout of nationwide epidemic Covid-19, in a contract of 320 days (10.5 mths). Hence during initial contract period, claimant could get only 105 working days (=320-140-75), which is 32.8% of initial contract period. Respondent admitted that claimant had completed more than 33% of work in the initial contract period. Even including EOT, during total contract period of 365 days, claimant got only 150 working days (=365-140-75), which is 41% of total contract period. Respondent admitted that claimant could achieve 37.77% progress during the total contract period. Hence performance of claimant was almost matching the front and drawings availability and the work progress was not suffering adversely on account of in-adequate resource mobilization by claimant; but was suffering due to defaults of respondent solely.

In view of the facts on record the total value of works that the Respondent failed to release within the agreed contract period is about Rs.48.93 Cr which is about 52% short from the awarded contract value.

Respondent's contention that claimant was supposed to inspect the site and tender drawings before quoting tender is sans merit, since as per records, delay is due to respondent's indecision and lack of timely planning and not due to ignorance of site conditions or pre-tender drawings by claimant on the face of it.

Hence, Respondent's contention stands dismissed.

Hence I hold that there is no justification to believe respondent's contention that work completion was delayed as claimant was lacking in adequate mobilization of resources. Rather, respondent is solely responsible for keeping various works under holds due to poor planning in issuing timely clear cut hindrance-free drawings, frequently revising drawings and lack of timely decisions, delay in payments, unlawful holds in payments etc, resulting in discouraging claimant for augmenting mobilizing as a catch up plan, causing delay in works and idle resources of claimant. Hence respondent is solely responsible for non-completion of work by not granting justified EOT for 215 days as per contract provision vide Cl 5.d & 13 of GTC. Respondent's contention that claimant was supposed to inspect the site and tender drawings before quoting tender is also dismissed.

79) The Arbitral Tribunal has thus excluded period of 140 days (hold period) and 75 days (covid pandemic period) for the purpose of recording a finding that in 41% available contract period, Respondent completed 37.77% work. However, Petitioner had raised a specific contention that only 14% of work on the basis of 94% 'hold-free drawings' was completed by the Respondent. The issue relating to responsibility for delay involved factual controversy and it was incumbent for the Arbitral Tribunal to discuss atleast some documents (in absence of oral evidence) while rendering the finding on that issue. The issue required discussion of at least documentary evidence, in absence of oral evidence. However, the issue is answered by merely undertaking guesswork in the form of arithmetic. The contract is terminated by holding Respondent responsible for delay in execution of work. Therefore, Respondent's witness ought to have stepped into the witness box and should have deposed to prove that there was no delay on Respondent's part and that the conclusions recorded in the termination order are factually incorrect. However, the Respondent shied away from the witness box despite grant of opportunity. It is another matter that the finding on Issue No. 8 also suffers from the same vice of non-consideration of even a single document by the Arbitral Tribunal.

80) *Issue No.9* relating to grant of extension of time is answered in favour of the Respondent and against the Petitioner by recording following cryptic findings:

> Arbitrator's findings and reasoning:
>
> The original contract period expired on 30.5.22. Respondent granted provisional EOT upto 19.9.22 without imposing LD vide his letter dt 30.5.22. Thereafter Respondent changed it and granted EOT for 45 days upto 14.7.22, without imposing LD, on 7.6.22 against claimant's request upto 31.12.22. Claimant replied it on 23.6.22. Respondent did not grant EOT after 14.7.22. Hence no contract existed thereafter.
>
> I therefore hold that the contract had come to an end on 14.7.22 by efflux of time. No EOT was granted thereafter. There is no dispute about this between the parties. There was no justification for respondent to deny justified EOT upto 31.12.22 for his own admitted

> delays for 140 days and 45 days for Epidemic Covid-19 vide his letter dt 30.5.22 granting provisional EOT upto 19.9.22 without imposing LD, which is a glaring injustice by respondent.

