

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 4.2.2014

Pronounced on: 30.4.2015

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN

O.P.Nos.98 and 272 of 2011

K.C.Palaniswami .. Petitioner in OP 98/11
& R3 in OP 272/11

Sporting Pastime India Limited
Represented by its Authorised Signatory
Subramani, 19, Kothari Road,
Chennai and Administrative Office at 78,
Government Arts College Road,
Coimbatore-18. .. Petitioner in OP 272/
11 & R3 in OP 98/11

Vs.

Kasturi & Sons Limited,
Nos.859-860, Anna Salai,
Chennai-2 represented by
Jt. Managing Director N.Murali. .. R-1 in both OPs

Hindcorp Resorts Private Limited,
Nos.859-860, Anna Salai,
Chennai-2 represented by
Director R.Ramesh. .. R-2 in both OPs

K.C.Palaniswami .. R-3 in OP 272/11 &
Petitioner in OP
98/11

Sporting Pastime India Limited
No.78, Government Arts College Road,
Coimbatore 641 018 and
at No.19, Kothari Road,
Nungambakkam, Chennai-600 031
represented by Director. .. R-3 in OP 98/11 &
Petitioner in OP
272/11

Mr.Justice K.Sampath (Retd.),
Arbitrator,
11, 2nd Street, Jagadambal Colony,

Chennai-600 014. .. R-4 in both OPs

Mr.S.Vijayaraghavan,
Arbitrator,
2D, Kameswari Apartments,
35, Desikachari Road, Chennai-4. .. R-5 in both OPs

Mr.C.Kamdar .. R-6 in both OPs

O.P.No.98 of 2011 is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 16.12.2009 passed by the respondents 4 to 6.

O.P.No.272 of 2011 is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 16.12.2009 passed by the respondents 4 to 6.

For Petitioner in both OPs : Mr.V.T.Gopalan, Senior Counsel
and
Mr.S.R.Rajagopal,

For Respondents in both OPs : Mr.Arvind P.Datar,
Senior Counsel

COMMON ORDER

These petitions are filed under Section 34 of the Arbitration and Conciliation Act, 1996, challenging an Arbitral Award passed on 16.12.2009.

2. I have heard Mr.V.T.Gopalan, learned Senior Counsel and Mr. S.R. Rajagopal, learned counsel appearing for the petitioner and Mr.Arvind P.Datar, learned Senior Counsel for the respondents.

3. An agreement was entered into on 19.7.2004 by and between (i) K.C.Palaniswami, who is the petitioner in O.P.No.98 of 2011 on the one hand and (ii) three companies by name, M/s.Kasturi & Sons Limited, M/s.Sporting Pastime India Limited and Hindcorp Resorts Private Limited on the other hand, with a view to enable K.C.Palaniswami to take over the

business, assets and liabilities of Sporting Pastime India Limited. Under the agreement, the issued, subscribed and paid up capital of Sporting Pastime India Limited was to be increased from Rs.3 crores (divided into 30,00,000 equity shares of Rs.10/- each), to Rs.27 crores (divided into 2,70,00,000 equity shares of Rs.10/- each). Under the agreement, K.C.Palaniswami was made liable to discharge the liabilities of Sporting Pastime India Limited, to third parties, which were guaranteed by Kasturi & Sons Limited.

4. In pursuance of the said agreement dated 19.7.2004, the share capital of Sporting Pastime India Limited was increased. But, the liabilities of the said company, which were guaranteed by Kasturi & Sons Limited, were not discharged. Therefore, disputes arose between the parties and they were referred to arbitration before a Tribunal. The Tribunal comprised of one Arbitrator by name S.Vijayaraghavan, nominated by Kasturi & Sons Limited and another Arbitrator by name C.Kamdar, nominated by K.C.Palaniswami. Both of them nominated Justice K.Venkataswami (Retd.) as the Presiding Arbitrator.

5. Before the Arbitral Tribunal, Kasturi & Sons Limited as well as Hindcorp Resorts Private Limited, jointly filed a statement of claim, as against (i) K.C.Palaniswami and (ii) Sporting Pastime India Limited. The reliefs sought by the claimants were as follows:

"6.1. In view of the above, the claimants pray that this Hon'ble Tribunal may be pleased:

(i) To direct the first respondent

(a) to pay a sum of Rs.31,74,15,150/- (Rupees Thirty

one Crores Seventy-Four Lakhs Fifteen Thousand One Hundred and Fifty only) for the monies spent by the first claimant on behalf of the second respondent, more fully described in Schedule 'A' and

(b) to pay Rs.5 crores as damages for breach of contract, irreparable hardship and loss of prestige and reputation of the first claimant;

on or before 30 days from the date of the Arbitral Award;

(ii) In the event of the first respondent being unable to make the above payments within the aforementioned time, to direct the first respondent

(a) to hand over the share certificates and the necessary transfer deeds for the re-transfer in the first claimant's name all the shares that were originally transferred by the first claimant to the first respondent and his nominees; and all the original title deeds and related documents, papers handed over by the first claimant's legal advisors to the representatives of the first respondent pertaining the lands owned by the second respondent and the second claimant, thereby restoring the status quo ante as on 18.8.2004, prior to takeover; and

(b) to pay Rs.5 crores as damages for breach of contract, irreparable hardship and loss of prestige and reputation of the first claimant;

(iii) costs; and

(iv) such other or further reliefs as the Tribunal deems fit and necessary in the facts and circumstances of the case."

6. The claimants subsequently filed a supplemental statement of claim demanding certain amounts towards electricity charges, insurance premium on irrigation system, staff salaries and wages etc. Thereafter, an application to amend the statement of claims was also filed. By the said

application, the claimants before the Arbitral Tribunal sought to incorporate an additional prayer as sub-clause (c) to clause (i) of para 6.1. of the original statement of claim. The additional prayer that the claimants sought to include by way of amendment, reads as follows:

"(c) to pay a sum of Rs.56,50,000/- (rupees fifty six lakhs and fifty thousand only) to the second claimant towards discharge of the liabilities of the second claimant included in Schedule 3 of the said agreement."

7. The Arbitral Tribunal allowed the amendment and the additional prayer was incorporated. Thereafter, the respondents before the Tribunal filed their reply along with a counter claim. In the counter claim, the respondents before the Tribunal prayed for the following reliefs:

*"(i) to direct the first claimant to join the first respondent in contesting the validity of the assessment order dated 23.02.2005 passed by the Income Tax Officer, Company Ward-VI (1), Chennai, against the second respondent OR in the alternative
(ii) to direct the first claimant to pay to the first respondent, the sum of Rs.8,83,23,086/- together with future interest @ 18% per annum."*

Interestingly, the counter containing the claim of KCP and SPIL was actually filed by (i) KCP for and on behalf of Cheran Group of Companies and (ii) SPIL. This was despite the fact that KCP was not shown as representing the Cheran Group of Companies, in the claim petition filed by KSL and HRPL.

8. To the reply and counter claim of the respondents before the Tribunal, the claimants filed a rejoinder. Thereafter, the Tribunal received draft issues from both parties and considered the same and framed the

following 21 issues:

(i) Whether the first respondent has complied with the promise given in the Agreement to release the first claimant of the guarantee obligations before the time frame stipulated in the Agreement?

(ii) Whether the first respondent is liable to pay the first claimant the amounts paid by the first claimant in discharging the liabilities of Schedule 2 creditors of the second respondent company totalling to Rs.29,09,58,527/-, due to the failure of the first respondent in honouring his commitments under the Agreements?

(iii) Whether the first respondent is liable to pay the first claimant the amount spent for preserving and protecting the properties of the second respondent company totalling to Rs.2,87,453/- (Rupees Two Lakhs Eighty-Seven Thousand Four Hundred and Fifty Three only)?

(iv) Whether the first respondent is liable to pay the first claimant the amount of Rs.2,30,75,738/- (Rupees Two Crores Thirty Lakhs Seventy Five Thousand Seven Hundred and Thirty Eight only) for the loss of interest sustained by it on account of meeting the liabilities of the second respondent company?

(v) Whether the first respondent is entitled to any interest for charges payable on the guarantees?

(vi) Whether the first respondent is liable to pay the first claimant the amount of Rs.32,18,402/- for the loss of interest sustained by it due to difference between interest on fixed deposit placed on a comfort level with the banks for repayment of the loans by the second respondent, and the borrowing cost of the first claimant?

(vii) Whether the first respondent is liable to pay to the

second claimant the amount of Rs.56,50,000/- (Rupees Fifty Six Lakhs Fifty Thousand only) towards the discharge of liabilities of the second claimant mentioned in Schedule 3 of the Agreement in the light of the first respondent taking over the lands of the second claimant under the Agreement?

(viii) Is it not true that all the liabilities of the second respondent company were taken into account by the first respondent as a part of sale consideration and that an additional sum of Rs.13.50 lakhs was paid over and above the agreed consideration?

(ix) Whether the first respondent has performed his obligations by depositing Rs.25 crores in a separate account of the first respondent on 20.10.2004?

(x) Whether or not the attachment of Rs.25 crores by Income Tax Department is due to the incorrect account statement of the first claimant, which has prevented smooth completion of the transaction?

(xi) Whether the first claimant is liable to join the first respondent in contesting the validity of the Assessment Order dated 23.2.2005 passed by the Income Tax Officer, Company Ward-VI (1) Chennai against the second respondent company?

(xii) Whether the first respondent is liable to handover to the first claimant the Share Certificates and the necessary transfer deeds for re-transfer in the first claimant's name of all the shares that were originally transferred by the first claimant to the first respondent and his nominees in the event of the first respondent being unable to make payments of the amounts mentioned in issues 2, 3, 4, 6, 7 & 19?

(xiii) Whether the first respondent is liable to handover all the original title deeds and the related documents, papers, handed over by the first claimant to the first respondent

pertaining to the lands owned by the second respondent company and the second claimant, in the event of the first respondent being unable to make payments of the amounts mentioned in issues 2, 3, 4, 6, 7 & 19?

(xiv) Whether the first claimant has committed breach of contract in not handing over the documents relating to the various vehicles for effecting renewal of insurance thereby keeping the vehicles to themselves?

