

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: May 23, 2023

+ O.M.P. (COMM) 290/2019, I.As. 10329/2019 & 15542/2019

PRANAV ANSAL

..... Petitioner

Through: Mr. Ashwini Kumar Mata, Sr.
Adv. with Mr. Sujoy Datta,
Ms. Nishtha Khurana,
Ms. Mahima Shekhawat and
Mr. Karan Gaur, Advs.

versus

VISTRA ITCL (INDIA) LIMITED & ANR.

..... Respondents

Through: Mr. Sidhant Kumar, Ms.
Manyaa Chandok,
Mr. Gurpreet Singh Bagga and
Ms. Vidhi Udayshankar, Advs.
for R-1
Ms. Ruby S. Ahuja,
Ms. Manmeet Kaur,
Ms. Hancy Maini, Ms. Anjali
Dwivedi and Mr. Lakshya
Khanna, Advs. for R-2

AND

+ O.M.P. (COMM) 265/2019 & I.A. 9346/2019

GAURAV DALMIA

..... Petitioner

Through: Ms. Ruby S. Ahuja,
Ms. Manmeet Kaur,
Ms. Hancy Maini, Ms. Anjali

Dwivedi and Mr. Lakshya
Khanna, Advs.

versus

VISTRA ITCL (INDIA) LIMITED & ANR.

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CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act of 1996', in short). Since the petitions are challenging the same Arbitral Award dated March 25, 2019, I shall decide these petitions by a common order.
2. The petitioners, Pranav Ansal and Gaurav Dalmia are the promoter-shareholder of Ansal Properties and Infrastructure Ltd. ('APIL', for short) and the Chairman of Landmark Group, respectively. Landmark Group and Ansal Group entered into a Joint Venture Company ('JV', for short) on September 13, 2004, which later

came to be known as Ansal Landmark Township Private Limited ('ALTPL', for short), (presently under majority control of Ansal Group), to undertake real estate projects. Subsequently, the JV was terminated by the parties through a Term Sheet Agreement dated December 21, 2011, and Definitive Agreements executed as per the Term Sheet. The JV would incorporate an entity, which would be transferred to Landmark Group. This entity named Ansal Landmark (Karnal) Township Private Limited ('ALKTPL', for short), was to implement the 'Karnal project'.

3. As per the petitioners, a Debenture Subscription Agreement ('DSA', for short) and a Deed of Personal Guarantee ('DPG', for short), were executed on July 28, 2015. As per the DSA, an entity namely Ansal Urban Condominiums Private Limited (hereinafter referred to as 'AUCPL' and 'Principal Borrower' interchangeably) was to implement a Group Housing Project at Ghaziabad.

4. The DSA dated July 28, 2015, was entered into between the following parties:-

- a. AUCPL
- b. ALTPL
- c. ALKTPL
- d. Sushil Ansal
- e. Gaurav Dalmia (petitioner in OMP (COMM) 265/2019)
- f. Pranav Ansal (petitioner in OMP (COMM) 290/2019)
- g. APIL

h. Indostar Capital Finance Limited
(‘Indostar’, hereinafter)

5. As per the DSA, Indostar invested ₹ 150 crore in AUCPL by subscribing 1,50,00,000 secured, unlisted, redeemable, non-convertible debentures at the face value of ₹100. These debentures were to be redeemed in tranches, with a validity of 36 months from the closing date. As per Article 2.1.1 read with Article 2(ii) of Terms of Debentures, AUCPL was to pay interest @ 21.75% per annum from the date Indostar remits the money.

6. AUCPL failed to make the payment for the debentures by July 31, 2017, causing an ‘event of default’ as per the DSA. The respondent No.1 stated that the payment to AUCPL was secured by the following:-

- i. Personal Guarantee dated July 28, 2015, executed by the petitioners and the respondent No.1.
- ii. Corporate Guarantee by ALTPL & ALKTPL dated July 28, 2015.
- iii. Corporate Guarantee by APIL dated October 23, 2015

7. On October 27, 2015, AUCPL redeemed 24,00,000 debentures held by Indostar, leaving Indostar with 1,26,000 debentures. These debentures were then transferred by Indostar to IIFL Income Opportunities Fund (‘IIFL’, hereinafter) pursuant to a Debenture Purchase Agreement (‘DPA’, for short) dated October 27, 2015 between Indostar, IIFL, AUCPL, ALTPL, ALKTPL, APIL, Sushil Ansal, and the petitioners herein.

8. On December 29, 2015, AUCPL redeemed another 26,00,000 debentures held by IIFL, bringing the debentures held by IIFL to 1,00,00,000.

9. Pursuant to a second DPA dated March 03, 2016 ICICI Prudential Real Estate AIF II (hereinafter referred to as 'IPRU' and 'Debenture Holder No. 1', interchangeably) represented by ICICI Prudential Asset Management Company Limited in its capacity as the investment manager, agreed to purchase 1,00,00,000 debentures from IIFL. On March 18, 2016 IIFL sold / transferred 57,00,000 debentures to IPRU (Debenture Holder No. 1). Thereafter, IIFL transferred 43,00,000 debentures to various entities of IIFL. On June 30, 2016, these 43,00,000 debentures were then acquired by IIFL Yield Enhancer Fund (hereinafter referred to as 'Debenture Holder No.2' and 'IIFL YEF' interchangeably).

