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REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 669 OF 2017**

Kingfisher Finvest India Ltd & Anr ...Petitioners
Versus
Zuari Fertilisers & Chemicals & Anr ...Respondents

**Mr Rohaan Cama , with Ajay Hailkar, i/b Bachubhai Munim & Co.,
for the Petitioners.**

**Mr Soli Cooper, Senior Advocate, with Atika Vaz & Krishna
Tangirala, i/b Shardul Amarchand Mangaldas & Co., for the
Respondents**

**CORAM: G.S. PATEL, J.
DATED: 16th January 2020**

PC:-

1. This order will dispose of the Arbitration Petition. It is filed under Section 34 of the Arbitration and Conciliation Act 1996. It assails a speaking Award dated 8th May 2017 rendered by the learned sole Arbitrator, the Hon'ble Mr Justice SP Bharucha, former Chief Justice of India, appointed by agreement of parties.
2. Before I proceed further, I must note that before the learned sole Arbitrator, after pleadings were filed, both sides agreed not to

lead evidence. I find that in the arbitral Award itself there is a hint of some controversy in this context, but I will return to that shortly.

3. The Petition is brought by two of the three original claimants. The original claimants were United Breweries (Holdings) Limited, now in liquidation, the present 1st Respondent, Kingfisher Finvest India Limited, and the present 2nd Petitioner, McDowell Holdings Limited.

4. There is a preliminary objection by Mr Cooper for the Respondents in regard to the maintainability of the Petition, but I will address towards the end of this judgment.

5. Before the learned sole Arbitrator, there were two Respondents, Zuari Fertilizers and Chemicals Limited and Zuari Agro Chemicals Limited. In the present Section 34 Petition, Zuari Fertilizers and Chemicals Limited has been deleted in February 2018 pursuant to leave granted by this Court since it was amalgamated with Zuari Agro Chemicals Limited.

6. The facts are these. The Claimants before the learned sole Arbitrator — United Breweries (Holdings) Limited, Kingfisher Finvest India Limited and McDowell Holdings Limited — are all part of what is known as the UB Group. At the relevant time, that is to say around May 2014, the UB Group collectively held a controlling 21.97% of the paid up share capital of Mangalore Chemicals & Fertilizers Limited (“MCFL”). The two Respondents (now amalgamated into one), known as the Zuari Group, held

16.43% of the paid up share capital in MCFL. Thus, between them the UB Group and the Zuari Group had a 38.4% interest in MCFL, possibly a controlling interest.

7. In April 2014, two companies, SCM Soilfert Limited (“**SCM**”) and Deepak Fertilizers and Petrochemicals Corporation Limited (“**Deepak Petro**”) publicly announced their intention to acquire up to 26% of the share capital of MCFL. This was widely understood, including by the UB Group and the Zuari Group, to be nothing but a takeover bid of MCFL by SCM and Deepak Petro. Agreeing to block, upset or defeat this takeover attempt, the UB Group and the Zuari Group entered into a Shareholders Agreement (“**SHA**”) on 12th May 2014. The terms of this SHA were the subject of controversy before the Arbitrator. Specifically, the question before the Tribunal was whether the SHA survived the failure of a competing bid, and whether the SHA could be specifically performed after the competing bid (by the UB Group and Zuari Group) failed.

8. On the very same day as the SHA, i.e. 12th May 2014, and pursuant to the SHA, the Zuari Group made a competing public announcement to acquire precisely 26% of the paid up share capital of MCFL. In doing so, the Zuari Group is said to have acted in concert with the UB Group.

9. It seems that 5.94% of MCFL’s paid up capital was tendered to and accepted by SCM in partial fulfilment of its offer. Shares constituting 0.04% of the paid up capital of MCFL were tendered to

the Zuari Group. At the end of the tendering process, the UB Group's shareholding in MCFL remained unchanged at 21.97%. The Zuari Group's holding rose marginally from 16.43% to 16.47%. SCM's holding then rose to 29.05%. Together, the UB Group and the Zuari Group still had a larger shareholding in MCFL than SCM.

10. One of MCFL's creditors was the State Bank of India. On 30th November 2014, it demanded that any MCFL director who was declared a wilful defaulter should step down. This resulted in the resignation of Vijay Mallya, then on MCFL's Board. On 4th December 2014 his mother, Ritu, was inducted onto MCFL's Board.