(xv) Whether or not the transaction depends on getting clearance from the Government in regard to use of the land as a golf course?

(xvi) Whether the Agreement dated 19.7.2004 is a complete and executed contract?

(xvii) Whether the statement made by the first claimant that the documents of the second respondent company have been pledged with a foreign company as alleged in the claim statement is correct?

(xviii) Whether the counter-claim of the respondent requiring the first claimant to pay a sum of Rs.8,83,23,086/- is sustainable and valid?

(xix) Whether the first respondent is liable to pay the first claimant the amount of Rs.5 crores as damages for breach of contract, irreparable hardship and loss of prestige and reputation of the first claimant?

(xx) Whether the claim now made by the second claimant is maintainable and if so, to what extent?

(xxi) Whether the first claimant and the second claimant are entitled to costs of the proceedings?

9. Along with the original statement of claim, the claimants had filed about 64 documents, which were marked by consent as Exx.A1 to A64.

Along with the supplementary statement of claim, the claimants filed 12 documents which were filed as Exx.A65 to A76. The respondents before the Tribunal filed four documents and they were marked as Exx.R1 to R4. The Tribunal took on record two documents and marked them as Ex.S1 and S2 series. Thereafter, arguments were advanced.

10. It appears that after the conclusion of arguments before the said Arbitral Tribunal, the matter was re-opened twice for some clarification. Thereafter, the Presiding Arbitrator died. In his place Justice K.Sampath (Retd.) was appointed as the Presiding Arbitrator.

11. Before the Arbitral Tribunal, the parties reached a compromise at one stage, leading to the passing of an interim Award on 3.4.2007. As per the interim award, K.C.Palaniswami became obliged to pay to Kasturi & Sons Limited, a sum of Rs.31,17,65,150/- together with interest at 12% per annum from 30.9.2005 till the date of payment. Similarly, K.C.Palaniswami was also directed to pay to Hindcorp Resorts Private Limited, a sum of Rs.56,50,000/- together with interest at 12% per annum from 30.9.2005. K.C.Palaniswami was granted time till 30.9.2007 to make payments as agreed to. It was made clear that the alternative relief prayed for by the claimants, which related to restitution will be left open for consideration by the Tribunal after 30.9.2007 in the event of non-payment of the amounts agreed to by K.C.Palaniswami.

12. It appears that the interim Award, passed by consent, was challenged before this Court in O.P.No.672 of 2007, by K.C.Palaniswami. But,

for reasons that are too obvious to be stated, the petition was withdrawn, thereby making the interim award reach finality.

13. However, the amount as stipulated in the interim Award was not paid by K.C.Palaniswami. Therefore, the Arbitral Tribunal proceeded further with the hearing of the claim, insofar as it related to "restitution". A preliminary objection was raised by the respondents before the Arbitral Tribunal, to the jurisdiction of the Arbitral Tribunal to proceed further, on the ground that after passing the interim award, the Tribunal became *functus officio*.

14. While the resumed hearing of the arbitration was in progress, Mr.K.C.Palaniswami informed the Presiding Officer, by a letter dated 05.6.2008, that his nominee, namely Mr.C.Kamdar had telephonically informed him that he had resigned. But, when the Presiding Officer contacted Mr.C.Kamdar, he confirmed his willingness to participate, provided the proceedings were held at Mumbai.

15. But, the counsel appearing for the respondents before the Arbitral Tribunal sent a communication dated 24.6.2008, to all the three Arbitrators claiming that his nominee Mr.C.Kamdar had resigned and that in exercise of his right to substitute another Arbitrator in his place under Section 15 of the Act, he was nominating a Senior Advocate of this Court. Not stopping with the same, the respondents before the Tribunal also filed an original petition in O.P.No.445 of 2008 on the file of this Court under Section 14(2), seeking a declaration that Mr.C.Kamdar had ceased to be an

Arbitrator.

16. It appears that the claimants before the Tribunal also moved a petition in O.P.No.390 of 2008 under Section 11(6) of the Act. Since the said petition was posted before the Hon'ble Chief Justice and O.P.No.445 of 2008 was posted before the portfolio Judge, both were directed to be posted together before the Hon'ble Chief Justice. But, after citing the decision of the Supreme Court in ***SBP & Co. [2005 (8) SCC 613]***, the Hon'ble Chief Justice delinked both and sent O.P.No.445 of 2008 to the regular Court. But, O.P.No.390 of 2008 was disposed of by the Hon'ble Chief Justice on 08.8.2008, directing the Presiding Officer of the Arbitral Tribunal, to ascertain from Mr.C.Kamdar, whether he is willing to continue or not and thereafter, to take a decision. Accordingly, the Presiding Officer of the Hon'ble Tribunal ascertained the willingness of Mr.C.Kamdar, in the course of proceedings on 09.8.2008. Mr.C.Kamdar expressed his willingness to continue in writing.

17. Thereafter, O.P.No.445 of 2008 was taken up by the regular Court and it was dismissed by an order dated 25.11.2008, holding that the controversy regarding the alleged resignation of Mr.C.Kamdar from the Arbitral Tribunal was already set at rest by Mr.C.Kamdar himself and that therefore, nothing survived.

18. Therefore, the Arbitral Tribunal commenced proceedings. But, in the light of the above developments that took place after the passing of the interim award, the Tribunal framed the following three additional issues:

(i) Whether the nomination of the third Arbitrator by the Arbitrators, the continuance of one of whom is challenged and

still pending in the Hon'ble High Court is valid and whether the Tribunal so constituted has jurisdiction to consider and decide the matters referred?

(ii) Whether after the interim award dated 09.4.2007, the Tribunal can decide the issue of restitution?

(iii) Whether as contended by the claimants, the corporate veil of the second respondent company should be lifted and relief granted on that basis?

19. After the framing of the additional issues, the claimants filed certain additional documents which were marked as Exx.A77 to A85. Thereafter, the Tribunal eventually passed an Award to the following effect:-

"28.01. In the result this Arbitral Tribunal passes the final Award in the arbitration matter between M/s.Kasturi & Sons Limited, M/s.Hindcorp Resorts Private Limited, the claimants and Mr.K.C.Palaniswami and M/s.Sporting Pastime India Limited, the respondents:-

(i) Directing the respondents to return to the claimants the documents of title and share certificates relating to 2,43,00,000 shares of the second respondent namely Sporting Pastime India Limited, which were handed over earlier to the first respondent pursuant to the agreement dated 19.7.2004 in the manner following:-

(a) The documents of title relating to the second claimant being part of the documents of title referred to above to the second claimant, forthwith.

(b) The documents of title pertaining to the first claimant being part of the documents of title referred to in (a) above and the share certificates pertaining to 2,43,00,000 shares referred to above contemporaneously with the first claimant paying/tendering the sum of Rs.3,58,11,000/- (Rupees Three

Crores Fifty Eight Lakhs Eleven Thousand only) to the first respondent as per para 27.01 with interest @ 12% p.a. on Rs.2,55,00,000/- from the date of award till 17.01.2010 or earlier payment/tender and thereafter @ 18% p.a. on Rs.2,55,00,000/- till date of payment/tendering of the amount of Rs.3,58,11,000/-.

(ii) Dismissing the counter-claim of the respondents for Rs.8,83,23,086/-.

(iii) Directing the respondents to bear the costs of the proceedings in a sum of Rs.60,15,000/- the claimants being entitled to the same in para 23.09 hereinabove and the same having been set-off in the manner stated in para 26.01 hereinabove.

(iv) Directing the respondents to bear their own costs in both the claim and the counter-claim."

20. Challenging the aforesaid Award, Mr.K.C.Palaniswami has come up with O.P.No.98 of 2011 and Sporting Pastime India Private Limited has come up with O.P. No.272 of 2011.

21. Before looking into the grounds of challenge to the Arbitral Award, it is necessary to bring on record a few more facts, that are nothing but an elaboration of the brief outline of facts mentioned in the preceding paragraphs. This has become necessary in view of the fact that the parties in both the original petitions, dwelt at length, the background of the case. Therefore, out of necessity and for the sake of completion of narration, I would record some more essential facts:-

(i) A company by name Sporting Pastime India Limited was incorporated originally as a 100% subsidiary of the company Kasturi & Sons Limited, which owns and publishes the English Daily "The Hindu". The

objects with which Sporting Pastime India Limited, hereinafter referred to as SPIL, was incorporated were to promote the game of Golf and to establish and maintain a Golf Club with Recreation Centre etc.

(ii) Another company by name Hindcorp Resorts Private Limited, hereinafter referred to as HRPL was incorporated on 13.12.1995 with an authorised capital of Rs.5 crores. This company HRPL and the other company SPIL acquired lands of the total extent of about 343.85 acres patta land in Mudaliarkuppam village, Nainiyarkuppam village and Odhiyur village, for the promotion and development of a Golf Course cum Beach Resort. SPIL was also in enjoyment of certain lands measuring about 83.80 acres from the year 1996, by paying penalty and receiving 'B' memos from the State Government. These lands were actually poramboke lands and were located in between patta lands owned by HRPL and SPIL together. The main object of formation of SPIL was to develop a Golf Course cum Beach Resort, on the land of the total extent of 435 acres.

(iii) However, in the year 2003, notices were issued to SPIL by the Revenue Department, for taking back possession of the poramboke lands and this led to the company filing 3 writ petitions on the file of the Madras High Court.

(iv) As the matter was dragging on, with the object of setting up a Golf Course of International Standards drifting away, Kasturi & Sons Limited, hereinafter referred to as KSL, decided to divest its interest in SPIL. At that time, K.C.Palaniswami came forward to take over SPIL.