10. On March 20, 2017, Debenture Holder No.2 transferred 26,00,000 debentures to Debenture Holder No.1, bringing the total debentures held by Debenture Holder No.1 up to 83,00,000. As per respondent No.1, on March 20, 2017, AUCPL was informed that the Debenture Holder No.2 is transferring 26,00,000 debentures to Debenture Holder No.1. Debenture Holder No.2 then requested AUCPL to pay the interest on the transferred debentures to Debenture Holder No.1, to which AUCPL agreed.

11. On August 01, 2016, Debenture Holder No.1 issued a letter to AUCPL and all the other promoters of AUPCL for the repayment of interest on 57,00,000 debentures amounting to ₹6,23,25,599/-.

12. AUCPL was required to redeem the 1/3rd of the outstanding

face value of debentures along with accrued and unpaid interest as per the DSA. On October 16, 2017, the Debenture Holder No.-1, through a letter, informed AUCPL and its promoters that they are liable to pay an amount of ₹60,07,14,358/-, within 7 days. AUCPL responded to the letter on December 08, 2017, and requested more time to make the payments, citing financial constraints.

13. Subsequent thereto, Debenture Holders No.1 and 2 issued letters to the AUCPL on December 15, 2017 and January 15, 2018 calling upon them and all their guarantors to make payments of the amount. On February 12, 2018, the Debenture Holders invoked the DPG and issued a notice calling upon the petitioners to pay the outstanding amount of ₹162,12,64,243/-, along with IRR of 27% thereon, within 15 days.

14. Subsequently, arbitral proceedings were invoked by a way of a notice dated May 16, 2018 and a Sole Arbitrator was duly appointed.

15. Thereafter, on March 25, 2019, the impugned award was passed, whereby the claimant has been awarded a sum of ₹187,50,93,000/- along with *pendente-lite* interest of 27% and also fees of the Debenture Trustee ₹1,91,508/- with 5% compound interest on monthly basis. Hence these petitions.

OMP (COMM) 290/ 2019

16. This petition has been filed Pranav Ansal, who is one of the promoters of AUCPL, challenging the award dated March 25, 2019 passed by the Sole Arbitrator.

17. The petitioner submitted before the Tribunal that there exists no arbitration agreement between the parties and in the Statement of

Defence challenged the jurisdiction of the Arbitrator under Section 16 of the Act of 1996, as the arbitration mechanism referred in the DPG has come to an end upon execution of the DPA.

18. Mr. Ashwini Kumar Mata, learned senior counsel for the petitioner stated that the Arbitrator has erroneously held that the jurisdiction of the Tribunal ought not to be judged with reference to the DPA but only in terms of the trilogy of deeds, i.e., Debenture Subscription Agreement (DSA), Debenture Trust Deed (DTD) and Deed of Personal Guarantee (DPG). He also stated that such conclusion is passed without considering the "Entire Agreement" clause, i.e., Article 12 present in the DPA, which leads to the said agreement superseding and overriding the DSA except to the extent that the contents of the former are saved by incorporation. Thus, the validity of the reference must be examined in light of the DPA and not just the DSA. He also stated that the Arbitrator concluded that the arbitration arises under the DPG and the DSA alone, without examining the provisions and impact of the DSA. While certain rights attached to the debentures under the DSA have been incorporated into the subsequent agreement, the arbitration agreement has not been incorporated.

19. He contended that the Arbitrator held that Article 39 of the DPG records a severable and general intent to refer disputes to arbitration, rather than a specific adoption of the mechanism housed in Article 19.4 of the DSA. He also stated that Article 39 cannot be read widely, as it states that the disputes shall be resolved in accordance with the arbitration mechanism as set out in the DSA. If this

interpretation is given to such clauses, then in effect it will be impossible to specifically incorporate a particular arbitration mechanism by reference and rather all such clauses will be interpreted to be separate and independent arbitration clauses which can survive even when the reference to arbitration mechanism does not survive.

20. If the arbitration has been initiated solely under Article 39 of the DPG in vacuum from the DSA, then the claimant could not have adopted the procedure under Article 19.4(b) of the DSA to unilaterally appoint a sole arbitrator.

21. He stated that, in the present case, it must be held that the arbitration mechanism in the DSA has not been assigned to the subsequent Debenture Holders. The Arbitrator has failed to appreciate that, it is not the case of assignment but of transfer of debentures along with attached rights and benefits. Arbitration mechanism certainly cannot be termed as a right or benefit accruing with the transfer of debentures. He stated that the judgments relied on by the Arbitrator, i.e., *DLF Power Limited v. Mangalore Refinery & Petrochemicals Limited*¹ and *Kotak Mahindra Bank v. S Nagabhushan and Ors.*², deal with the issue of assignment of contract and not of sale of debentures, hence, they are distinguishable.

22. He also stated that the Arbitrator failed to consider the fact that there was no incorporation of the arbitration agreement contained in the DSA to the DPA and to follow the law laid down with respect to

¹ 2016 SCC Online Bom 5069

² 2018 SCC Online Del 6832

incorporation of arbitration agreement in *M. R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd*³.

23. According to Mr. Mata, the arbitration mechanism in the DSA came to an end when the said agreement was superseded by the DPA and as the latter agreement does not incorporate the arbitration mechanism of the former by reference, the same does not survive.