11. On 4th December 2014, the Zuari Group made a second public announcement of its open offer to acquire MCFL's shares constituting up to 25.90% of its paid up capital. On 30th December 2014, it revised that amount to shares constituting 36.56% of the share capital of MCFL. Upon shares tendered to it under the open offer the Zuari Group then increased its own holding (i.e. without reckoning the UB Group's holding) to 53.03% of the paid up capital of MCFL.

12. There is a letter of 7th May 2015 to which the learned sole Arbitrator referred early in his Award between Saroj Poddar of the Zuari Group to Vijay Mallya of the UB Group regarding the Zuari Group's shareholding in MCFL. I will return to this later.

13. Once disputes arose between the UB Group and the Zuari Group under the SHA, the learned sole Arbitrator came to be appointed.

14. At an Annual General Meeting of MCFL held on 27th September 2016, the Zuari Group voted against the appointment of one Mr Venkatraman, a UB Group nominee as a director on the Board of MCFL. That resolution was, therefore, defeated.

15. Before the learned sole Arbitrator in the Statement of Claim the case of the UB Group was that the SHA continued to be valid, binding and subsisting notwithstanding the failure of the competing bid. It will be recalled that there were two bids, at distinct points in time, by the Zuari Group to increase its stake in MCFL. The first was in May 2014, pursuant to the SHA and the Zuari Group took up only an additional 0.04% of MCFL's share capital. The second was in December 2014, for 36.56% of MCFL's share capital. The UB Group said in its claim that the December 2014 Zuari Group bid was also pursuant to the SHA. The Zuari Group disputed and denied this.

16. The SHA contains a provision by which the UB Group has the option to purchase from the Zuari Group such number of shares as necessary to equalize its shareholding within five years, i.e. before 20th October 2019. It was UB Group's case that while it had every *intention* of exercising that right, a situation was created, and ought not to be permitted, by which the Zuari Group succeeded in defeating the exercise by the UB Group of that right. MCFL's

Articles of Association provided that the UB Group had the right to nominate three directors to MCFL's Board. This is reflected in the SHA and about this, there is no dispute. According to the UB Group and its Statement of Claim, the appointment of directors by the Zuari Group to the MCFL Board was contrary to and in breach of the SHA and consequently all reconstitution of various committees and sub-committees, attempts to terminate certain licenses, to modify the Memorandum and Articles of Association and to revise the salary of the Managing Director were vitiated and rendered illegal, void and non est. The Zuari Group could not, it was specifically contended, have voted against the appointment of Mr Venkatraman, a UB Group nominee.

17. I do not think it is necessary in this judgment to set out the exact prayers before the learned sole Arbitrator. A summary should suffice. One prayer was for the declaration that two Zuari Group appointments to the MCFL's Board were void and illegal; for a declaration that the appointment of a law firm to obtain an opinion in regard to the proposed amendments to the Memorandum and Articles of Association of MCFL was also illegal; that the termination of a trademark license agreement was also illegal; that all consequential actions upon the appointment of the Zuari Group nominee directors were illegal; and that the Zuari Group's vote against Mr Venkatraman's nomination by the UB Group at the MCFL's AGM was in breach of the terms of the SHA and, therefore, not binding. The next prayer required a restoration of the status quo ante prior to the AGM dated 29th September 2015 including the removal of the Zuari Group directors. Then there was

a prayer for specific performance of the SHA, and finally there were the usual prayers for an injunction.

18. The Zuari Group filed a Statement of Defence and an Additional Statement of Defence. Central to this defence was that the SHA was incapable of specific performance after the competing bid failed. As we shall see, it is to this that the Arbitral Tribunal directed its attention and it is on this that the Arbitral Tribunal returned a finding.

19. The Additional Statement of Defence amplified on the contention previously taken by saying that the SHA was no longer valid and binding and that it had in fact — and I am paraphrasing here — outlived its primary purpose and, therefore, had been abandoned or treated as having come to an end by the parties. The SHA had a single, solitary purpose: to defeat the open offer made by SCM/Deepak Petro, and to do so by making a competing offer. The Zuari Group also said that once MCFL became a subsidiary of the then 1st Respondent, Zuari Fertilizers, there was no question of the SHA subsisting. The continuance of the SHA was predicated on there being in play a competing offer.