(v) Therefore, an agreement was entered into on 19.7.2004 between K.C.Palaniswami, hereinafter referred to as KCP on the one hand and KSL, HRPL and SPIL on the other hand. At the time when the agreement was entered into, the paid up capital of SPIL was Rs.3 crores divided into 30,00,000 equity shares of Rs.10/- each. Under the agreement, the equity capital was to be increased to Rs.27 crores comprising of 2,70,00,000 equity shares of Rs.10/- each. The increase of Rs.24 crores (from Rs.3 crores to Rs.27 crores) in share capital was to be brought in by KCP in consideration of 2,40,00,000 equity shares of Rs.10/- each fully paid up at par being allotted to KCP. In other words, KCP was to acquire 90% of the shareholding in SPIL and all liabilities of SPIL were agreed to be discharged by KCP. KSL had guaranteed some of the liabilities of SPIL to various creditors. The liability of SPIL to the tune of Rs.15 crores to Dhanalakshmi Bank Limited, a liability of Rs.10 crores to Development Credit Bank Limited, a liability of Rs.1 crore to Bommi Dala International Private Limited and another liability of Rs.1 crore to Polisetty Somasundaram Tobacco Threshers Private Limited, were all guaranteed by KSL and under the agreement, KCP became obliged to discharge the liabilities and relieve KSL of its guarantee obligations.

(vi) Under the agreement, the guarantee obligations of KSL for the liabilities of SPIL, had to be relieved within 180 days of the agreement.

(vii) Pursuant to the agreement, the authorised capital of SPIL was increased to Rs.27 crores and KSL transferred to KCP and his nominees, 90% of the issued and paid up capital of SPIL, against receipt of a sum of

Rs.2.43 crores. The Share Certificates duly endorsed in the names of the transferee were handed over to KCP and all original title deeds and related documents concerning the lands were also handed over by KSL to KCP. The statutory records and registers were also handed over and on 18.8.2004, the Board of Directors was reconstituted.

(viii) However, complaining that KCP did not fulfil his part of the obligations under the agreement, in relation to discharge of liabilities and also claiming that KSL was consequently made to pay the creditors and discharge all the liabilities by spending a sum of Rs.31,74,15,150/-, KSL launched a legal battle.

(ix) At first, KSL filed applications under Section 9 of the Arbitration and Conciliation Act, 1996, seeking certain interim reliefs. In O.A.Nos.179 and 298 of 2005, an interim order of injunction restraining SPIL from alienating, disposing of or encumbering the lands was obtained. Subsequently, the Company Secretary of KSL was appointed as Interim Receiver to take charge of SPIL.

(x) Similarly, a company petition was filed in C.P.No.50 of 2005 before the Company Law Board praying for various reliefs. The Arbitration Agreement was also invoked and both parties nominated one Arbitrator each. After the Arbitrators chose the Presiding Arbitrator, KSL and HRPL joined together and filed a Statement of Claim.

22. As stated earlier, the claim was actually preferred by KSL and HRPL together, against KCP and SPIL. The reliefs originally sought by the

claimants viz., KSL and HRPL has already been extracted in paragraph 5 above. The additional reliefs sought by way of amendment, has also been extracted by me in paragraph 6 above.

23. At the preliminary hearings held before the Arbitral Tribunal, the claimants sought an interim relief to direct KCP to deposit the original documents of title and the Share Certificates. But it was pointed out that a similar prayer had already been made before this Court in an application under Section 9 and that an undertaking was recorded in the said application. An affidavit of undertaking was filed on 19.11.2005 before the Arbitral Tribunal.

24. It appears that the learned counsel appearing on both sides completed their arguments on 19.3.2006 and the Arbitral Tribunal reserved orders and indicated the next date of hearing as 30.4.2006, perhaps indicating that judgment may be pronounced on the said date.

25. However, on 30.4.2006, the Arbitrators met and held discussions. After discussion, the Arbitral Tribunal decided to reopen the matter and issue notice to both parties for clarification on the prayer regarding restitution. It is relevant to note the record of proceedings of the date 30.4.2006 and it reads as follows:-

"RECORD OF PROCEEDINGS-DATED 30.4.2006

The Arbitrators alone met and had discussions regarding the issues and the matters to be decided in the arbitration. After Substantial discussion it was decided that notice be issued to both sides to clarify on the prayer regarding restitution."

26. The Arbitral Tribunal posted the case for hearing to 01.7.2006 and issued notices to both parties. But it appears that the learned counsel for KCP and SPIL withdrew his appearance in the meantime and a new counsel entered appearance. What happened on 01.7.2006 can be seen from the record of proceedings dated 01.7.2006. Hence, it is extracted as follows:-

"RECORD OF PROCEEDINGS-DATED 1.7.2006

Notice had been issued to Mr.K.Harishankar for Respondent. He had however informed that he would not be appearing any longer for the Respondent and Mr.Karthik Seshadri would be appearing in his place. Mr.Karthik Seshadri appeared little later for the hearing and submitted that he needed time for making his submission if any. He was informed that the entire hearing was over and the matter was posted for clarification regarding prayer for restitution. In the meantime a proposal for settlement was given by Mr.T.V.Padmanabhan to Karthik Seshadri which was to be considered by the Respondent. The matter is posted to 9.7.2006 for submission of the claimants."

27. But on 9.7.2006, it was represented by the counsel appearing for KCP and SPIL that they wanted to file a fresh application for summoning a document. But the said request was opposed by the claimants on the ground that after completion of proceedings and the Arbitral Tribunal reserving its verdict, the parties should not be allowed to let in fresh evidence. However, the Arbitral Tribunal, by its proceedings dated 9.7.2006, permitted the respondents (KCP and SPIL) to file an affidavit, without actually summoning any document. Thereafter, the Tribunal adjourned the hearing to 22.7.2006 for clarification on the question relating to restitution.

28. As per the order of the Tribunal dated 9.7.2006, the KSL filed an affidavit. Thereafter, written arguments were submitted.

29. Subsequently, KCP and SPIL filed a memo on 18.9.2006 before the Arbitral Tribunal claiming that they are ready to pay Rs.25 crores, which had become free from the claim made by the Income Tax Department, consequent upon the appeal being allowed by the Commissioner of Income Tax (Appeals).

30. To the said memo, KSL and HRPL filed a reply rejecting the offer of KCP and SPIL to pay the amount of Rs.25 crores.

31. In view of the memo and reply memo, the Arbitral Tribunal again reopened the proceedings and held the hearing on 12.10.2006. Thereafter the Tribunal reserved orders.

32. But unfortunately, the Tribunal again reopened the matter for seeking further clarification on the question of the reliefs claimed. Therefore, on 4.3.2007, the Tribunal directed both parties to file their submissions.

33. On 3.4.2007, the counsel appearing for both parties agreed that an interim award could be passed by consent. The record of proceedings dated 3.4.2007 and it reads as follows:-

"RECORD OF PROCEEDINGS-3.4.2007

Both the learned counsel appearing for the Claimants and the Respondents have after consulting and securing the acceptance of the respective clients agreed that an interim award may be passed by the Tribunal by consent for the money claim as made out with the amendment by the Claimants: giving the First Respondent time till 30th September 2007 to make the full

payment. Both parties agree that the rate of future interest from September 2005 until 30th September 2007 (being the date within which the money claim would have to be paid by the First Respondent) shall be 12% simple interest per annum on the amount claimed. Both parties specifically agree that the question of restitution as a relief as well as damages as a claim would be left for consideration by the Arbitral Tribunal after 30.9.2007, in the event of non-payment as above, for which purpose the matter is posted on 6th October 2007 at 11.00 A.M. at the same venue."

34. In the light of the above, the Tribunal passed an Interim Award on 9.4.2007 and it reads as follows:-

"INTERIM AWARD OF THE ARBITRATORS DT.9.4.2007

After extensive arguments and certain proposals for settlement the claimants and the respondents have filed before the Arbitrators a certain agreed proposal for passing an interim award by consent. The Arbitrators have taken note of the record of proceedings dated 3.4.2007 by both the parties and proceed to pass an interim award as follows:

(1) The first respondent is directed to pay to the I claimant the sum of Rs.31,17,65,150/- together with interest thereon at 12% p.a. from 30th September 2005 till date of payment.

(2) The first respondent is directed to pay to the II claimant the sum of Rs.56,50,000/- together with interest thereon at 12% p.a., from 30th September 2005 till date of payment to the II claimant.

(3) The first respondent is hereby granted time till 30.9.2007 to make the payments under clauses 1 & 2 to the I & II claimants respectively.

(4) The question of restitution as a relief as well as

damages as a claim, shall be left open for consideration by the Tribunal after 30.9.2007 in the event of non-payment of the above mentioned entire amounts in the manner stated above on or before 30.9.2007.

(5) The record of proceedings dated 3.4.2007 signed by the counsel for claimants and the respondents after securing the consent of the respective parties is being annexed to the award as part thereof.

(6) The interim award is passed without prejudice to the rights, contentions and submissions that the parties are entitled to make on other matters before the final award.

(7) The matter is hereby posted on 6.10.2007 at 11 a.m. at the Palkhiwala Arbitration Centre for further orders.

Dated the 9th day of April 2007 and signed by the Arbitrators at the places respectively mentioned alongside their names."

35. Despite the Interim Award being one passed on consent, KCP and SPIL jointly filed a petition in O.P.No.672 of 2007 under Section 34 of the Act, challenging the Interim Award passed by consent. After receipt of notice in the said original petition, KSL and HRPL took out an application in A.No.6373 of 2007 for impleading Mr.Karthik Seshadri, a counsel who appeared before the Arbitral Tribunal for KCP and SPIL and who signed the memo filed on 3.4.2007, consenting to the Interim Award.

36. Immediately after an application was filed by KSL and HRPL for impleading the counsel for KCP as a party to the main original petition, the petitioners agreed to withdraw the original petition. Accordingly, O.P.No.672 of 2007 was dismissed as withdrawn by an order dated 1.10.2007.