24. He controverted the reliance placed by the Arbitrator on *DLF Power Limited v. Mangalore Refinery & Petrochemicals Limited*⁴ to the present case, as the said judgment was passed in entirely different facts and circumstances, i.e.:—

- i. It pertained to a single-contract situation rather than multiple agreements as in the present case.
- ii. The entire engineering and supply contract was "assigned" to the successor entity including the arbitration agreement. Here, the earlier agreement has been superseded and replaced by the later agreements save certain specific parts (not including the arbitration agreement) which have been incorporated.
- iii. The present case does not deal with assignment of the entire DSA to an assignee but rather with transfer of debentures to a subsequent

³ (2009) 7 SCC 696

⁴ MANUMH/1200/2016

Debenture Holder. The transfer of debentures vests much narrower rights to the transferee than the assignment of an entire contract to an assignee.

- iv. The question herein, is not whether an arbitration agreement can be assigned, but rather whether it can be said to be assigned without any incorporation by reference merely as collateral "right" or "benefit" to the debentures.

Further, he has endeavored to distinguish the judgment in *Kotak Mahindra Bank vs. S Nagabhusan and Ors.*⁵, also on the above grounds.

25. He stated that the respondent No.1 has not disclosed any instructions from the Debenture Holders for issuing the notice invoking arbitration, nominating the Sole Arbitrator, or for instituting the claim, which is an issue that goes to the very root of the matter and renders the claim and proceedings *non-est*. The Arbitrator has failed to consider this. Such non-consideration or unreasoned rejection of a foundational issue is against the very notion of justice and is an error apparent on face of the award. He also stated that, in terms of Article 1.2.6 of the DTD, the respondent No.1 could only act upon instructions of the Debenture Holder and thus it was imperative to disclose and prove that clear instructions were received from both Debenture

⁵ MANU/DE/03671/2018

Holders. Thereafter, the claim was not supported by a valid affidavit, as the deponent was not authorised by the respondent to institute the claim.

26. He also stated that the respondent No.1 has not disclosed any document or otherwise proved that all rights and benefits of the Debenture Holders under the DSA were conferred to IIFL YEF. Unless the scope of the assignment to IIFL YEF is established, it cannot be stated that it is entitled to all the benefits of the DSA and thus can be considered a Debenture Holder in terms of the DSA, DTD and DPG and that the claimant can invoke arbitration in respect of alleged default towards IIFL YEF.

27. It his case that the Arbitrator has failed to give any decision on scope of rights assigned to IIFL YEF and has instead given the issue a go-by by observing that it currently holds the dematerialised debentures and mere ownership of the debentures does not disclose as to what rights under the DSA have been conferred, and thus the Arbitrator has in effect rendered no decision on a foundational issue which goes to the root of the matter.

28. He has relied on judgment of the Supreme Court held in ***M/s GAIL (India) Ltd. v. Bell Ceramics Pvt. Ltd. and Ors.***,⁶, wherein it was held that under Section 34 of the Arbitration and Conciliation Act, 1996, once the award is found to be perverse and against the law of the land, the Court is entitled, and in fact duty bound, to interfere with the award.

⁶ 2010 SCC OnLine Del 1062

29. He stated that the Arbitrator has acted contrary to the binding dictum of law laid down by the Supreme Court in the case of *Som Datt Builders Ltd. v. State of Kerala*⁷, wherein it was held that the requirement of reasons in support of an award under Section 31 (3) of the Act of 1996 is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. The Supreme Court has further held that mere noticing of the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to provide. To satisfy the requirement of Section 31(3), reasons must be stated by the Tribunal upon which the award is based and want of reasons would make such award legally flawed. In view of the same, the impugned award is liable to be set aside.

30. He stated that, no DPA is placed on record in respect of transfer of debentures to IIFL YEF and if assumed while not admitting that the rights and benefits transferred to IIFL YEF are similar to the rights and benefits transferred to IPRU under second DPA dated March 03, 2016, Article 6.1 thereof provides that all rights and benefits of the debentures purchased by the Purchaser and all the transaction documents (as defined in the DSA) shall be enjoyed by and be available to the purchaser.

31. Reliance is placed on the judgment in the case of *North Western Rubber Company. and Huttenbach & Co., Re.*⁸, to contend

⁷ (2009) 10 SCC 259

⁸(1908) 2 KB 907

that, an arbitration agreement in no way classifies the right of the parties under the contract but it relates wholly to the mode of determining the rights. Reference is also made to the judgment in the case of *M. Dayanand Reddy vs. A.P. Industrial Infrastructure Corporation Limited and Ors.*⁹

32. He stated that, assuming that the rights and benefits in terms of Article 6.1 read with Article 6.2 of the second DPA, can be said to include right to enforce security, but it cannot include incorporation of an arbitration agreement. He also stated that the words "rights" and the "benefits" cannot in any manner imply the existence of an independent arbitration agreement, if such agreement does not exist. Hence, in the present case, it cannot be held to exist if such rights have not been conferred to the current Debenture Holders under the DPA.

33. The respondent sought to invoke arbitration under Article 39 of the DPG, and the said Article states that, any dispute under the Deed would be resolved in accordance with the arbitration mechanism as set out in the DSA.

34. He stated that the subsequent DPA dated October 27, 2015 has brought an end to the DSA. The DPA, which is executed between all entities which were party to the DSA, refers to and acknowledges the DSA but specifically states in Article 12.1, as under;-

"this Agreement constitutes the entire agreement between the Parties and supersedes any previous agreements relating to the subject matter of those documents, and sets out the complete legal relationship

⁹ (1993) 3 SCC 137

of the Parties arising from or connected with that subject matter."