20. In this context, some recitals of the SHA are interesting. They have been set out extensively by the learned sole Arbitrator in the Award, but again for my purposes I think a summary should be enough. The point is that the SHA makes an explicit reference to SCM in the very second recital and to its open offer. The third recital goes on to say should that offer by SCM succeed, the UB

Group would ‘lose control’ over the MCFL. It notes the UB Group’s intention of desire to ‘protect its investment and prevent any diminution thereof’, i.e. that the UB Group desired to retain control of MCFL. It then goes on to mention that the Zuari Group also had a stake in MCFL and because the combined UB Group-Zuari Group’s stake exceeded 38%, the two Groups had decided to come together to collectively exercise voting rights. Recital (E) is then most relevant. This is the one recital that I think is best set out in full:

“E) Presently, the UB Group is not in a position to finance the Competing Offer (as defined hereinafter), but the Z Group, which is independent of the UB Group, is willing to finance the Competing Offer and participate in the management of the Company. Therefore, the Parties are desirous of recording this agreement and the Z Group’s responsibility to fund the Competing Officer in its entirety, with the UB Group, currently the promoters of the Company, supporting the Competing officer as persons acting in concert.”

21. Even before proceeding to the rest of the SHA, these recitals give us the entire conspectus of what was at stake, what the intendment of the SHA was and how it was to be commercially realized or read. This was not, on a plain reading of it, a garden-variety plain-vanilla Shareholders Agreement. It had a specific and narrow focus: at all costs to prevent SCM/Deepak Petro from taking control of MCFL. This obstruction was to be financed entirely by the Zuari Group. The UB Group had no money with which to realize these corporate ambitions.

22. There are other provisions in regard to the role and composition of the Board, the manner of exercise of voting rights, the conduct of business and some sort of a pre-emption provision in clause (4). Then we come to three interesting clauses, Clauses 5, 6 and 7. Essentially, clause 5 dealt with the competing offer and obliged the Zuari Group as the defined ‘acquirer’ to make a competing offer. That clause acknowledged in sub-clause 5.2 that UB Group was in financial distress, and that it was the Zuari Group which would subscribe to all the shares required to make the competing offer. Clause 6 had a provision for what was called ‘Creeping Acquisition of Shares and Clawback’. This provided a five-year term ‘after completion of the competing offer’ — and the relevance here is not so much five years as *completion* — and said that during that time, should the shareholding of the Zuari Group exceed that of the UB Group, then the UB Group would be entitled to acquire in any subsequent financial year such number of additional shares or voting rights by way of a creeping acquisition under the relevant regulations until the two Groups’ shareholding equalized. The UB Group was also entitled to an option to purchase such shares from the Zuari Group as necessary to achieve this equalization. Clause 6.1.2 made a similar provision in reverse if the Zuari Group’s holding was below that of the UB Group.

23. Then comes clause 6.2, worded thus:

“6.2 Notwithstanding anything contained in Clauses 6.1 hereinabove, the Parties hereby agree that in the event of a sale/disposal of Shares by a substantial shareholder of the Company, the Parties shall be free to purchase such Shares and shall not be prohibited on account of the restrictions set

out in Clauses 6.1.1 to 6.1.3 hereinabove. In the event, one of the Parties is unable to participate in such transaction due to any reason whatsoever, including any financial constraints, the other Party shall be entitled to proceed individually with such acquisition.

Within the aforementioned period of 5 (five) years, as and when the other Party overcomes its current difficulties, including its financial constraints, it shall, in its sole and absolute discretion, have an option to purchase such number of Shares from the Acquiring Party so as to equalize the respective shareholdings of the two (2) Groups in the Company (the “**Clawback Option**”). The price per Share at which the other Party shall be entitled to exercise the Clawback Option shall be mutually agreed to between the chairpersons of each of the two (2) Groups which shall in any event be not less than the cost of acquisition of such Shares.”

24. Finally there is clause 6.3 which says that in addition to the options mentioned above if, after taking into account all permissible acquisition of the shares by the Zuari Group under the SHA, the Zuari Group still held more shares than the UB Group, then within that period the UB Group would have the option to purchase an equalizing number of shares from the Zuari Group. Clause 7 had a put option which granted the UB Group the option to call upon the Zuari Group to acquire any or all of the UB Group shares upon terms and conditions to be decided by the two Chairpersons (Poddar and Mallya) of the two Groups.