37. Thereafter, the Arbitral Tribunal took up the matter on 2.11.2007. As a matter of fact, the Arbitral Tribunal had only adjourned the proceedings to 6.10.2007, after passing the Interim Award dated 9.4.2007. This can be seen both from the record of proceedings dated 3.4.2007 and from the last paragraph of the Interim Award dated 9.4.2007, both of which I have extracted earlier. Since the Arbitral Tribunal had kept the matter pending without finally disposing it of by the Interim Award dated 9.4.2007, both parties had to appear again before the Arbitral Tribunal in November 2007. In November 2007, the very entitlement of the Arbitral Tribunal to continue with the proceedings was challenged by KCP and SPIL, by filing additional written submissions. However much I would like to, I cannot resist the temptation to record one factor here. The counsel who signed the memo on 3.4.2007 before the Arbitral Tribunal, giving consent on behalf of KCP and SPIL, for passing an Interim Award, was not the same counsel who filed O.P.No.672 of 2007 challenging the Interim Award. This is perhaps the reason why KSL and HRPL attempted to implead the counsel who signed the consent terms on 3.4.2007 for an Interim Award. Immediately upon the impleading petition being filed, KCP and SPIL withdrew the challenge to the Interim Award. One would have expected the counsel to sever ties with KCP and SPIL at that moment. But alas, it did not happen. The same counsel bounced back to continue to defend KCP and SPIL even in the arbitration proceedings that got reopened in November 2007, despite his client having disowned the consent given by him. I do not know whether KCP and SPIL

disowned the consent for Interim Award given by their counsel, only upon the advise of the very same counsel.

38. Be that as it may, the Arbitral Tribunal proceeded with the hearing and the claimants wanted to file additional documents in view of the subsequent developments. Permission was granted.

39. But suddenly, KCP informed the Arbitral Tribunal that Mr.C.Kamdar had express his unwillingness to continue. However, in response to a query by the Presiding Arbitrator, Mr.C.Kamdar expressed willingness to continue. Since this was not accepted by KCP and his counsel, KSL filed a petition in O.P.No.390 of 2008 under Section 11(6), but the same was disposed of by the Hon'ble Chief Justice on 8.8.2008, allowing the Presiding Arbitrator to ascertain the willingness of Mr.C.Kamdar. Accordingly, Mr.C.Kamdar expressed his willingness to continue by a letter dated 09.8.2008.

40. However, KCP and SPIL through their very same counsel, who was a party to the consent Interim Award, filed O.P.No.445 of 2008 under Section 14 for the termination of the mandate of Mr.C.Kamdar. But, it was dismissed on 25.11.2008.

41. However, in the meantime, the Presiding Arbitrator Hon'ble Mr. Justice K.Venkataswami (Retd.) died on 27.9.2008. Therefore, in his place, Hon'ble Mr. Justice K.Sampath (Retd.) was appointed and the newly constituted Tribunal framed additional issues, took on record additional documents and heard the arguments of the learned counsel on both sides

and thereafter passed the Award that has now come under challenge.

42. The Award is challenged by the petitioner on several grounds, which could be summarised into the following:

(i) The dispute that was originally raised was only by KSL and it was only KSL which invoked the arbitration clause. After the constitution of the Arbitral Tribunal, HRPL joined KSL as a co-claimant, when they did not raise any dispute and when they did not invoke the arbitration clause. Therefore, the amendment allowed and the relief granted to them, were beyond jurisdiction and scope of reference to the Arbitral Tribunal;

(ii) As per the agreement dated 19.7.2004, KCP and SPIL were obliged to discharge KSL from their guaranteed obligations to 4 secured creditors, only within a period of 180 days from the date of reconstitution of the Board. The constitution of the Board happened on 18.8.2004 and hence the period for discharge of the liabilities of KSL, as Guarantor, was available upto 13.2.2005. But KSL started alleging breach of contract much before the deadline viz., 13.2.2005 and the same has been accepted by the Arbitral Tribunal to order restitution. This is wholly a perverse approach;

(iii) For a whole period of nearly a year from the date of the agreement, the only claim of KSL and HRPL was for payment of money either on the ground that they have to pay the creditors of SPIL or on the ground that they have made payments due to pressure. Therefore, their claim before the Arbitral Tribunal can be only for payment of money. Hence the Award of restitution is uncalled for;

(iv) The Arbitral Tribunal thoroughly misconstrued the law on the application of Section 39 of the Contract Act. Section 39 would apply only to cases where the promisee put an end to the contract on the ground that the other party refused to perform or disabled himself from performing. In this case, KCP had 180 days time to perform and did not do something which disabled him from performing his promises. KSL also did not put an end to the contract. On the contrary, KSL kept on demanding money. When payment of money was the only performance due from KCP, there cannot be an Award for anything other than payment of money;

(v) KSL was not a borrower. They were only guarantors. Therefore, by discharging the liabilities of the borrower, KSL actually stepped into the shoes of the creditor under Section 140 of the Contract Act. Hence, their claim as against the borrower viz., SPIL can be only for recovery of money and not for restitution;

(vi) The Interim Award for payment of money has attained finality, with the dismissal of the petition (O.P.No.672 of 2007) filed against the same by the petitioner herein and hence the only remedy open to the respondent is to execute the Interim Award;

(vii) Today there are two Awards viz., an Interim Award and a Final Award. Since the Arbitral Tribunal has not stated that the Final Award supersedes the Interim Award, both the Awards are capable of being executed as on date and such an anomalous situation is contrary to public policy;

(viii) After the passing of the Interim Award, the Arbitral Tribunal became *functus officio* and it could not have proceeded further to pass a Final Award;

(ix) The Arbitral Tribunal is bound by the terms of reference. The original terms of reference to the Arbitral Tribunal were only about the alleged non-fulfilment of the obligations by the petitioner under the agreement dated 19.7.2004 and the terms of reference did not include the question of restitution. Therefore, the Arbitral Tribunal could not have travelled beyond the terms of reference and passed an Award for restitution;

(x) In pursuance of the agreement dated 19.7.2004, the authorised and paid up capital of SPIL was increased and the Board of Directors was also reconstituted on 18.8.2004. Therefore, if at all KSL and HRPL wanted restitution, it could be only for the status that prevailed as on 19.7.2004. But the state of affairs as prevailed on 19.7.2004, cannot be restituted at all, in view of what happened between 19.7.2004 and 18.8.2004. The Arbitral Tribunal completely failed to understand what restitution actually connotes;

(xi) There cannot be partial restitution, as the same would go against the very fundamental concept of restitution;

(xii) The principle of restitution is applicable only to cases of unjust enrichment. The claimants did not even plead unjust enrichment and hence, the Arbitral Tribunal could not have granted restitution;

(xiii) Though the agreement was between KCP, KSL, SPIL and

HRPL, the allotment of shares to the extent of the increased share capital, had taken place with the consent of all the contracting parties, to and in favour of several third parties nominated by KCP. Those third parties nominated by KCP were not before the Arbitral Tribunal. They could not also have been impleaded as parties to the arbitral proceedings, as they were not parties to the arbitration agreement. But by granting restitution, the Arbitral Tribunal has actually affected the rights of those third parties in whose favour share allotments had taken place; and

(xiv) The Arbitral Tribunal did not appreciate the scope of Section 65 of the Contract Act. Section 65 applies only to a contract which is void. The Arbitral Tribunal found the contract on hand to be capable of being performed, but held that KSL could avoid the contract and seek restitution due to the alleged breach committed by KCP. But this situation is not covered by Section 65.

43. Before dealing with each of the grounds raised by the petitioners, it is necessary to refresh the memory, on the scope of jurisdiction of this Court under Section 34 of the Arbitration and Conciliation Act, 1996. Sub-section (2) of Section 34, divides the scope of jurisdiction of this Court into two categories, one falling under clause (a) and another falling under clause (b). Five grounds are indicated under clause (a) and two are indicated under clause (b). Predominantly, the grounds indicated in clause (a) are rooted on factual foundation. This is why, clause (a) begins with an indication about the burden. It is the obligation of the party coming

up under Section 34 "**to furnish proof**" that there exists anyone or more of the grounds indicated in sub-clauses (i) to (v) of clause (a). In contrast, the grounds indicated in clause (b) are purely legal.

44. For an application under Section 34 to fall under clause (a) of Sub-section (2), the person moving the application should produce proof to show -

- (i) that he was under some incapacity, or
- (ii) that the arbitration agreement was not valid under the law,
- (iii) that he was not given proper notice of appointment of an Arbitrator, or was otherwise unable to present his case, or
- (iv) that the arbitral award deals with a dispute not contemplated by, or not falling within the terms of submission to arbitration, or it contains decision on matters beyond the scope of submission to arbitration, or
- (v) that the composition of the Tribunal was not in accordance with the agreement of the parties.

45. For an application under Section 34 to fall under clause (b) of Sub-section (2), it is necessary for the Court to find -

- (i) either that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- (ii) that the arbitral award is in conflict with the public policy of India.

46. Therefore, the 14 grounds that the petitioners have raised, which I have elicited in para 42 above, should fall within any of the sub-

clauses under clause (a) or clause (b) of Sub-section (2) of Section 34. A careful analysis of the grounds of challenge, shows that none of them would fall under sub-clauses (i) to (iii) and (v) of clause (a). None of them would fall even under sub-clause (i) of clause (b). At the most, the grounds of challenge may have to be brought within Section 34(2)(a)(iv) and 34(2)(b)(ii). Some of the 14 grounds of challenge would fall under Section 34(2)(a)(iv) and the others would fall under Section 34(2)(b)(ii).

47. Insofar as legal principles are concerned, the law is by and large well settled, despite the best efforts of lawyers (and at times Courts) to unsettle them. These principles can be summarised as follows:

(i) that this Court cannot re-appreciate evidence [see *Ravindra Kumar Gupta vs. Union of India* {AIR 2010 SC 972}];

(ii) that reasonableness of the reasons given by the Arbitrators cannot be challenged and there is no power for reappraisal of evidence [see *Sudarsan Trading Co. vs. The Government of Kerala* {AIR 1989 SC 890}];

(iii) that once there is no dispute as to the contract, what is the interpretation of that contract is a matter for the Arbitrator and the Court cannot substitute its decision thereupon [see *Sudarsan Trading Co. vs. The Government of Kerala* {AIR 1989 SC 890}];

(iv) that the power of this Court under Section 34 is not the same as that of an Appellate Court [see *Lal Builder vs. Union of India* {MANU/DE/4498/2009}];

(v) that the Arbitrator is the sole Judge of quality and quantity of

evidence adduced and the approach of the Court should be to support it rather than destroy it [see *Tamil Nadu Civil Supplies Corporation Ltd vs. G.S.N. Exporters* {2008 (1) TLNJ 603}];

(vi) that the Arbitrator is the sole Judge of the facts as well as law and had the right to interpret the contract and that the Court cannot substitute its own opinion for that of the Arbitral Tribunal with regard to quality, quantity and appreciation of evidence, import of documents and interpretation of contract [see *Samho Gunyoung Co. Ltd vs. Flakt (India) Ltd* {MANU/ DE/1062/2009}]; and

(vii) that the interpretation of a contract may fall within the realm of the Arbitrator and the Court will not interfere unless the reasons adduced by the Arbitrator are found to be perverse or based on wrong proposition of law [see *G.Ramachandra Reddy vs. Union of India* {2009 (6) SCC 414}].