35. The DSA is superseded by the DPA, as both agreements share the same subject matter of the debentures. The DPA specifically states that the complete legal relationship of the parties "arising from" or "connected with" the subject matter of previous agreements or of current agreement, shall be determined by the current agreement. It is clear that the intent of the petitioners while entering into DPA, was to end the arbitration mechanism as the DPA does not contain any specific arbitration clause to adjudicate the disputes with regard to DSA or transaction documents.

36. He stated that the only way an arbitration agreement / clause can be said to exist in the DPA is by incorporation by specific reference and in support of this submission, he has relied on the judgments of the Supreme Court in the following cases:-

1. *M.R. Engineers and Contractors Pvt. Ltd. (supra)*
2. *Inox Wind Ltd. M/s Thermocables ltd.,*¹⁰

37. He stated that the respondent, in both the Statement of Claim and in the notice invoking arbitration dated May 16, 2018, has taken a position that an arbitration agreement exists between parties based on a joint reading of Article 39 of the DPG along with Article 19.4 of the DSA. He stated that, it has been the constant and unvarying stand of the respondent No.1 that the arbitration agreement exists between the parties by a joint reading of the two clauses in the two different

¹⁰ (2018) 2 SCC 519.

agreements, and in fact the arbitration has been carried out before the Arbitrator of the respondent's unilateral nomination, purportedly in terms of Article 19.4 of the DSA.

38. He contended that the Article 39 of the DPG state as under:-

“disputes with respect to personal guarantee shall be referred to and finally resolved in accordance with the arbitration mechanism set out in the Debenture Subscription Agreement dated 28.07.2015.”

39. Article 19.4 of the DSA provides for a single-member tribunal to adjudicate issues arising between parties to the said agreement. Even if Article 39 of DPG survives independently of the mechanism set out in DSA, even then the procedure under DSA to unilaterally appoint a sole arbitrator by the respondent No.1 cannot be adopted and the only remedy left with the respondent No.1 would have been to constitute the Tribunal as per the provisions of the Act, with respect to appointment when the procedure is not agreed between the parties.

40. Throughout the proceedings the petitioner raised the objection of non-existence of arbitration agreement in its Statement of Defense and Written Submissions, in terms Section 16 of the Act, before the Arbitral Tribunal at the appropriate point. He also stated that the petitioner never submitted to unilateral appointment of the Arbitrator by the respondent.

41. He submitted that, the only agreement surviving between the parties after the execution of the DPA, was the DPA and any agreements specifically saved by it. While the respondent No.1 has sought to differentiate the subject matter of the superseded DSA from

the arbitration agreement contained therein, it is settled law that the subject matter of a contract includes the arbitration agreement.

42. In support of the above submission, he has relied upon the following judgments :

a) *Air Liquide North India Pvt Ltd v. Inox Air Products Pvt. Ltd.*¹¹

b) *Gatx India Pvt. Ltd. v. Arshiya Rail Infrastructure Limited.*¹²

43. He submitted that the law is settled with respect to the novation of an agreement containing an arbitration clause the arbitration clause does not survive by relying on:-

(a) *Union of India v. Kishorilal Gupta & Bros*¹³

(b) *Damodar Valley Corporation vs KK Kar.*¹⁴

(c) *Young Achievers vs. IMS Learning Resources Private Limited.*¹⁵

44. He stated that the DPA does not have an arbitration agreement governing the petitioner, neither are there independent arbitration clauses governing disputes with the petitioner nor is there any

¹¹ 2015 (2) RAJ 135, 2015 (3) AD (Delhi 673)

¹² (2015) 216 DLT 20

¹³ AIR 1959 SC 1362,

¹⁴ (1974) 1 SCC 141

¹⁵ (2013) 10 SCC 535

incorporation or saving of the arbitration agreement contained in Article 19.4 of the DSA. The DPA contemplates an arbitration mechanism only in respect of disputes between the Seller and Purchaser of the debentures, that too by a three-member Tribunal.

45. He stated that the respondent No.1 has now taken two positions which were never taken before the Arbitral Tribunal:-

- a) Article 39 of the DPG incorporated Article 19.4 of the DSA, hence Article 19.4 would continue to operate irrespective of the novation of the DSA.
- b) Even if the Article 19.4 was superseded and novated, Article 39 of the DPG is an independent arbitration agreement without any reference to the DSA.

46. He stated that the respondent has in its arguments averred that Articles 1.1 (ix) and 1.2(x) of the DPA specifically incorporate the DSA, since the DSA is enclosed as an annexure to the DPA, however the same is entirely erroneous and misconstrued interpretation of DPA. He also stated that the Article 1.1(ix) defines DSA and marks it as annexure to DPA and Article 1.2(x) states as under:

'In this Agreement....references to an agreement shall include any recitals, annexures, schedules or attachments to it'.

47. The plain reading of the said clauses themselves mean that reference to DSA would include its annexures and does not mean that DSA being an annexure to DPA forms part of DPA.

48. He contended that the judgment relied upon by the respondent

No.1 in *UHL Power Company v. State of Himachal Pradesh*¹⁶ is misplaced, since the clause mentioned in the judgment define ‘Agreement shall mean this agreement together with all its appendices and annexure..’, which is entirely different from the definition of agreement in the present case i.e. “Agreement” means this agreement at Article 1.1(i) and “In this Agreement....references to an agreement shall include any recitals, annexures, schedules or attachments to it’.. The interpretation of both clauses is completely different from each other and reliance upon the said judgment is misconstrued.

49. Mr. Mata stated that the respondent has mislead this Court by placing reliance in *Narayan Prasad Lohia v. Nikunj Kumar Lohia*¹⁷. In the facts of the said judgment, the appointment procedure was neither invalid as per the Act nor contrary to the agreement. In the present case, the procedure of appointment of arbitrator is not in accordance with the intention of the parties or the agreement and therefore the Award is liable to be set aside.