81) For recording a finding that '*there was no justification for Respondent to deny justified EOT upto 31.12.22'*, the Tribunal has not taken into consideration any document on record. In absence of oral evidence, some documentary evidence ought to have been discussed by the Arbitral Tribunal for holding Petitioner responsible for non-grant of extension of time. This is particularly because Petitioner had taken specific defence that Respondent had completed only 14% of work despite availability of 94% drawings. In my view therefore, the findings recorded on Issue No.9 are also without discussing any evidence on record and are patently perverse.

82) *Issue No.10* was the most vital issue relating to commission of breach of contract by the Respondent. This vital issue is decided in favour of the Respondent and against the Petitioner once again without discussing any document on record and by undertaking mere arithmetic calculations and by merely referring to the contractual clauses. The findings in this regard are to be found in para-50 of the Award, which are as under :-

> Arbitrator's findings and reasoning:
>
> There are implied & explicit contract provisions in the contract. From the evidence placed before by the parties and as recorded in paras 43-46 & 48 above, it appears that respondent failed in fulfilling implied & explicit contract provisions and reciprocal promises on several accounts, such as:
>
> i) Respondent failed to issue GFC drawings minimum required initially by claimant to commence the work immediately and required for at least for next 3 months' works and thereafter to issue balance GFC drawings in initial one month progressively so that claimant can plan mobilization suitably and execute the work smoothly without any hindrance and complete within 10.5 months. In view of the facts on record the total value of works that the Respondent failed to release within the agreed contract period is about Rs.48.93 Cr which is about 52% short from the awarded contract value.

ii) Respondent failed in finalising sequencing of priority structures and inform claimant of dates by which those structures are required and make available required inputs.

iii) Respondent failed in avoiding imposing frequent holds on works.

iv) Respondent failed in giving timely decisions so as to continue work smoothly.

v) Respondent failed in issuing timely work permits.

vi) Respondent failed in making timely payments without any unlawful holds.

vii) Respondent failed in issuing timely change orders as per Cl 20 of SCC and fulfil consequential contractual provisions such as reduction in CPBG, quantity variation of BOQ items etc.

viii) Respondent failed in granting EOT as per CI 5 & 13 of GTC for his own admitted delay attributable to respondent and for Covid-19, beyond claimant's control etc total for 215 days.

ix) Respondent terminated contract unlawfully even whe provisions of contract under Cl 12 of GTC were not triggered.

x) Respondent failed in resolving dispute amicably as pe contract Cl 14 of GTC before resorting to arbitration.

xi) Respondent failed in appointing arbitrator when disputes are not resolved amicably as per contract.

xii) Respondent failed to release of SD/retention money and CPBG even after completion of defect free DLP as per the provisions of CI-5 read with Cl-11 of GTC of contract.

xiii) Respondent did not allow claimant 30 days' time to file his final bill and take any joint measurements with claimant of work done when claimant submitted measurements and FB on 7.9.22. He has not communicated any measurements to claimant, nor filed evidence to AT of such measurements having taken himself / with outside engineer as per Cl 7 of GTC, nor filed any justification before AT for his defaults.

xiv) respondent encashed CPBG unlawfully on 6.2.23, instead of releasing, without issuing any defect list and establishing any recovery required as per contract provisions. Respondent mischievously encashed it without informing AT, even when the dispute was under arbitration.

xv) respondent consumed claimant's left out materials at site in February 2023 unlawfully, without taking joint measurements with claimant or an outside qualified engineer and not making any payment to claimant for his material consumed as per contract provisions and Sec 70 of ICA. Mischievously respondent did not even

bother to inform to AT, even though the matter was under arbitration.

xvi) respondent failed to fulfil reciprocal promise and pay damages under section - 37, 39, 51, 52, 53, 54, 55, 67, 70, 73 of the ICA.

xvii) Respondent failed to issue completion certificate of the works completed by claimant within 30 days of as per contract provision together with defect list if any, inspite of claimant's several repeated requests. No defect list was issued by respondent, which confirms that there were no defects in works.

xviii) The Respondent by not verifying the Claimant's measurements that were submitted by him within 07 days of his submission, has breached the provision of CLAUSE-7 (b).