48. In ***Oil & Natural Gas Corporation Limited Vs Saw Pipes Limited [2003 (5) SCC 705]***, the Supreme Court evolved the following principles :

(i) that in view of the mandate contained in Section 28(1)(a) of the Arbitration and Conciliation Act, 1996, the Arbitral Tribunal is obliged to decide a dispute in accordance with the substantive law of India, that includes the Indian Contract Act, the Transfer of Property Act and other such laws in force;

(ii) that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be

patently illegal calling for interference under Section 34; and

(iii) that the phrase "Public Policy of India" appearing in Section 34 should be given a wide meaning, so as to include within its fold, the fundamental policy of India, the interest of India, justice or morality and patent illegality.

49. In ***Hindustan Zinc Limited Vs. Friends Coal Carbonisation [2006 (4) SCC 445]***, the Supreme Court reiterated the principles laid down in ***Oil and Natural Gas Corporation***. The Court held that as per the law laid down in ***Saw Pipes***, it is open to the Court to consider whether the award is against the specific terms of the contract or not.

50. In ***Security Printing and Minting Corporation of India Limited vs. Gandhi Industrial Corporation {2007 (13) SCC 236}***, the Supreme Court reiterated that when a perverse Award is passed, the Courts are not powerless to interfere with the Award. In ***Arulvelu vs. State {2009 (10) SCC 206}***, which arose out of a criminal case, the Supreme Court dealt with the meaning and scope of the expression "perverse finding". Therefore, perversity of finding is also a ground for challenging an Arbitral Award.

51. Keeping in mind the above fundamental principles of law, let me now deal with each one of the grounds of challenge.

Ground-1 (HRPL - joining as co-claimant)

52. The first ground of challenge is about the entitlement of HRPL

to join KSL as a co-claimant. According to the petitioners, HRPL did not raise any dispute and did not invoke the arbitration clause. But, they were joined as co-claimants and by virtue of an amendment to the original statement of claim, they were also permitted to seek an independent relief. The subsistence of a dispute and the invocation of the arbitration, is a *sine qua non* and a fundamental requisite, for a party to file a statement of claim. In the absence of a party raising a dispute and invoking the arbitration clause, the Arbitral Tribunal could not even had jurisdiction to entertain the claim. Therefore, it is contended by the petitioners that the award was without jurisdiction, inasmuch as the Tribunal entertained the claim of a person who never raised a dispute and never invoked arbitration.

53. To test the correctness of the above contention, it is necessary to have a re-look at some of the provisions of the Act. The word "party" is defined under Section 2(1)(h) to mean a party to an arbitration agreement. The fact that HRPL was a party to the arbitration agreement is not in dispute.

54. Section 11, which deals with the appointment of arbitrators, stipulates under Sub-section (4) that if a party fails to appoint an arbitrator within 30 days from the date of receipt of a request from the other party, or if the two appointed Arbitrators failed to nominate the third one, the appointment shall be made by the Chief Justice. While empowering the Chief Justice under Sub-section (4), the Act uses the expressions "a party" and "other party". Interestingly, the person referred to as "a party" in Section 11(4)(a), is not the same person referred to in the expression "upon request

of a party", towards the end of Sub-section (4). On the contrary, both expressions have exactly opposite meanings. The one in clause (a) refers to a party who fails to nominate. The other towards the end of Sub-section (4) refers to a party other than the one who failed to nominate. If pure and simple logic had been followed by the draftsman, he should have used the expression "other party" towards the end of Sub-section (4). But, the expression "a party", which is embedded towards the end of Sub-section (4), clearly indicates that it is not necessary for all parties to file applications under Section 11(4). Similarly, Sub-sections (5) and (6) of Section 11 also use the very same expression "a party". Therefore, it is not necessary for every party to a contract to seek the appointment of an Arbitrator, to enable him to file a claim. If there are several parties to a contract, one of whom approaches the Chief Justice with an application under Section 11(4) or 11(5) or 11(6), it is enough if the others simply await the appointment and file a statement of claim.

55. Section 19(1) makes it clear that the Arbitral Tribunal is not bound by the Rules of Procedure prescribed in the Code of Civil Procedure. Sub-section (3) of Section 19 indicates that in the absence of any agreement between the parties about the procedure to be followed, the Arbitral Tribunal may conduct the proceedings in the manner it considers appropriate.

56. Under Section 21, the arbitral proceedings in respect of a particular dispute commence, on the date on which a request for reference of that dispute is received by the respondent. The fact that KSL raised a dispute

and invoked the arbitration clause, is not in dispute. Therefore, the date on which both parties nominated their Arbitrators and those two Arbitrators nominated the Presiding Arbitrator, became the date of commencement of arbitral proceedings under Section 21. Hence, it is not and it can never be contended that the commencement of the arbitral proceedings, was illegal or without jurisdiction, at least insofar as the claim of KSL is concerned.

57. Once the constitution of the Tribunal and the commencement of the arbitral proceedings had happened validly, the jurisdiction assumed by them in the first instance, is beyond any pale of doubt. Once a Tribunal had assumed jurisdiction validly, it becomes competent to deal with and rule on its own jurisdiction, in terms of Section 16.

58. Section 16(2) makes it clear that a plea that the Arbitral Tribunal does not have jurisdiction, shall be raised not later than the submission of the statement of defence. Similarly, Sub-section (3) makes it clear that a plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised, as soon as the matter alleged to be beyond the scope of its authority during the proceedings. Sub-section (4) confers powers upon the Arbitral Tribunal to admit such pleas as are specified in Sub-sections (2) and (3), at a later date, if the Tribunal finds the delay to be justified.

59. Therefore, it is clear that the question of jurisdiction of the Tribunal as well as the question of Tribunal exceeding its authority, should be raised specifically before the Tribunal, in terms of Section 16(2) or 16(3). If such objections are overruled, the party against whom a ruling is given, can

always raise it as a ground in a petition under Section 34. But, a party who fails to raise such questions before the Arbitral Tribunal, cannot raise them before this Court under Section 34.

60. Keeping the above in mind, if we get back to the "Record of Proceedings" dated 19.11.2005 of the Tribunal and the award passed by the Arbitral Tribunal, it will be clear that the original statement of claim was filed jointly by KSL and HRPL as against KCP and SPIL. But, the reliefs sought, were made in common. But, subsequently, the claimants filed an application for amendment and an application for making supplemental statement of claim on 25.10.2005. In the petition for amendment, the claimants merely sought to split the amounts into two portions, so that an independent award could be passed in favour of HRPL.

61. On 19.11.2005, the Arbitral Tribunal recorded that the objection relating to splitting of claims was taken note of and that a separate issue will be framed. Accordingly, the Tribunal framed an issue at Issue No.20 with regard to the maintainability of the claim made by HRPL.

62. But, when a compromise was reached between the parties on 03.4.2007, the petitioners gave up their objection in this regard and agreed to pay to HRPL, who was the second claimant, a sum of Rs.56,50,000/- together with interest. In other words, the petitioners submitted to a decree in favour of HRPL under the interim award dated 03.4.2007. A party who submitted to an interim award being passed against a co-claimant, cannot later on turn around and contend that the Tribunal had no jurisdiction to

entertain a claim from HRPL, due to their failure to raise a dispute and invoke an arbitration clause.

63. I should also bring on record one important fact, namely that the petitioners did not raise this point in their counter statement. They did not raise any objection to HRPL joining as co-claimant, on the ground that they did not raise any dispute and that therefore, the Arbitral Tribunal could not have assumed jurisdiction. Therefore, the objection raised by them orally on 19.11.2005, after the claimants filed an application for amendment, did not deserve any consideration. Yet, the Tribunal agreed to frame an issue. After the Tribunal framed an issue, the petitioners submitted to an award being passed in favour of the co-claimant. Therefore, the petitioners cannot now raise the question of jurisdiction, against the final award.

64. A party who submitted to a decree, interim or final, cannot later on turn around and contend that the claim itself was bad for misjoinder of two parties, as claimants. The issue here, though not exactly similar to misjoinder, but deals with the question of jurisdiction, deserves the same treatment as an issue of misjoinder would. This is for the simple reason that in the counter, the petitioners did not raise any issue. After raising an issue orally, they gave it up by submitting to an interim award. Even today, another ground of challenge by the petitioners is that the respondents can always execute the interim award. If the respondents are entitled to execute the interim award, how is it that their joining together and filing a claim will be without jurisdiction. Therefore, the first ground of challenge is rejected.

Ground-2 (Allegation of breach of contract before deadline):

65. The second ground of attack to the award is that as per the agreement dated 19.7.2004, the obligation to discharge KSL from their guarantee to four secured creditors should be performed within 180 days from the date of reconstitution of the Board. The constitution of the Board happened only on 18.8.2004 and hence the petitioners had time up to 13.2.2005. But KSL started alleging breach of obligations much before the deadline. Hence, the petitioners contend that the award of the Arbitral Tribunal was perverse.