50. Further, he submitted that the Judgment of *Jagdish Chander v. Ramesh Chander*¹⁸, has no bearing on the present case, as the said judgment holds that the intent of parties to submit their disputes to a private tribunal for adjudication and the willingness to be bound by such adjudication constitute a valid arbitration agreement. In the present case, Article 39 of DPG clearly shows the intention of the

¹⁶ (2022) 4 SCC 116

¹⁷ (2002) 3 SCC 572

¹⁸ (2007) 5 SCC 719

parties to be bound by arbitration only in accordance with mechanism as set out in DSA, and not otherwise.

51. He also stated that the respondent's contention that the application challenging the jurisdiction of Arbitral Tribunal was not preferred by the petitioner under Section 16 of the Act is misplaced as there is no requirement for a separate application to be filed before the Arbitral Tribunal. He also stated that Section 16 of the Act only requires for a plea to be taken before the Arbitral Tribunal challenging jurisdiction. The petitioner in its written submissions had taken a plea under Section 16 of the Act; therefore, the contention of the respondent is highly misconstrued.

52. According to him, the respondent has misconstrued the order dated August 07, 2018 passed by this Court in *Vistra ITCL (India) Limited (Formerly Known As IL & FS Trust Company Limited) v. Pranav Ansal & Anr.*¹⁹. In the said order, the parties noting that an Arbitral Tribunal had been constituted, agreed that the question of interim relief can be taken up before the Tribunal under Section 17, and this does not in any manner amount to accepting that the Arbitral Tribunal has been validly constituted, and does not abrogate the right under Section 16 to challenge the jurisdiction of the Arbitral Tribunal up to the stage of filing Statement of Defence. The challenge was duly raised at the appropriate juncture.

53. It is stated that there was no basis whatsoever for refusing to consider the material at hand and if the Tribunal had not refused to

¹⁹ OMP (I) (COMM) 195/2018

consider the impact of the DPA, certainly it would have reached the conclusion that it novated the Article 19.4 of the DSA and that thus no arbitration agreement exists. He stated that the Arbitrator completely disregarded the existence of DPA and that it superseded and novated DSA. He also stated that the award which ignores vital and material evidence would be liable to be set aside on the ground of patent illegality. In support of the his submission, he has relied upon the following judgments:

- i. *Associate Builders v. Delhi Development Authority*²⁰.
- ii. *Ssanyong Engineering and Construction Company Ltd. v. National Highways Authority of India*²¹.

54. He also stated that the Arbitrator in the award has based his entire reasoning on the principle that the assignment of contract would also amount to assignment of arbitration agreement contained in contract. However, the DSA has not been assigned to the subsequent Debenture Holders by the DPA; rather the DSA has been novated by the DPA in terms of Article 12 of the DPA. He stated that, such erroneous interpretation misconstruing novation of an agreement as assignment of the agreement (a) arises from refusal to consider the impact of the DPA, (b) is *prima facie* erroneous that no reasonable person would take such a view and hence the view is patently illegal and vitiates the award.

55. He has opposed the submission of the respondent No.1, before

²⁰ (2015) 3 SCC 49

²¹ (2019) 15 SCC 131

this Court that the scope of interference of this Court is limited and the Courts cannot re-interpret the terms of the contract under the present proceedings and that a question of interpretation of contract cannot be looked into by the Court for purpose of revisiting the award on merits of a decision. He stated that, every examination of a question of existence of an arbitration agreement must necessarily delve into interpretation of the said agreement and other agreements novating it.

56. In the present case, the scope of interference by this Court is wide for deciding the arbitrability of a dispute and Courts under Section 34 can have a ‘second look’ on the aspect of validity of arbitration agreement. In support of the above submission, he has relied upon the judgment of the Supreme Court in the case of *Vidya Drolia & Ors v. Durga Trading*²², wherein the Supreme Court observed that issue of non-arbitrability can be raised at three stages, firstly, at the time of reference under Sections 8 and 11, secondly, before the arbitrator during the arbitral proceedings and thirdly, before the Court at the stage of challenge or enforcement of the award. The Courts at the stage of the challenge of the award can have a second look into the validity of arbitration agreement.

57. He has sought prayers as made in the petition.

OMP (COMM) 265/2019

58. Ms. Ruby S. Ahuja, learned counsel appearing for the petitioner- Gaurav Dalmia, has largely adopted the submissions made by Mr. Mata in OMP (COMM) 290/2019. Her additional submissions

²² (2021) 2 SCC 1

are narrated below.

59. Landmark Group / Gaurav Dalmia never received the shares in the Principal Borrower, as promised by Pranav Ansal. As a result, the relation between the petitioners- Gaurav Dalmia and Pranav Ansal soured, which led to inaccessibility for inspection of documents of the Principal Borrower. Therefore, the petitioner herein did not have necessary information with regard to the transactions between the Debenture Holders, Debenture Trustee and Principal Borrower. Therefore, during the arbitration proceedings, the petitioner could not defend himself.

60. She contended that the Arbitrator did not consider the submission of the petitioner as to vesting of powers under the DSA and assumed that IIFL YEF has powers under DSA, without producing any documents to demonstrate the same. She also stated that the Arbitrator did not give any finding with regard to the authority of IIFL Asset Management Limited ('IIFL AML', for short) as an Investment Manager to IIFL. In the impugned award, the Arbitrator held that the money is due to IIFL YEF without any document on its record and that IIFL YEF has purchased the debentures. That apart, she stated that the Demat account only shows the present holding of the debentures and does not demonstrate the power vested under DSA to sue.