I therefore hold that it is respondent who has solely committed various breaches of contract and is therefore liable to compensate claimant in terms of various provisions of ICA and agreement. H'ble Supreme / High courts held in several cases that in case of contradiction between provisions in agreement and ICA, it is ICA provisions which will have over-riding effect nullifying agreement provisions. Hence respondent's contention that as per contract provisions claimant is barred from claiming any comensation stands dismissed as null and void, since in contradiction of 'IC Act' / law and natural justice.

83) Perusal of the above findings would indicate that not even a single document is considered for holding Petitioner responsible for failing to finalise sequencing of priority structures, for failing to inform the Respondent of dates by which such structures were required, for failure to give timely decisions, for failing to issue timely work permits, for failing in making timely payments etc. All these findings are recorded without referring to even a single document on record. The Tribunal ought to have considered and discussed atleast some documents on record, in absence of oral evidence, as to when a particular decision was required by Respondent and when such decision was given by Petitioner. Similarly, some documents ought to have been discussed to indicate as to when any particular work permit was required to be issued and how there was delay in issuance of the same. The above findings are recorded by the Arbitral Tribunal on its *ipse-dixit* without even bothering to take into consideration even a single document on record. The findings are

patently perverse to say the least. The findings also exhibit lack of judicial approach on the part of the Arbitral Tribunal.

84) Findings on *Issue No.11* relating to termination of contract within its validity and following of procedure for termination is answered in favour of the Respondent and against the Petitioner again without referring to any particular document on record. There is no clarity in the Award as to which procedure under the contract was not followed before issuing termination letter. It has once again gone into the same issue of suspension of works for 140+75 days and has recorded a vague finding that '*respondent failed to substantiate that any of those provisions were triggered to justify termination of work due to failure of Claimant prior to 31.12.22*'. Burden was on Respondent to prove as to how the termination is invalid. However, the burden is shifted on Petitioner to prove that no contractual eventuality for termination had triggered and on Petitioner's inability to prove the same, the issue is answered in Respondent's favour. The Tribunal has not even bothered to discuss the provisions of Clause12 of GTC. The findings are clearly unsustainable, being egregiously perverse.

85) *Issue No.12* about execution of balance work at the risk and costs of Respondent is answered in favour of the Respondent in the light of decision on issues relating to validity of termination of contract. Since findings on the issue of validity of termination itself are perverse, the consequential finding on Issue No.12 is automatically rendered perverse. This would apply even to findings on *Issue No. 13* relating to consumption /disposal of Respondent's material/machinerries and in preventing the Respondent from taking it out.

86) The Arbitral Tribunal has decided *Issue No.14* relating to grant of claims in favour of the Respondent in absence of any oral evidence on record. The first claim was in respect of loss of profit of Rs.12,30,65,251/-. The claim was in the form of damages/compensation.

However, no oral evidence is led by Respondent about sufferance of any loss on account of termination of the contract. It is well settled principle of law that claim for damages/compensation cannot be granted in absence of leading of evidence. Reliance by Mr. Behramkamdin on judgment of the Apex Court in ***Bharat Coking Coal Ltd.*** (supra) in this regard is apposite. The Apex Court has considered the judgment of ***Bharat Coking Coal Ltd.*** in ***Unibros Ltd Versus. All India Radio*** [9], and has held in para-15,16 and 19 as under :-

> 15. Considering the aforesaid reasons, even though little else remains to be decided, we would like to briefly address the appellant's claim of loss of profit. In ***Bharat Cooking Coal*** (supra), **this Court reaffirmed the principle that a claim for such loss of profit will only be considered when supported by adequate evidence**. It was observed:
>
> > "24. ... It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. **Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same**."
>
> 16. To support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that the appellant could have earned elsewhere by taking up any, it becomes imperative for the claimant to substantiate the presence of a viable opportunity through compelling evidence. This evidence should convincingly demonstrate that had the contract been executed promptly, the contractor could have secured supplementary profits utilizing its existing resources elsewhere.
>
> 19. The law, as it should stand thus, is that for claims related to loss of profit, profitability or opportunities to succeed, one would be required to establish the following conditions : first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability. On perusal of the records, we are satisfied that the fourth condition, namely, the evidence to substantiate the claim of loss of profitability remains unfulfilled in the present case.
>
> *(emphasis added)*

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The Apex Court has thus held that the claim for loss of profits cannot be awarded by the arbitrator in absence of credible evidence.