66. But as rightly contended by Mr.Arvind P.Datar, learned senior counsel for the respondent, law recognises a repudiatory breach. In other words, if a party to a contract indicates his intention not to perform his obligations under the contract, the other party need not wait till the expiry of the period for the performance of the obligations. This, sometimes called as the Doctrine of Anticipatory Breach, is lucidly expounded by the Calcutta High Court in ***Manindra Chandra Nandy v. Aswini Kumar Acharjya*** [AIR 1921 Cal. 185] in the following words:

"Where there is such a breach by an unqualified and positive refusal to perform a contract though the performance thereof is not yet due, the injured party may bring his action at once for recovery of damages. The damages for breach of a contract by renunciation thereof before performance is due are measured by what the injured party would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of

which he ought reasonably to have availed himself. The substance of the matter then is that the damages are assessed as on the date of the breach; nevertheless, they are to be a compensation for the loss caused by depriving the plaintiff of the benefit of the contract as it was originally made. The doctrine of anticipatory breach is not a doctrine which fictitiously moves the performance ahead to the time on the repudiation, and regards the repudiation as a failure to perform the contract. The anticipatory breach takes effect as a premature destruction of the contract rather than as a failure to perform it in its terms."

67. The Tribunal found in this case that the agreement dated 19.7.2004 was not a mere share transfer agreement but a composite agreement to take over the second petitioner company and the liabilities of the second respondent company. But by a letter dated 8.12.2004, the petitioner attempted to tie the issue of discharge of liabilities, with the issue of obtaining the approval of the Directorate of Town and Country Planning. Therefore, the Tribunal found that the petitioner did not have any intention to perform his part of the obligations and that there was anticipatory breach. Once it is found from facts that there was an anticipatory breach on the part of the petitioner, then, the law enables the respondent to two types of remedies, namely, (i) contractual remedies, and (ii) restitutionary remedies. The Arbitral Tribunal in its wisdom, granted restitutionary remedies, especially since the petitioner grossly failed and neglected even to honour the interim award, which could have actually saved restitution. In such circumstances, the decision of the Arbitral Tribunal cannot be found fault

with. Hence, the second ground of attack is not available to the petitioner even if I were a Court of first appeal. While so, the petitioner cannot assail the award, in a petition under Section 34.

Ground-3 (Award of restitution - uncalled for):

68. The third ground of attack is that for a whole period of nearly a year from the date of agreement, the only claim of KSL and HRPL was for payment of money either on the ground that they have to pay the creditors of SPIL or on the ground that they have made payments due to pressure. Therefore, it is contended by the petitioner that at the most the Arbitral Tribunal could have only awarded a money decree and not restitution.

69. But I do not think that the petitioner is entitled to raise such a ground of attack. On 9.4.2007, an interim award was passed by the Tribunal by consent of parties. It was specifically agreed by the parties that if the petitioner failed to make payment as agreed, the question of restitution as well as damages would be taken up for consideration. At that time, the petitioner did not mind conferring the jurisdiction upon the Tribunal to deal with the issue of restitution, if he failed to make payment. Therefore, it is not open to him that in cases of this nature restitution is never possible.

Ground-4 (Application of Section 39 of the Contract Act):

70. The fourth ground of attack is that the Tribunal misconstrued the law on the application of Section 39 of the Contract Act. According to the petitioner, Section 39 would apply only to cases where the promisee put an end to the contract on the ground that the other party refused to perform or

disabled himself from performing.

71. In order to understand the scope of the above contention it is necessary to have a look at Section 39 of the Contract Act. It reads as follows:-

"39.Effect of refusal of party to perform promise wholly:-

When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance."

72. The above provision merely formulates the English Rule as laid down in the leading cases of *Hochster vs. De La To* [(1853) 118 ER 922], *Forst vs. Knight* [(1872) 7 Ex. 111] and *Avery vs. Bowden* [(1856) 119 Er. 1119].

73. In ***Muralidhar Chatterjee vs. International Film Co. Ltd {1943 (2) MLJ 369}***, the Privy Council considered the scope and effect of Sections 39 and 64 of the Contract Act and held that the right of one party upon refusal by the other to perform the contract is described indifferently by the Act as a right to "put an end" or "rescind" it. The Privy Council pointed out that illustration (c) to Section 65 plainly imports that this right is either that of a person at whose option the contract is voidable (Section 64) or is such that by the exercise of it, the contract becomes void (Section 65). Both of them are not mutually exclusive whether or not each involves the other.

74. As stated earlier, Section 39 contemplates three situations such as (i) refusal to perform; (ii) making oneself disabled from performing

the promise in its entirety; and (iii) the promisee putting an end to the contract. In the case on hand the Arbitral Tribunal has found that the petitioner was guilty of displaying an intention not to perform his promise in entirety. Therefore, one of the contingencies stipulated in Section 39 had arisen, in the opinion of the Arbitral Tribunal. On such finding rendered by the Tribunal, there is no scope for interference in a petition under Section 34. Therefore, the fourth ground of attack is also rejected.

Ground-5 (KSL - guarantor, not borrower):

75. The fifth ground of attack is that KSL was only a guarantor and not a borrower. Therefore, by discharging the liabilities of the borrower, KSL merely stepped into the shoes of the creditor in terms of Section 140 of the Contract Act. Hence, KSL can only have a claim for recovery of money and not for restitution.

76. It is true that under Section 140 of the Contract Act, the surety steps into the shoes of the creditor and becomes vested with all the rights which the creditor had against the principal debtor, the moment he performs the obligations of the principal debtor.

77. But the case on hand is not merely one of lending and borrowing. The transaction between the parties was something more than a mere loan transaction. As I have stated earlier, SPIL was incorporated originally as a 100% subsidiary of KSL. This company and another company by name HRPL acquired a vast extent of land for the development of a golf course-cum-beach resort. But since the said object faced several obstacles,

KSL decided to divest its interest in SPIL. At that time, the petitioner came forward to take over SPIL. Therefore, a multi party agreement was entered into on 19.7.2004. As part of the obligations, the financial liabilities of SPIL had to be discharged.

78. Therefore, it was a composite transaction and the question of application of Section 140 of the Contract Act does not arise. In any case, I do not know under what category this ground of attack of the petitioner would fall in terms of Section 34 of the Arbitration and Conciliation Act.

Grounds 6, 7 and 8 (Execution of interim award and final award - its effect):

79. Since grounds 6, 7 and 8 revolve around the interim award and the effect of the interim and final awards upon one another, I shall take up all these three grounds together.

80. The contention of the petitioner is (i) that with the dismissal of O.P.No.672 of 2007 arising out of the interim award, the interim award had become final, leaving no scope for any further award; (ii) that due to the failure of the Arbitral Tribunal to stipulate that the final award supersedes the interim award, there are actually two awards as on date, both of which are capable of being executed, leading to an anomalous situation which is contrary to public policy; and (iii) that after passing an award, the Tribunal became functus officio and hence could not pass another award.

81. But, I do not think that it is open to the petitioner to raise these grounds. The interim award was actually passed on consent. But as stated earlier, the petitioner challenged even such an award by filing

O.P.No.672 of 2007, showing his unscrupulous nature. When faced with hostile weather, the petitioner chose to withdraw the challenge to the interim award. Therefore, it does not lie in his mouth to raise this objection.

82. Moreover, the interim award itself gave liberty to the respondents to press for restitutionary remedies, if the petitioner failed to make payment as per the interim award before 30.9.2007. Admittedly, the petitioner not only failed to make payment, but also chose to challenge the consent award and to withdraw the challenge later. Therefore, the Tribunal could not have become functus officio.

83. Every Arbitral Tribunal is a creature of contract. The interim award, having been passed by consent, also contained a contractual clause that permitted the respondents to reopen the proceedings and press for restitution, if the petitioner failed to make payment as per the memo of compromise. Therefore, the Arbitral Tribunal had the authority, by virtue of the memo of compromise signed by both parties on 3.4.2007, to reopen the proceedings after 30.9.2007.

84. In ***Satwant Singh Sodhi vs. State of Punjab {1999 (3) SCC 487}***, the Supreme Court was concerned with a case where the Arbitral Tribunal passed an Award for a particular amount and later for another amount in respect of one particular item of claim. Therefore, the question arose whether the subsequent Award was a Final Award that superseded the earlier one or whether the Interim Award was actually revised by the Final Award. The Supreme Court held that the question whether the Interim

Award is final to the extent it goes or has effect till the Final Award is delivered, will depend upon the form of the Award. If the Interim Award is intended to have effect only so long as the Final Award is not delivered, it will have the force of the Interim Award and it will cease to have the effect after the final Award is made. If, on the other hand, the Interim Award is intended to finally determine the rights of the parties, it will have the force of a complete Award.

85. After referring to the aforesaid decision of the Supreme Court in *Satwant Singh Sodhi*, I held in ***Gammon India Ltd vs. Sankaranarayana Construction (Bangalore) Pvt Ltd {2010 (1) LW 325}*** that there is a distinction between an Interim Award and a partial Award. I also pointed out that the power conferred by Section 31(6) of the Act, cannot be artificially restricted to exclude from its purview, the power to pass an Interim Award on admission.

86. In ***Deepak Mitra vs. District Judge, Allahabad {CDJ 1999 All HC 905}***, the Allahabad High Court also held that it is permissible in view of the definition of the expression "Award", to make an Interim Award. The Court also clarified that in principle, an Award, including an Interim Award is a final determination of a particular issue or claim in the arbitration. The Court incidentally pointed out the distinction between orders and directions which address the procedural mechanism to be adopted in the arbitration proceedings.

87. Therefore, the 6th, 7th and 8th grounds of attack cannot be

countenanced. Hence they are rejected.

Ground-9 (Terms of reference):

88. The 9th ground of attack is that since an Arbitral Tribunal is bound by the terms of reference, it could not have ordered restitution, which was not one of the terms of the reference. According to the petitioner, the original terms of the reference to the Tribunal were only with respect of the non-fulfilment of the obligations under the agreement dated 19.7.2004.

89. In ***MSK Projects India (JV) Limited vs. State of Rajasthan {2011 (10) SCC 573}***, the Supreme Court held that Special Tribunals like Arbitral Tribunals got jurisdiction to proceed with the case only from the reference made to them and that therefore it is not permissible for such Tribunals to travel beyond the terms of reference. The Court held that powers cannot be exercised by the Arbitral Tribunal so as to enlarge materially the scope of reference itself. If the Award goes beyond the reference, the Court is entitled to interfere with such an Award. Citing with approval its earlier decision in *Associated Engineering Co., {1991 (4) SCC 93}*, the Supreme Court held that an Arbitrator cannot be allowed to assume jurisdiction over a question which has not been referred to him and that he cannot widen his jurisdiction by holding contrary to the fact that the matter which he wants to decide is within the submission of the parties.