61. She stated that the Arbitrator failed to determine whether IIFL AML was authorised to act on behalf of IIFL YEF and did not make any finding as to power and ability of IIFL AML. She also stated that, the Arbitrator allowed the claim filed by the Debenture Trustee without instructions, which was accelerated through a letter by IIFL AML,

whose authority is in dispute and has not been proved.

62. Ms. Ahuja has also stated that the petitioner had no accessibility to the documents/ information of the transactions between Debenture Holders, Debenture Trustee and the Principal Borrower. She also stated that the respondent No.1 did not implead the Principal Borrower in the arbitration proceedings. The petitioner being an outsider, and as the Principal Borrower is managed by Ansal Group, had no means to answer the allegations on facts due to such non-impleadment. The arbitration clause in the DPG dated July 28, 2015 was incorporated only by reference to the main Agreement with the Principal Borrower. Even the Arbitrator did not direct the impleadment of the Principal Borrower, the entity which was party to Arbitration Agreement.

63. She stated that the petitioner was sued because of the DPG signed by the petitioner, wherein it was stated that some shares of the Principal Borrower would be given to an entity of the Landmark Group, but neither have such shares been transferred to the petitioners' associate Company, i.e., ALKTPL, nor has it been registered as a shareholder of the Principal Borrower. The Arbitrator failed to appreciate that no shares have been transferred from the respondent No.2 to the petitioner and that the respondent No.2, failed to make payments in terms of the composite transactions granting shares to the entity. Therefore the failure to consider for issuing personal guarantee, the personal guarantee is *void-ab-initio*, by which the respondent No1 cannot act upon the petitioner.

64. She stated that the respondent No.1 acted upon the petitioner

than to directly approach the Principal Borrower for recovery of the outstanding dues, if any, from the corporate entities who have provided guarantee.

65. Apart from that, the Arbitrator while granting interest at the rate of 27% per annum, has failed to consider that the respondent No.1, has not claimed severances on monies retained by the Principal Borrower, but relied on an inoperable clause of DSA to base its claims and has sought to profit out of claims by seeking IRR at the rate of 27% after the date of purported default, i.e., 83,00,000 debentures held by IPRU and 17,00,000 debentures purportedly held by IIFL YEF.

66. By further clarifying her submission, she has stated that the interest rate was 19.75% and the interest granted by the Arbitrator is 27% IRR is *ex-facie* penal against the agreed rate of interest. The impugned award failed to give reason to the principles governing the grant of interest, which are:-

- a. the 'loss of use' of the principal sum;
- b. the types of sums to which the interest must apply;
- c. the time period over which interest should be awarded;
- d. internationally prevailing rates of interest;
- e. whether simple or compound rate of interest is to be applied;
- f. whether the rate of interest awarded is commercially prudent from an economic stand-point;
- g. the rates of inflation;
- h. proportionality of the amount awarded as interest to the principal sums awarded.

67. In doing so, the Arbitrator has erred in treating the respondent No.1's internal statements of computation as a bank statement evidencing computations through XIRR Function of the software MS Excel. That the Arbitrator has in the impugned award, erroneously held that Article 9 of Annexure 4 of the DSA renders the debentures non-marketable but has awarded through XIRR Function, which inherently requires determination of present value of debentures, which in this case was neither averred nor proved by the respondent No.1.

68. Further, she stated that in respect of debentures as on July 04, 2018, held by Debenture Holder No. 1, IRR at the rate of 27% was achievable by use of XIRR function in MS Excel from any amount ranging between ₹ 107,00,00,000 to ₹ 107,80,00,000/- i.e., an approximate range of about ₹ 80,00,000/- and respondent No. 1, has totally failed to aver or prove as to how the value of ₹ 1, 36, 39, 28,000/- was used by respondent No. 1 to achieve IRR @ 27%.

69. Insofar as the debentures held by Debenture Holder No.2, the IRR at the rate of 27% was achievable from any amount ranging between ₹ 29,99,00,000/- to ₹ 30,84,00,000/- i.e., an approximate range of about ₹ 85,00,000/-, respondent No. 1 had totally failed to aver or prove as to what was the value of 'INR' used by respondent No.1 to achieve IRR at the rate of 27%. Such position arises out of law as well as Article 17.2.1 (a) of the DSA. She stated that the usage of word "debt due" evidence crystallisation of amounts, which are amounts payable *in praesenti*. Therefore, a sum when payable *in praesenti* essentially has to crystallise, and the only remedy, if at all available to the respondent No.1, is to claim severances on monies

retained by the Principal Borrower. Therefore, the claims based on IRR @ 27% were *in terrorem*.

70. She has placed reliance upon the judgment of the Supreme Court in the case of *Union of India v. Raman Iron Foundry*²³, wherein, it was held that, there must be *debitum in praesenti*; *solvedrum* may be *in praesenti* or *in futuro* -that is immaterial. There must be an existing obligation to pay a sum of money now or in future. She stated that the above passage was from the judgment of the Supreme Court of California in *People v. Arguello*²⁴, which was quoted by the Supreme Court in *Kesoram Industries v. Commissioner of Wealth Tax*²⁵, clearly bringing out the essential characteristics of a debt. When there is an obligation to pay a sum of money at a future date, it is a debt owing but when the obligation is to pay a sum of money *in praesenti*, it is a debt due. In this regard, she has also relied upon the judgment of the High Court of Judicature at Hyderabad in *Mauritius Commercial Bank Ltd. v. Sujana Universal Industries Limited*²⁶. According to her, the first default of interest would have occurred as early as December 31, 2015 and repayment default occurred on July 31, 2017. However, the respondent No. 1 did not proceed until February 12, 2018, i.e., 2 years after the interest default and approximately 6.5 months from the date of repayment default.