87) In my view, leading of oral evidence to prove the claim of loss of profits was utmost necessary and unless a witness steps in the witness box and deposes to establish with credible evidence that the Respondent had suffered any loss of profits on account of wrongful termination, damages under Section 73 of the Indian Contract Act,1872 can never be awarded.

88) Also, the claim for damages depends on issue of validity of termination of contract. Since I have held that the findings of the Arbitral Tribunal on the issue of validity of termination are perverse, the claim for damages can otherwise not be upheld.

89) Similar is the case in respect of various other claims granted by the Arbitral Tribunal in favour of the Respondent. Once the finding on termination of contract is not upheld and is set aside, award of various claims in favour of the Respondent will necessarily have to be set aside. I am therefore not considering various findings recorded by the Arbitral Tribunal in respect of each of the claims. However, since the claim for structural steel is of sizable value of Rs.6,30,59,230/-, it would be apposite to consider Tribunal's findings on the said issue which are recorded in para-59 of the Award as under :-

> Arbitrator's findings and reasoning:
>
> Respondent has never disputed that the required structural steel has not been brought at site. There was also no dispute regarding the quality of structural steel. What respondent has disputed is that claimant failed to attend joint measurement, hence it is not admissible. Respondent failed to bring out any such provision of contract as already recorded in findings of AT in para 53 above. The structural steel of required quantity was only brought through security gate of respondent with proper IMRs which is as authentic as joint measurements quantity in absence of any other authentic measurements records taken and produced by respondent as required under the contract provisions. Claimant has not claimed any excess quantity beyond BOQ quantity. Moreover, respondent has not

brought out any letter to AT's notice where he has written to claimant for having failed to procure required quantity of steel.

It is an established fact that advance paid requires receipt of material at site along with a copy of the invoice for the same. Respondent has not disputed that he has not paid the above stated advance to the Claimant as per IMRs.

Respondent has not disputed the detail of various IMR's (Inward Material Receipt No) that have been issued by him as mentioned by Claimant and therefore the AT finds that the receipt of the total quantity of Structure steel is not in dispute which is 1674.73 M and therefore the quantity of material once verified does not need any repeat joint verification. Out of this quantity claimant has claimed that 231.129 M was fabricated, installed & completed in all respect but not paid; 1087.33 M was fabricated; balance 355.73 M was available at site as fresh material, which was not disputed by respondent, nor he has brought out any different quantity in his pleadings / arguments.

AT finds that the Respondent has availed more than sufficient time to have proceeded with Joint Verification if he so intended which is from 7.9.2022 to 16.04.2023, for which respondent has not produced any justification. It establishes that the Respondent intentionally avoided the joint verification with intention of undue enrichment by causing a financial harm/loss to claimant, which is not permissible by law.

The Respondent has admitted that he has taken over and consumed all the materials that was available at site as per his own admission to AT.

It is noted that the Respondent neither permitted the Claimant to proceed with the works to at least consume the balance materials which was in different stages of installation to therefore enable the Claimant to avail return of his investments and nor was the Claimant permitted to take the unconsumed materials back and on the contrary the Respondent has consumed the Claimant's materials unilaterally / arbitrarily, without giving credit of amount to claimant as per contract provisions.

From evidence on record, it is established that Respondent stands in breach of contract term vide clause-7.4 final bill, clause-7(b) billing of works and clause-7.a.3 measurement of works.