25. The dispute resolution clause is undisputed.

26. In all this, MCFL was not a party to the SHA, although it was very much the object of both the UB Group's and the Zuari Group's affections. It is MCFL's shares that were being targeted for acquisition by the competing offer. MCFL itself was never a party to the arbitration, but the Statement of Claim challenged appointments to the Board of MCFL and actions taken pursuant to those appointments. One of the arguments evidently taken by the Zuari Group was that the prayers in arbitration directly sought reliefs against MCFL, which was not a party. The learned sole Arbitrator accepted that contention and in my view correctly.

27. About the objective of the SHA, there can no dispute. It had a solitary purpose. The SHA also made a clear-cut distinction between representation on the Board. The UB Group contended that the SHA itself contemplated that the competing bid to be mounted by the Zuari Group would fail. They placed reliance on clause 6.1.2:

“6.1.2 In the event, the shareholding of the Z Group is still below the shareholding of the UB Group, the Z Group shall be entitled to acquire in any subsequent financial year such number of additional Shares or voting rights by way of creeping acquisition under Regulation 3 of the Takeover Regulations, till such time the aggregate shareholding of the Z Group in the Company is equal to the aggregate shareholding of the UB Group.”

28. The argument was that it was only upon a failure of the competing bid that the Zuari Group's shareholding would be below that of the UB Group's shareholding. But the SHA intended the UB

Group to have dominant control over MCFL in future after the competing offer. I do not think that it is correct to say that clause 6.1.2 exhausted the universe of possibilities in which the Zuari Group's shareholding could be less than that of the UB Group. It is to those other situations (by an unrestricted outside sale, for instance) that clause 6.1.2 was to apply. That clause in itself could not lead to an acceptance of UB Group's argument that the purpose of the SHA was to ensure UB Group's total domination and control over MCFL in eternity, or that this should be done at the cost of the Zuari Group.

29. In fact the SHA, as I have noted above, proceeds on the footing that, funded by Zuari Group, the competing bid was bound to succeed, and the SCM/Deepak Petro's bid was bound to fail.

30. There are two threshold problems in the Petitioners' way on any formulation of this case. First, the assumption that every MCFL share purchase by the Zuari Group was tied hand and foot to the SHA is far from clear. As the SHA itself recites, its purpose was to defeat SCM/Deepak Petro. It was not to enable the UB Group to get dominant control of MCFL over a long time-span. This is the second problem, for the Petitioners' formulation amounts to this: that the Zuari Group had, for no apparent reason, agreed to fund the UB Group's shadow-control over MCFL and to do so in perpetuity. The Zuari Group could not acquire any greater stake in MCFL without being beholden to make over this additional stake to the UB Group, virtually on demand. The Zuari Group was literally condemned to remain in perpetuity at its 16.43-16.47% holding of MCFL's share capital. Everything else it bought, ever, at any time,

and in any circumstances, was only on behalf of the UB Group and could not be for itself. And yet, the UB Group was literally in penury. It did not have the means to increase its stake in MCFL. If the SHA was to be held to have a broader purpose than defeating the SCM bid, then this position needed to be reconciled.

31. The entire rationale of the SHA was, clearly, the competing offer. As the learned sole Arbitrator put it, this was the central factor. It was, again as he noted, the reason for the SHA and there was no other. What did that competing bid actually entail? It meant that the Zuari Group would fund the acquisition of additional shares sufficient to defeat the SCM bid, and then the parties' relationship would be governed by SHA so that the UB Group's control over MCFL continued. The financing was to come entirely from the Zuari Group.

32. But what if the competing offer, i.e. the one made by Zuari Group, did not bring in enough shares? Would the SHA survive such a situation? Or would it have failed to fulfil its solitary purpose and thus fallen through?

33. Before the learned sole Arbitrator, this is what the Zuari Group argued urging that the very basis or substratum of the SHA was lost when the competing bid fail. There was a considerable amount of reliance placed before the learned sole Arbitrator on some correspondence and I find this is quoted and dealt with from pages 482 to 484.