90. However, in paragraph 21 of the same decision, the Supreme Court also indicated that in exceptional circumstances, where a party pleads that the demand of another party is beyond the terms of contract and

statutory provisions, the Tribunal may examine by the terms of contract as well as the statutory provisions. But in the absence of proper pleadings and objections, such a course may not be available.

91. But, I do not know how the petitioner can raise this contention. The dispute that was referred to Arbitration was the one that arose out of the agreement dated 19.7.2004. The Tribunal itself framed as many as 21 issues, some of which related to the claim for handing over the original title deeds, share certificates etc. The petitioner did not raise objections to these issues being raised by the Tribunal. On the contrary, the petitioner allowed an interim award to be passed by consent. This interim award allowed the question of restitution to be agitated, if the petitioner failed to make payment as per the interim award. Therefore, there was in fact a reference on this question to the Tribunal.

92. If an Arbitral Tribunal is not bound by the strict rules of the Code of Civil Procedure, but is entitled to formulate its own rules of procedure, the same cannot be found fault with. The fact that the present dispute between the parties arose out of an agreement dated 19.7.2004, is not denied. What was referred to the Arbitral Tribunal was this dispute. Therefore, it is completely misconceived to think that the Tribunal had gone beyond the scope of the reference. Hence, the 9th ground of attack is also rejected.

Grounds 10, 11, 12 and 13 (Restitution and rights of third parties):

93. Since grounds 10, 11, 12 and 13 revolve around the question

of restitution, I shall take up all these three grounds together. As I have stated earlier, the tenth ground of attack is that in pursuance of the agreement dated 19.7.2004, the authorised and paid up capital of SPIL was increased and the Board of Directors was also reconstituted on 18.8.2004. Therefore, if at all KSL and HRPL wanted restitution, it could be only for the status that prevailed as on 19.7.2004. But the state of affairs as prevailed on 19.7.2004, cannot be restituted at all, in view of what happened between 19.7.2004 and 18.8.2004. Therefore, it is contended that the Arbitral Tribunal completely failed to understand what restitution actually connotes.

94. The 11th ground of attack is that there cannot be partial restitution, as the same would go against the very fundamental concept of restitution. The next ground of attack is that the principle of restitution is applicable only to cases of unjust enrichment. The claimants did not even plead unjust enrichment and hence, the petitioner contends that the Arbitral Tribunal could not have granted restitution. The 13th ground of attack is that though the agreement was between KCP, KSL, SPIL and HRPL, the allotment of shares to the extent of the increased share capital, had taken place with the consent of all the contracting parties, to and in favour of several third parties nominated by KCP. Those third parties nominated by KCP were not before the Arbitral Tribunal. They could not also have been impleaded as parties to the arbitral proceedings, as they were not parties to the arbitration agreement. But by granting restitution, the Arbitral Tribunal has actually affected the rights of those third parties in whose favour share allotments

had taken place and hence the petitioner contends that the award is contrary to public policy.

95. Since these four questions revolve around restitution, it is imperative to see what the law relating to restitution is. In ***De Molestina vs. Ponton*** {LLR (2002) Vol.1 Part 4 271}, the Commercial Court of Queen's Bench Division, elicited the principles governing the rescission of a contract and the claim for restitution. Pointing out that right from the 18th Century, the law was that a mis-representee is permitted to rescind the whole of a contract but not part of it, the Commercial Court observed that the defrauded party could not avoid one part of a contract and affirm another part, unless indeed the parts are so severable from each other as to form two separate contracts. In paragraph 6.2 of the Report, Justice Colman opined as follows:-

"6.2. These authorities do, in my judgment, make it very clear that the principle that there cannot be partial rescission is part of the wider requirement that there cannot be rescission unless there can be restitutio in integrum. Further, that requirement is the conceptual consequence of the basic nature of the remedy of rescission which is to discharge all the parties from the bargain into which the mis-representor has induced them to enter. It is not and never has had the function of providing compensation for the misrepresentation or some hybrid solution to reflect what would be fair between the parties having regard to the nature of the representation and the extent to which one party has been misled by another. Consistent with that, the Court has no power to create a new bargain for the parties. What has been

induced is the original bargain and it is the purpose of the remedy to return the parties to their position before that particular bargain was made. There is therefore no room for any form of equitable engineering directed to reconstructing the fabric of the original contract."

96. The general principles governing restitution, were elicited in detail by the Supreme Court in ***Indian Council for Enviro-Legal Action vs. Union of India {2011 (8) SCC 161}***. Pointing out that unjust enrichment is basic to the subject of restitution and is indeed a fundamental principle thereof, the Supreme Court held that restitution is frequently based upon the theory of unjust enrichment. The Court pointed out that there can be no restitution without unjust enrichment. After referring to the earlier decisions of the Supreme Court in *South Eastern Coalfields {2003 (8) SCC 648}* and *Sahakari Khand Udyog Mandal Ltd {2005 (3) SCC 738}*, the Supreme Court indicated that the terms "unjust enrichment" and "restitution" are like the two shades of green, one leaning towards yellow and the other towards blue. The Courts have wider powers to grant restitution and more so, where it relates to misuse or non-compliance with Court orders.

97. As pointed out earlier, a party to a contract, who is taken for a royal ride, has two remedies upon termination of the contract for breach. One set of remedies is contractual which is really calculated on the basis of the loss suffered by the injured. The other set of remedies is restitutionary, which is actually based on the gain that the other party had through unjust enrichment.

98. In ***Aktuate Internet Services v. Star India Pvt. Ltd.*** [2013 Delhi HC (MANU/DE/2768/2013)], the Delhi High Court pointed out that a claim for unjust enrichment rests on three prongs namely (a) enrichment of the defendant (b) at the expense of the claimant and (c) an unjust factor in allowing the retention of such benefit.

99. The case on hand is one where it was alleged that the petitioner failed to discharge the liabilities under the agreement. This failure was actually a failure of consideration. According to the respondents, failure of consideration is one of the unjust factors which entitled the claimant to restitution.

100. The expression "consideration" as understood in the Law of Contracts, has a different connotation than the one that we refer to as "failure of consideration". Section 2(d) of the Contract Act defines "consideration" to be an act or abstinence or promise, when such an act is done or abstained from being done or promised to be done or promised to abstain from doing something. Without such an act or abstinence or promise, an agreement would be void except in circumstances indicated in Section 25 of the Contract Act.

101. It will be interesting to note that the definition of the expression "consideration" is wider than that under the English Law. If we have a look at the history of the Law of Contracts under the English Law, it could be seen that at first, only formal contracts were recognized as enforceable in law. Apart from formal contracts, the English Law recognized

real contracts which could be enforced by actions of debt or detinue in which liability arose from the fact of one party delivering a chattle to another. But with the growth of civilization, law started recognizing informal promises and consideration was adopted as the real test to distinguish an enforceable informal promise. Therefore, it was understood in the sense of detriment to the promisee and benefit to the promisor. But the concept of detriment grew out of an action in tort.

102. But, in the law relating to restitution, the term "consideration" has assumed a different connotation than that in the Law of Contracts. In the Law of Contracts, the expression would signify either a quid pro quo or detriment. But in relation to restitution, the term signifies the condition that formed the basis for a person to transfer a benefit to another. When this basis itself is shaken, the foundation crumbles and a right to restitution arises.

103. In ***Goff & Jones: The Law of Restitution (8th edn. London, 2011)***, it is pointed out as follows:

"A variety of phrases are used in cases concerned with failure of basis, the most common being "failure of consideration". Others include "a consideration that happens to fail", "absence of consideration" and "no consideration". The language of failure of basis has been preferred for four reasons.

First, it accurately identifies the essence of the claim being pursued. As was said in Wilson v Church, the claim arises when there has been "a total failure of the original enterprise-a total subsidence, so to speak, of the common ground".

Secondly, it avoids potential confusion with the doctrine of

consideration in contract. In contract "consideration" refers to the benefit conferred or detriment suffered by a promisee which makes a promise enforceable. "Consideration" in unjust enrichment, by contrast, refers to the basis for making a payment. Thus, for instance, in the leading case of Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd there was a sale of machinery, under which the seller promised to manufacture and deliver it by a specified date and the buyer paid in advance. The seller's promise provided consideration (in the contractual sense) for the payment. However, once the contract became frustrated and no delivery was possible, the buyer could successfully assert that there had been a failure of consideration in the unjust enrichment sense: the basis of making the payment was that he would receive the machinery and that had not been fulfilled. It may be that when the terminology was originally introduced in the 18th Century, there was not the same potential for misunderstandings: but, today, the double meaning of consideration creates as obvious risk of confusion".

104. Therefore, the question of restitution has to be understood in the context of the meaning of the expression "consideration" and the failure of the same in relation to a contract of this nature. This is why, heavy reliance is placed by Mr. Arvind P. Datar, learned senior counsel for the respondents, upon the decision of the English Court in **Giedo Van der Garde BV v Force India Formula One Team Ltd [2010] EWHC 2373 (QB)**, wherein it was held:

"The trial Judge held that the consideration had not totally failed because the claimant had received part of the benefit he had bargained for [2000 out of 6000 KM] and the contract

*price would not be apportioned per KM because of the contingent rights which were also promised. If the trial Judge had asked the different question, namely whether the basis for the payment had totally failed, then the answer might have been different. The basis for the claimant's payment was receipt of a minimum of 6000 km. That basis failed when he received only 2000 km. The claimant would be required to make counter-restitution of any benefit received from the defendant (including a valuation of the contingent rights and kilometres received), but once attention is directed to the meaning of consideration as a basis or purpose (as it implicitly was in *Haugesund Kommune v Depfa ACS Bank* [(2010) EWCA Civ.579] rather than just promised counter performance, then restitution ought more readily to have been recognized."*

105. Therefore, the petitioner cannot really complain of the grant of restitution, in a case of this nature. As pointed by the Supreme Court in ***Prakash Chand Khurana v Harnam Singh [AIR 1973 SC 2065]***, it is not impermissible to put the clock back and order the delivery of possession of the property. As a matter of fact, the said decision arose out of the Arbitration Act, 1940. The Supreme Court upheld an award that provided for delivery of possession back to the party, upon the failure of the other party to make payment. Therefore, the Arbitral Tribunal in this case has not done anything unheard of or contrary to public policy, by ordering restitution.