The other dispute is regarding using TEKLA software for structural design. Claimant has not been able to substantiate that respondent rejected his offers of using other approvable software arbitrarily and that he has incurred extra cost for using vis-à-vis other approvable software.

The dispute regarding Procurement of material at higher cost during Russia-Ukrain war is not covered by any provision of contract; hence dismissed.

As per technical specification, the claimant is required to submit the detail drawings within 4 weeks of issuance of GA drawings.

> I therefore hold that claim of Rs 6,30,59,230/- as per calculations shown in para 85, towards unpaid structural steel brought at site including part fabrication & erection, as per IMRs, is payable to claimant; but no extra payment for using TEKLA software or preparing detail design and drawings is admissible.

90) The Tribunal has proceeded to award the claim mainly on account of failure on the part of the Petitioner to proceed with joint verification. Petitioner is held responsible for avoiding joint verification. The quantity of structural steel is determined mainly on the basis of Inward Material Receipts (IMR). No document is discussed for recording existence of alleged admission of consumption of all the steel at the site. The purchase and supply of claimed quantity of steel is presumed on the basis of failure on the part of Petitioner in writing any letter to Respondent about not procuring required quantity of steel. This is clear from the finding that '*Moreover, respondent has not brought out any letter to AT's notice where he has written to claimant for having failed to procure required quantity of steel.*' This finding is in the nature of a conjecture in absence of any direct documentary evidence of claimed quantity of steel purchased and brought at the site by the Respondent. The Arbitral Tribunal has not discussed any invoices of purchase of claimed quantity of steel by the Respondent. The IMR alone cannot form the basis for determining the quantity brought at site. Entries made at the security gate of the Petitioner on IMRs cannot alone be the basis for holding that Respondent brought the claimed quantity of steel at the site. In my view, the Arbitral Tribunal has failed to discuss any tangible documentary evidence on record, rendering its finding on the issue to be perverse.

91) Accordingly, it is concluded that in absence of oral evidence, none of the claims of the Respondent could have been granted. Though documents were filed before the Tribunal, the same were not proved. Also, various findings, as discussed above, are recorded without referring

to any document produced on record. The findings in the Award are thus patently perverse.

NON-GRANT OF OPPORTUNITY OF LEADING EVIDENCE TO PETITIONER

92) I have already held that the Arbitral Tribunal has adopted procedure unknown to law by directing parties to file list of witnesses and affidavits of evidence even before framing of issues. The issues were framed by Procedural Order dated 16 September 2023 after recording that examination-in-chief and cross-examination was not necessary in the light of non-filing of list of witnesses by 31 August 2023. The Arbitral Tribunal thereafter proceeded to frame 17 issues as observed above and straightaway proceeded to direct that oral arguments shall commence on the issues so framed. This course of action adopted by the Arbitral Tribunal is already held to be exhibiting absence of judicious approach on its part.

93) The Petitioner had filed counterclaim and possibly desired to lead evidence. However, after passing of Procedural Order dated 3 August 2023, the Petitioner had raised the issue of jurisdiction of the Arbitral Tribunal by sending email dated 1 September 2023. I have already dealt with the manner in which the Tribunal prevented the Petitioner from filing formal application under Section 16 of the Arbitration Act and how the email dated 1 September 2023 was treated and decided as application under Sections 16 and 32 of the Arbitration Act. Since the Petitioner was agitating the issue of jurisdiction till 16 September 2023 and since the said issue was decided by order dated 16 September 2023, no occasion arose for the Petitioner to file affidavit of evidence. However, by order dated 16 September 2023 the Arbitral Tribunal recorded that all procedural formalities were completed and final arguments shall commence on the next date of hearing. In view of these peculiar circumstances, though initially an opportunity was granted by the Arbitral Tribunal on 3 August 2023 for filing of evidence, the Arbitral

Tribunal appears to have shown some haste in directing the parties to commence arguments simultaneously with deciding application of jurisdiction under Sections 16 and 32 of the Arbitration Act.