²³ AIR 1974 SC 1265

²⁴ 37 Cal.524 (Cal 1869)

²⁵ AIR 1996 SC 1370

²⁶, 2015 SCC OnLine Hyd 281

Therefore, the respondent No. 1 cannot be allowed to profit out of its own inaction and seek damages as on present day. In support of this contention she has relied upon the judgment of the High Court of Calcutta in *Union of India v. Moujilal Shaw*²⁷.

71. She has also relied upon the judgment of the Supreme Court in the case of *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*²⁸ wherein the Court has laid down the guiding principles to be considered for grant of interest under Section 31 (7), of the Act of 1996 from the date of cause of action till post award interest.

72. It was her contention that the respondent No.1 has not averred in the Statement of Claim with regard to the computation formula used. The XIRR function requires use of a pre-defined formula and the award was made without any averments or documents authenticating the veracity and authenticity of inputs (Dates, Formula. Figures, Output produced in Appendix 1). The computer generated outputs are without complying with the principles of Section 65 B of the Indian Evidence Act, 1872 ('Evidence Act', hereinafter).

73. The computation through XIRR function requires the net present value, which cannot be calculated as securities are not in the open market. The claim is outside the scope of reference and further, the respondent No.1 failed to prove its dues, as it has neither claimed such amount in its notice of invocation nor placed any bills, invoices or expenses on record. She also stated that the respondent No.1 has

²⁷ AIR 1960 Calcutta 729

²⁸ 2018 SCC OnLine SC 1922

neither placed any letter of services under DTD on record nor claimed any specific performance of the DSA. Therefore, the award is in-executable as it does not direct the redemption of debentures.

74. For the Debenture Trustee to claim specific performance, it had to aver and prove by leading evidence that the Debenture Holders were ready and willing to perform the obligations and the Principal Borrower ought to have been directed to redeem the debentures. The averments were mandatorily required to be proved in light of Section 16(1)(c) of the Specific Relief Act, 1963. She also stated that the Statement of Claims contained no pleading or averment, that the Debentures Holders were ready and willing to perform their obligation. In the absence of such averments and proofs, specific performance of the contract and the accelerated redemption value ought to have been refused. Therefore, the Debenture Trustee cannot claim the readiness or willingness of the Debenture Holder or Principal Borrower for redeeming the debentures as an independent third party.

75. She also stated that the Arbitrator has overlooked terms of the DSA, which requires notice to the subscriber. The Arbitrator did not rule on the ability of the Debenture Trustee to institute and maintain arbitration proceedings based on acceleration made by a non-party; which was the disputed issue.

76. She has relied upon the following judgments in support of her submissions:-

*a. Food Corporation of India v Chandu Construction and Anr.*²⁹

²⁹ (2007) 4 SCC 697

- b. MSK Projects (I) (JV) Ltd v State of Rajasthan and Anr.*³⁰
- c. Associated Engineering Co v Govt. of Andhra Pradesh.*³¹

**SUBMISSIONS ON BEHALF OF THE RESPONDENT -
VISTRA**

77. Mr. Sidhant Kumar, learned counsel for the respondent No.1 / Debenture Trustee stated that, under Section 128 of the Contract Act, the liability of a guarantor is co-extensive with that of the Principal Borrower, i.e., AUCPL. He also stated that by way of the DPG, the guarantors, i.e., the petitioners in the two petitions have jointly and/or severally agreed unconditionally and irrevocably to secure the payment of the amounts due to the Debenture Holders and discharge all the secured obligations under the DSA and other transaction documents.

78. He stated that Article 11 of the DPG stipulates that the liability of the guarantors is co-extensive with the liability of the Principal Borrower / AUCPL; and the Debenture Trustee / respondent No. 1 shall be entitled to proceed against the guarantors as if they are the Principal Borrowers to the Debenture Holders. Article 23 of the DPG states that the respondent No.1 need not enforce any other security or take any other action prior to invocation of the personal guarantee. The respondent No.1 is not required either under the agreements or under the law to proceed against AUCPL first, before proceeding

³⁰ AIR 2011 SC 2979

³¹ (1991) 4 SCC 93

against the guarantors. He submitted that Articles 5 and 6 of the DPG clarify that the guarantors are under an obligation to pay the demanded sums without taking any recourse against AUCPL. Furthermore, the obligations of the guarantors were raised by the petitioners before this Court at the hearing of the application under Section 9 of the Act of 1996, filed by the respondent No.1.

79. It is the submission of Mr. Kumar that the guarantors are estopped from questioning the veracity of the amounts due in view of the Articles 5 and 6 of the DPG which stipulate that the amount demanded by respondent No.1 shall be conclusive evidence of the amounts due and shall not be questioned by the guarantors and will be paid without any demur, delay or protest. In support of this submission, he has relied upon the judgment of the Supreme Court in *Gujarat Maritime Board v. L&T Infrastructure Development Projects Ltd. and Anr.*³², wherein it was held that, when the word ‘conclusive’ is prescribed, then the underlying fact is not questionable.