106. Though Mr.V.T.Gopalan, learned senior counsel appearing for the petitioner contended that the decision in ***Prakash Chand Khurana***, arose under the 1940 Act, where the Court was conferred with the power to

pass a decree in terms of the award, I do not think that the said distinction is of any avail, in so far as the fundamental principle relating to the grant of restitution is concerned. The decision in *Prakash Chand* is relied only for the proposition that the Supreme Court had earlier approved an award directing delivery of possession of a property, upon failure to make payment. Therefore, the distinction sought to be made is unacceptable.

107. The next contention of the petitioner is that third party rights would be affected by the grant of restitution. In so far as the question relating to third party rights are concerned, it is needless to point out that in ***Sukanya Holdings (P) Ltd vs. Jayesh H.Pandya {2003 (5) SCC 531}***, the Supreme Court pointed out that there is no provision in the Arbitration Act to refer disputes other than those covered by the Arbitration Agreement also to arbitration and there is also no provision for splitting cause or parties and referring the subject matter of the suit to Arbitrators. There is also no provision as to what is required to be done in a case where some parties to the suit are not parties to the Arbitration Agreement. Therefore, relying upon this decision, it is contended by Mr.S.R.Rajagopal, learned counsel for the petitioner that inasmuch as the relief of restitution cannot be granted without making persons who are not parties to the Arbitration Agreement and inasmuch as even the reliefs as against the petitioner cannot be separated, the Tribunal erred in granting restitution.

108. In ***S.N.Prasad, Hitek Industries (Bihar) Limited vs. Monnet Finance Limited {2011 (1) SCC 320}***, the question that arose

for consideration was whether a Guarantor for a loan, who is not a party to the loan agreement containing the Arbitration Agreement between the lender and borrower, can be made a party to a reference to arbitration in regard to a dispute relating to repayment of such loan. The Supreme Court held that under the Act, an Arbitrator can be appointed at the instance of a party to an Arbitration Agreement only in respect of disputes with another party to the Arbitration Agreement. If there is a dispute between a party to an Arbitration Agreement with other parties to the Arbitration Agreement, as also non-parties to the Arbitration Agreement, reference to arbitration can be only with respect to the parties to the Arbitration Agreement and not the non-parties. Therefore, it is the contention of the learned counsel for the petitioner that the Award cannot bind the allottees of shares who are not parties to the Arbitration Agreement.

109. But the above contentions cannot be accepted. In this case, the Arbitral Tribunal took note of the involvement of the rights of third parties and found that those third parties were nothing but the shadow of the petitioner. As a matter of fact it was the petitioner who gave an undertaking, not only on his behalf but also on behalf of those so called third parties, not to sell or dispose of the property or the shares in question. At that time the petitioner did not raise this objection. Moreover, the Arbitral Tribunal took note of an affidavit filed before the Company Law Board to the effect that the petitioner came to hold 90% of the capital in the second petitioner company through other companies on which he held a sway.

Therefore, the petitioner cannot today contend that it is out of his hands to effect restitution.

110. As a matter of fact, the first respondent has already filed C.P.No.36 of 2010 before the Company Law Board, for the consequential reliefs. Therefore, the petitioner cannot set up the plea of third party rights. Moreover, the claim of the petitioner is that he holds just one share. If it is so, he could not have committed himself to make payment under the interim award. The amount which he agreed to pay, was for safeguarding the shares and interest of those third parties also.

111. In a petition under Section 34, it is not open to the petitioner to question the executability of the award. What the Arbitral Tribunal has done is just to direct the petitioner to honour the undertaking given by him. A person who gave an undertaking cannot wriggle out of the same. Therefore, the grounds of attack 10 to 13 are also liable to be rejected.

112. On the issue of restitution, I need to deal with one more contention of Mr.V.T.Gopalan, learned senior counsel for the petitioner. According to him, the Tribunal could not have awarded restitution especially when it has rejected the claim for damages in para 17.0 of the award, while recording a finding on issue No.19. Supplementing this argument of Mr.V.T.Gopalan, learned senior counsel for the petitioner, it was contented by Mr.S.R.Rajagopal, that under Section 75 of the Contract Act, a person who rightly rescinds a contract is entitled to compensation for any damage that he has sustained due to non fulfilment of the contract. Therefore, it is

his contention that once the claim for damages is rejected, the claim for restitution will also fail.

113. But the above contention loses sight of the fact that the claim for damages was made for loss of prestige and reputation that resulted from the breach of contract. Therefore, the Arbitral Tribunal relied upon the decision in ***Ghaziabad Development Authority v. Union of India [2000 (3) CTC 546]*** to reject the claim on the ground that a claim for damages for loss of prestige and reputation cannot be sustained. But it does not mean that if a claim for damages fails, a claim for restitution should automatically fail.

114. Interestingly, Mr.S.R.Rajagopal, learned counsel for the petitioner went to the extent of contending that issue No.12 relating to restitution, was contrary to public policy and that this issue could not have been taken up for consideration after the passing of the interim award.

115. I have already extracted the interim award. There is no dispute about the fact (1) that the interim award was passed by consent (2) that thereafter, the petitioner had the audacity to challenge the interim award by making all kinds of allegations against his counsel and (3) that thereafter, he withdrew the challenge to the interim award. Once the petitioner withdrew the challenge to the interim award, it had become final. Therefore, clause 4 of the interim award by which the parties conferred jurisdiction upon the Tribunal to decide the question of restitution, is binding upon the petitioner. Hence, the present contention is only an argument of

convenience.

Ground-14 (Section 65 of the Contract Act):

116. The last ground of attack is that the Arbitral Tribunal did not appreciate the scope of Section 65 of the Contract Act. Section 65 applies only to a contract which is void. The Arbitral Tribunal found the contract on hand to be capable of being performed, but held that KSL could avoid the contract and seek restitution due to the alleged breach committed by KCP. But this situation, according to the petitioner is not covered by Section 65.

117. In order to consider this ground of attack, it is necessary to take note of Section 65. Section 65 of the Contract Act states that when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or make compensation for it to the person from whom he received it.

118. But, unfortunately, Section 65 is not a complete code, in so far as the circumstances under which a party is entitled to restitution, are concerned. Section 65 in fact brings out a distinction between agreements and contracts. This is for the reason that by virtue of Section 2(e), every promise and every set of promises forming the consideration for each other, is an agreement. But it is only an agreement enforceable by law, which is a contract by virtue of Section 2(h).

119. It is needless to point out that a contract may become void even due to impossibility. In **Satgur v. Har Narain [62 MLJ 451]**, the Privy

Council held that the words "when a contract becomes void" are sufficient to cover cases of voidable contract, which have been avoided. Even in a case where a contract failed by reason of not being executed in strict compliance with the rules framed therefor, this High Court held in ***Palaniswami Gounder v. E&S Co-operative wholesale Societies Limited [1933 Madras 145]***, that the principle behind Section 65 could be applied.

120. Therefore, it is not correct to contend that de hors Section 65 of the Contract Act, there can be no claim for restitution. Hence, the 14th ground of attack is also to fail.

121. As contended by Mr.Arvind P.Datar, the conduct of the petitioner in O.P.No.98 of 2011 also deserves to be noted, before parting. I am not referring to his conduct outside the Arbitral proceedings. But the way he conducted himself even during the Arbitral proceedings, spoke volumes about his bad intentions. This evident from the following:-

"(a) The petitioner appoints his nominee arbitrator from Mumbai when the parties and subject matter of arbitration are confined to Tamilnadu. Both arbitrators fail to agree upon the Presiding Arbitrator and the Respondents filed a Section 11 petition pursuant to which Justice Venkatasami is appointed as the Presiding Arbitrator.

(b) The petitioner changes his counsel after the arguments are concluded. The new counsel then comes up with a request to reargue the case.

(c) The petitioner agrees for an interim award by consent and then challenged it on the ground that his counsel acted without authorization. He further fails to honour the interim award.

(d) The petitioner alleges that the Arbitrator nominated by him has resigned from the Arbitral Tribunal. He further fails to pay the Arbitrators fees, the venue fees to the Palkhivala Arbitration Centre and travel expenses of the Arbitrator from Mumbai. He further fails to pay the dues of the Late Justice Venkataswami to his widow.

(e) The petitioner challenges the continuance of the arbitrator appointed by him in Section 14 proceedings. The courts rejects his petition with costs.

(f) The petitioner seeks unnecessary adjournments and refuses to attend the proceedings pursuant to High Court order.

(g) The petitioner refuses to come down to Mumbai for the only hearing posted in Mumbai due to the health condition of the sixth Respondent.

(h) In Section 9 proceedings A.No.2734 of 2008, the petitioner gives an undertaking through the counsel that the documents will be brought to the court while the order was being prepared and flouts the order.

(i) The O.Ps. were filed challenging the Arbitral Award dated 16th December 2009. The O.Ps. challenging the Award were numbered only in 2011 and the same has come up for arguments only in November 2013.

(j) Even in the present O.Ps., the petitioners have changed the counsel many times."

Conclusion:

122. Therefore, in fine, all the grounds of attack raised by the petitioners are unsustainable in law. The award of the Arbitral Tribunal is not vitiated by any one of the grounds available in Clauses (a) or (b) of sub-section (2) of Section 34 and hence it does not call for interference.

Therefore, the Original Petitions are dismissed with costs of Rs.50,000/- each.

30-04-2015

Index : Yes
Internet : Yes

Svn/kpl/gr

V.RAMASUBRAMANIAN,J

kpl/gr.

Common Order
in OP Nos.98 & 272 of 2011.

30-04-2015