PETITIONER'S OBJECTION OF BIAS

94) So far as the allegation of bias levelled by the Petitioner against the learned Arbitrator is concerned, I am not inclined to delve deeper into the said allegation since I have arrived at a conclusion that the Arbitral Award is not sustainable, both, on account of the manner in which the arbitral proceedings are conducted as well as the findings of the Tribunal being perverse. Suffice it to observe that the Tribunal has conducted the proceedings in such a manner that has given room for Petitioner to allege bias against it. I am however not considering those allegations as there are better reasons for setting aside the Award.

FEW MORE INSTANCES OF LACK OF JUDICIOUS APPROACH

95) In addition to the instances discussed above exhibiting lack of judicious approach by the Tribunal, there are couple of more instances not touching the merits of the case. The Arbitral Tribunal, while awarding costs of arbitration of Rs.40,00,000/- in favour of the Respondent, has also awarded costs of Application under Section 11 of the Arbitration Act and costs of Writ Petition No.3553 of 2023. While dismissing the Petition, this Court issued following directions in paragraph 37 of the judgment as under:-

> 37. In the facts and circumstances of the case, there will be no order as to costs.

96) Thus, when the Division Bench did not feel it appropriate to impose costs, the Arbitral Tribunal overstepped its jurisdiction and proceeded to award costs of the Writ Petition. Similar is the position in

respect of costs of Rs.1,00,000/- awarded in respect of Commercial Arbitration Application (L) No. 33837 of 2022. This Court did not award any cost by order dated 12 December 2022 and the Arbitral Tribunal overstepped its jurisdiction by awarding costs of the said Arbitration Petition as well. The manner of awarding costs by the Tribunal also exhibits absence of judicial approach on the part of the Tribunal. Be that as it may. Since the whole of the Award is being set aside, the direction for payment of costs of Rs.40,00,000/- awarded in favour of the Respondent would no longer survive.

97) There is yet another aspect which again exhibits absence of judicious approach on the part of the Arbitral Tribunal. The Petitioner has contended that the Arbitral Tribunal insisted upon the Petitioner submitting a signed statement certifying/ confirming that full opportunity was extended to the Petitioner and all procedures specified in the Arbitration Act were followed. Ordinarily seeking such statement from parties, by itself, would not be a reason for criticizing the Tribunal as such statements, if submitted, would obviate the challenges to the procedures before Section 34 Court. The present case however depicts departure from set principles of law and procedures. The Petitioner has refused to submit any such statement and recorded detailed reason for refusing to do so. I have already held that the Petitioner has been erroneously denied an opportunity of amending the statement of defence. Having conducted the arbitral proceedings by following procedures unknown to law, the Tribunal expected Petitioner to certify that full opportunity was granted and all procedures were followed.

CONCLUSIONS

98) Considering the overall conspectus of the case, I am of the view that the impugned Award is unsustainable and liable to be set aside. The Arbitral Tribunal has adopted procedure unknown to law while conducting the arbitral proceedings. It has erroneously treated mere

emails for deferment of proceedings as applications and has prevented the Petitioner from filing proper applications. It has erroneously prevented the Petitioner from raising the issue of validity of the contract in the light of suppression of CIRP against Nice Projects Ltd. prior to issuance of tender.

99) Apart from exhibiting non-judicious approach by the Arbitral Tribunal in conduct of arbitral proceedings, the findings recorded by it on various issues are otherwise patently perverse and unsustainable. The Arbitral Tribunal has proceeded to decide the issue of validity of termination of contract and damages suffered by the Respondent in absence of any oral evidence. Parties had not consented for decision of arbitral proceedings in absence of oral evidence. Even if the vice of absence of oral evidence is to be momentarily ignored, most of the findings recorded by the Arbitral Tribunal do not even refer to any documentary evidence on record. The documents produced by the parties are not discussed by the Arbitral Tribunal while recordings its findings.