34. Mr Cama for the Petitioners has laboured long and hard to persuade me that the learned sole Arbitrator not only misinterpreted this correspondence and its evidentiary value but ought to have looked at other evidence also. He says that a failure to consider evidence is a sufficient ground within Section 34 of the Arbitration and Conciliation Act 1996. Mr Cooper disagrees, and I think with quite considerable justification. When we ask that a Tribunal 'appreciate the evidence', this is all too often mistaken to mean that every tribunal and court (presumably excluding superior Courts) must sedulously examine the minutiae of every single document in a huge mass of documents, not all of which may be relevant, or even very interesting; and that a failure to look at even a single one of these constitutes 'a failure to consider the evidence'. This is wholly incorrect. When we say that there has been a failure to consider evidence, the proposition takes one of two flavours. Either it must be demonstrated that there is a document or a piece of evidence that is so utterly central and pivotal that it could not have been overlooked, or that the Tribunal has missed looking at all the evidence altogether.

35. The argument from Mr Cama also overlooks the manner in which civil actions are decided. They are not decided on the basis of a stray line in this or that document, nor on one document or sentence or word plucked and considered in isolation. One must look at the weight of evidence on both sides, and one must look at it overall, to see what it is to which that evidence tends. We deal in probabilities and preponderances, not absolutes. Does the preponderance of evidence, taken as a whole, tend to support the Petitioners case? Or does it not? If we do not see it like this, then

every single award and every single judgment is vulnerable because no two decision-makers will ever view the same document in the same fashion and it will then always be possible to say that a tribunal missed this or that particular sentence or letter. That is in fact not the remit of Section 34 at all.

36. Two things are crucial here. One, that the UB Group only ever expressed its ‘intention’ to exercise its options to buy MCFL shares from the Zuari Group’s increased stock. It does not seem to have actually done anything in that direction, and understandably so; that would have required it to pay for those shares. Second, the clawback provision in Clause 6 speaks of a period *after completion of the competing bid*. This cannot possibly mean *after failure* of the competing bid — if the competing bid by the Zuari Group undertaken pursuant to the SHA failed there would simply be nothing to ‘clawback’. *Completion* must be read contextually, and to give business efficacy to the parties’ intendment. Whether it said so or not, *completion* could only mean the success of the competing bid, i.e. a rise in the Zuari Group’s stake in MCFL, from which the UB Group could then make its creeping acquisition and begin clawing its way back into becoming the single largest shareholder. On its own, the creeping acquisition and clawback clause needed a target, and that target could only be the additional shareholding in MCFL that the Zuari Group acquired because its competing bid was the winning one. If that competing bid did not achieve its purpose, then the SHA ran aground too. And that purpose was known, stated and documented — for the Zuari Group to acquire 26% of the MCFL share capital, sufficient to defeat SCM’s bid in that very amount.

37. It is for this reason that when it realized that its arguments were floundering, counsel for the Petitioners submitted before the learned sole Arbitrator that the Zuari Group had not disclosed its case that the SHA was abandoned or treated as at an end, and that the UB Group had elected not to lead evidence without knowing that this was to be the stand of the Zuari Group. The Arbitrator noted this argument, but also said that there was no application by the UB Group either written or oral, seeking permission to revoke the earlier statements of the UB Group dispensing with evidence. There was no application to add to the issues. The argument before the learned sole Arbitrator that the UB Group was ‘denied an opportunity’ was thus repelled by the learned sole Arbitrator, and quite correctly.

38. Apart from what the parties did in the arbitration, the argument by the Zuari Group as to the consequence of the failure of the competing offer by the Zuari Group was purely a legal argument. It spoke of to a consequence that was bound to follow. That apart, in fact I find this argument is hard to countenance because the Additional Statement of Defence introduced additional preliminary submissions. These are numbered from paragraphs 35A onwards. Paragraph 35B opens by saying—

‘As previously submitted, the SHA is no longer valid and binding on the Respondents and has, in fact, been abandoned and/or treated as at an end by the parties. The intent and purpose of the parties to enter into the SHA was to make a “Competing Offer” in response to SCM’s Open Offer dated 23 April 2014. ...’.