100) This Court is not interfering in the impugned Award because another view is also possible. The manner in which arbitral proceedings are conducted by the Tribunal as well as findings recorded by it are such that no fair-minded person would ever conduct the proceedings in such manner or record such findings. The issue is not about adequacy or sufficiency of evidence. If Arbitral Tribunal was to support its findings at least by referring to some documentary evidence, this Court would have invoked powers of explaining and justifying such findings by undertaking the exercise of reading the whole of the Award as well as documents produced before the Arbitral Tribunal. This principle is enunciated by the Supreme Court in ***OPG Power Generation Private Limited*** in which it is held thus:

> 168. We have given due consideration to the above submission. In our view, a distinction would have to be drawn between an arbitral award where reasons are either lacking/unintelligible or perverse and an

> arbitral award where reasons are there but appear inadequate or insufficient [See paras 79 to 83 of this judgment]. **In a case where reasons appear insufficient or inadequate, if, on a careful reading of the entire award, coupled with documents recited/ relied therein, the underlying reason, factual or legal, that forms the basis of the award, is discernible/ intelligible, and the same exhibits no perversity, the Court need not set aside the award while exercising powers under Section 34 or Section 37 of the 1996 Act, rather it may explain the existence of that underlying reason while dealing with a challenge laid to the award. In doing so, the Court does not supplant the reasons of the arbitral tribunal but only explains it for a better and clearer understanding of the award.**
>
> (emphasis added)

101) However, the Tribunal has not discussed even a single document and had no oral evidence before it. The Tribunal cannot record conclusions by stating that the same are reached 'from material on record', without actually referring to the exact document it seeks to rely on. Court exercising powers under Section 34 is not expected to go through the documents on record of the tribunal and certify that the conclusions of the Tribunal are otherwise supportable by evidence on record. There is a marked difference between explaining the inadequately worded underlying reason in the award by Section 34 Court by discussing documents on record and rewriting the whole of the award by supporting each finding with documents available on record. The latter exercise involves supplanting of reasons, which is impermissible. For preserving the impugned Award, what this Court will have to do in the present case is to undertake the latter exercise. I am not supposed to navigate through the heap of documents produced before the Tribunal and find out if the finding on each issue can be supported or not. Therefore, this Court is unable to preserve the Award by undertaking the exercise of justifying findings of the Arbitral Tribunal by explaining the same with reference to the documents available on record. Therefore, the principle enunciated by the Apex Court in ***OPG Power Generation Private Limited*** (supra) cannot be invoked in the present case. The principles enunciated in ***OPG Power Generation Private Limited*** cannot be overstretched to an absurd level where Section 34 Court virtually

rewrites the entire Award by corelating each conclusion of the Tribunal with evidence on record.

102) In the present case, it is not possible to sever good part of the Award or the preserve the same by setting aside the bad part. There is no good part in the Award. Denial of an opportunity for Petitioner to raise the issue of procurement of contract by fraud and refusal to adjudicate the issue of validity of contract by the Tribunal vitiates the entire Award. The entire award is riddled with egregious errors, patent illegalities and gross perversities.

103) One of the reasons for setting aside the Award is the manner in which the proceedings are conducted resulting in non-decision of vital issue of validity of contract. Therefore, if advised, the Respondent can invoke arbitration once again. Parties would have full opportunity to raise all issues. Petitioner can raise the issue of validity of contract based on its contention of suppression of pendency of CIRP against Nice Projects Ltd. while procuring the contract. In fresh arbitration proceedings, what can be decided is not just the claims raised in present proceedings, but also possible alternate claim for payment for work done, even if the contract is declared invalid. The Respondent would also get an opportunity to lead oral evidence to prove its claims. In my view therefore, setting aside of the impugned Arbitral Award would be the right course of action to be adopted in the present case.

ORDER

104) The Petition accordingly succeeds. The impugned Award dated 18 June 2024 passed by the Arbitral Tribunal is set aside.

105) The Petition is **allowed** in above terms. Considering the facts and circumstances of the present case there shall be no order as to costs.

With disposal of the Petition, nothing would survive in the Interim Application and the same is disposed of.

[SANDEEP V. MARNE, J.]