In paragraph 35D:

“.... This Competing Offer admittedly failed. The failure of this Competing Offer naturally entailed the SHA losing its substratum. In other words, the purpose for which the Claimants and the Respondents had joined together came to an end and no longer existed and thus, the SHA, which was only reflective and for the advancement and effectuation of the said purpose also came to an end.”

Then in paragraph 35F:

“In view of the aforesaid, since the Respondents made an independent open offer, which was clearly beyond and outside the purview of the SHA, the Respondents cannot be said to be bound by the SHA in respect of the shares acquired by them under the Second Open Offer. ... Thereafter, the SHA became without any legal force effect and redundant. The Claimants’ argument that the SHA was binding on the parties in perpetuity is without any force and merit.”

(Emphasis added)

39. This argument (of being unaware of the Zuari Group’s stand on the SHA) must fail. It may be true that the UB Group committed itself to proceeding without evidence before the Zuari Group put in the additional Statement of Defence. But at the stage of arguments before the learned Sole Arbitrator, it could hardly be said to have been taken unawares or denied a fair opportunity. By then, it knew what the stand was; we find it in the additional Statement of Defence, and I have extracted the relevant portions. The Zuari Group’s contentions were therefore to the knowledge of the UB

Group and its legal advisers. If they yet wanted to withdraw from their earlier commitment to not leading evidence, then, as the learned Sole Arbitrator noted, there had to be an application for that purpose. It is difficult to conceive what that application might have been. It could not have been the UB Group's case that there was any sort of oral understanding continuing the SHA. That would have been destructive of its principal contention that the SHA survived. If the contention was that correspondence between Poddar and Mallya proved an alleged continuance, then that correspondence — which was undisputed — only had to be read and interpreted. The objection before the learned Sole Arbitrator was inconsequential and without purpose, and it is of no avail to the UB Group now.

40. In this Petition, the entire thrust of the argument has been to show that there was material before the Arbitrator in the form of correspondence to indicate that the parties intended the SHA to continue. But that is not a question of a failure to appreciate evidence. It is an argument that since the Arbitrator did consider the correspondence, he failed to appreciate it correctly. That is a very different thing.

41. The law is well settled. The Arbitrator is not just the proper judge of the evidence. He is the only judge of the sufficiency of that evidence. A Section 34 Court will not sit in appeal over the view of the Arbitral Tribunal on matters of evidence: A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the sole judge of the quantity and quality of the evidence.¹

¹ *MP Power Generation Co vs Ansaldo Energia Spa & Anr*, (2018) 16 SCC 661.

42. This brings us to a question of law in regard to the frame of Section 34 as amended and the permissible limits of a challenge to an arbitral award. This has to be read with Section 5, as the Supreme Court has said, the statutory charge to minimize judicial interference in Arbitral Awards.

43. Mr Cama is clear that he is not placing his case under the public policy challenge and he does not claim a violation of the Arbitration Act or of any particular statute. Indeed, he appreciates the limitations within which he must frame his case and he does so by attempting to say that there has been a wholesale failure by the arbitrator to consider the evidence. This is not borne out by the record and pointing out to me that the Arbitrator could have viewed the evidence differently is insufficient for his purposes.

44. The requirement of law are fully set out in *Associate Builders vs Delhi Development Authority*.² The principles are well-settled and do not require great elaboration. Since there is no invocation of the public policy challenge or that of patent illegality, what remains is that to succeed the Petitioner must show that the Arbitral Award is so utterly perverse that no reasonable person could ever have arrived at a conclusion the Arbitral Tribunal did. In *ONGC v Western Geco International Ltd*,³ the Supreme Court said, in the case of arbitration law:

39. No less important is the principle now recognised as **a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no**

2 (2015) 3 SCC 49.

3 (2014) 9 SCC 263.

reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

(Emphasis added)

45. This has been reaffirmed in *Associate Builders*. Explaining ‘perversity’ in this context, the Supreme Court in *Associate Builders* said:

29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons* [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)

“7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In *Kuldeep Singh v. Commr. of Police* [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

“10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

33. **It must clearly be understood that when a court is applying the “public policy” test to an arbitration**

award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: “General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”. It is very important to bear this in mind when awards of lay arbitrators are challenged. **Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.** In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. ...”

(Emphasis added)

46. In the present case, this is what the learned sole Arbitrator said:

“The SHA must be read in a reasonable practical business sense. Other than clause 5, which dealt with the obligation to make the competing offer, the SHA was intended to operate upon the basis that the competing offer would provide enough shares to make the UB Group’s control of MCFL secure. It made no commercial sense to require the Zuari Group to support three nominees of the UB Group on the Board of MCFL if the position of the UB Group was, post the failure of the competing offer, to remain as insecure as it was when the SHA was signed. The provisions as to the sale of shares by the parties in the SHA would also be of worth only if the competing offer yielded a substantial number of shares to the Zuari Group.

The SHA mentions no public offer other than the competing offer. There is no correspondence prior to or after the public offer made by the Zuari Group on 4th December 2014 that links the public offer with the UB Group, nor, indeed, is it the case of the UB Group that it was in any way linked with the public offer. It was clear from the advertisement of the public offer that the Zuari Group intended to acquire a majority stake in MCFL but there was no letter written by the UB Group to protest or to state that it would lay claim to the shares acquired under the public offer by relying upon the clauses of the SHA. Its conduct indicates that the UB Group was aware that the SHA no longer had effect.

That the UB Group knew that the SHA was no longer of any effect is also shown by the fact that no objection was raised by its nominee directors or by the UB Group when

the Zuari Group proposed the appointment of three nominee directors to the Board of MCFL.

The letters, sent by e-mail, upon which the Claimants place great stress to suggest that the Zuari Group treated the SHA as binding post the failure of the competing offer to bring in enough shares to assure the UB Group of control, did not mention the SHA; what they mentioned was an “agreement”. But I shall assume that the “agreement” meant the SHA.

It is important to note that the letters were not written by or on behalf of the Zuari Group. The letters were written by “Saroj” (Poddar) to “Vijay” (Mallya). They were letters between individuals, not between companies. They were letters that showed the desire of Mr Poddar to assist Mr. Mallya in the difficult times he was facing.

But it would appear that Mr Poddar’s first letter to Mr Mallya led the UB Group to chance its arm at reviving the SHA.

It is also relevant that from his first letter Mr Poddar was at pains to point out that the SHA was no longer applicable in that it had not considered the situation of MCFL becoming a subsidiary of the Zuari Group and that this required the Zuari Group to report the operations of MCFL along with its own operations.

It cannot be held on the basis of Mr Poddar’s letters that the Zuari Group treated the SHA as binding and, in any event, it cannot be determinative of the construction to be placed on the SHA. The submission of learned counsel for the Claimants that there are admissions by the Zuari Group that the SHA continued to operate after the competitive offer had failed to produce the desired result is, hence, unacceptable.”

(*Emphasis added*)

47. The underlined portion in this extract, and everything that follows, is nothing if not an appreciation of the evidence. I am not shown anything that can be said to have been ‘ignored’ by the learned Sole Arbitrator. All that I am shown is, in fact, *the very same material that was before the learned Sole Arbitrator*, and I am asked to hold that his reading of that evidence was incorrect. Or, to put it differently, that another view is possible. Not, as the law demands, that the finding is based on no evidence, that it takes into account irrelevancies, or ignores vital relevant evidence, or outrageously defies logic; but only that the arbitrator *could* and *might* and *ought* to have taken a different view. That does not even begin to approach the necessary standard.

48. There is nothing about the learned Sole Arbitrator’s conclusion that would even remotely tempt me to a conclusion that it is wrong or incorrect in the slightest, let alone perverse. It is not just a plausible view, nor merely a commercially sensible one. It is in fact the only possible view, and I would go so far as to say that any other view would fall foul of the jurisprudential standard.

49. In my judgment, the Award calls for no interference.

50. Finally, there remains the preliminary question raised by Mr Cooper, namely, that the original 1st Claimant no longer exists and the 2nd original Claimant (the 1st Petitioner, Kingfisher Finvest) has divested itself of its equity in MCFL. McDowell Holdings Limited

(the present 2nd petitioner) has only 1.061% of MCFL's equity and therefore, even a Petition of this kind would not be maintainable. Mr Cooper is correct on this too. There is no possibility of reverting the parties to the status quo ante.

51. The Petition is without merit. It is dismissed.

52. Having regard to the financial misfortunes of the UB Group, I decline to pass an order of costs.

(G. S. PATEL, J)