80. Mr. Kumar submitted that the respondent No.1 has adduced the evidence on record before the Tribunal with respect to the amounts due during the relevant period. He has also stated that bank statements along with bank certificates, and the independent auditor's reports confirm the accuracy of the amounts received by the Debenture Holders.

81. He stated that the guarantors have not provided any proof or details of any payments by AUCPL, which may be in excess of the

³² (2016) 10 SCC 46

payments already disclosed to have been received by the Debenture Holders. All notices were issued to the guarantors as well. However, neither did they dispute their liability nor did they controvert the amounts demanded or provide any contrary calculations.

82. According to him, the debentures are freely transferable without the requirement of seeking any prior consent of AUCPL or any of the guarantors, as per Article 19.17 of the DSA. Furthermore, debentures were in dematerialised form, as is clear from the Demat Holding Statements of IPRU and IIFL, both dated July 4, 2018. He also stated that under Section 56 of the Companies Act, 2013 read with Rule 11 of the Companies (Share Capital and Debentures) Rules, 2014, does not require any instrument of transfer to be delivered to the company when securities are held in dematerialised form and entered in the records of a depository. He also stated that the obligation of the petitioners under the DPG is to the Debenture Holders, including the persons whose name is mentioned as beneficiary in the records of the depository, i.e., the respondent No.1 herein.

83. It is also stated that, under Article 19.18 of the DSA, it is agreed that the petitioners are bound by the security documents which include the DPG, notwithstanding any transfer or assignment of the debentures. Moreover, Article 19.16.1 of the DSA also provides that it shall be binding upon and would ensure the benefit to each party and its successors/assigns.

84. He submitted that the IRR rate of 27% per annum was agreed to be payable on the occurrence of an "event of default" by the parties under Article 17.2.1(a) of the DSA, to which the petitioner is a

signatory. In the event of default, the Debenture Holders are entitled to accelerate the redemption of the debentures along with IRR interest of 27% per annum, which is the contractual rate of interest agreed by the parties. That apart, the formula adopted to calculate the 27% IRR is stipulated in the DSA, wherein, Article 1.1.54 defines the term IRR and the manner in which it was calculated. The formula does not entail guess work and the petitioners had agreed to such term and cannot be permitted to resile.

85. Under Article 13 of the DPG, liability of the petitioners continue until the payment of entire amounts due, the discharge of the secured obligations and shall remain in full force and effect till the final settlement date. As per Article 2 of the DPG, the amounts due has been defined to *inter alia* include the default of IRR.

86. Furthermore, by virtue of Article 1 of the DPG, Definitions and Interpretations of DSA apply to the DPG. Article 1.1.46 defines the Final Settlement Date as the date on which all the amounts due and all the obligations of all the obligors have been fully repaid to the satisfaction of the subscriber. Therefore, the liability of the petitioners continue till the entire amount due in respect of the debentures including the default IRR is fully repaid. He stated that the method adopted by the Tribunal to arrive at the computation of *pendente-lite* or post-award interest cannot be a ground for setting aside the arbitral award. The Arbitrator has awarded the interest at the rate of 27% per annum on default of IRR till the amounts due in respect of the debentures are fully paid, which is in accordance with Article 13 read with Articles 1 and 2 of the DPG, read with Article 1.1.46 of the DSA.

87. He stated that, under Section 28(3) of the Act of 1996, the Arbitral Tribunal should only consider the terms of the contract and the trade usages. In this case, the petitioners despite receiving all notices, including the acceleration notices dated December 15, 2017 and January 15, 2018 and DPG invocation notice dated February 12, 2018, had failed to make any payment in respect of the debentures.

88. Furthermore, Section 146 of the Contract Act provides for *inter se* arrangement between guarantors, but the liability towards the beneficiary is not affected by the provision. The use of the phrase “*as between themselves*” in Section 146 clarifies the position. Provisions of Section 43 of the Contract Act provides that, in the absence of a contract to the contrary, the promisee may compel any one or more of the joint promisors to perform the whole contract, whereas, in the present case, the DPG specifically states that the liability of the guarantors is joint and several.

89. As per Article 25 of the DPG, the petitioners unequivocally agreed to compensate and indemnify the Debenture Holders/Debenture Trustee, *inter alia* against all losses, liabilities, damages and other costs or expenses, including, but not limited to attorney's fees and other expenses, in respect of any default of the Principal Borrower or the guarantors. He stated that the Tribunal has rightly accepted the claims of the respondent No.1 by allowing the fee for the Debenture Trustee.

90. Mr. Kumar submitted that the impugned award has been passed based on the arbitration agreement contained in Article 39 of the DPG which reads as under:-

“Notwithstanding anything contained herein, it is agreed that any dispute, controversy, claim or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Guarantee or the breach, termination or invalidity thereof shall be referred to and finally resolved in accordance with the arbitration mechanism as set out in the DSA.”

91. He stated that the impugned award, as a matter of fact and upon a reading of the said article, found conscious acceptance of the arbitration agreement contained in the DSA. Consequently, the impugned award affirmed the existence of an arbitration agreement between the parties. Section 7(5) of the Act of 1996, permits parties to incorporate an arbitration agreement; that arbitration agreement which is contained in another priorly executed agreement, upon such incorporation, the arbitration agreement is deemed to be a part of the subsequent agreement. He stated that, in the present case, the parties incorporated the arbitration agreement set out in the DSA into the DPG.

92. He has relied upon the judgment of the Supreme Court in ***M.R. Engineers and Contractors (supra)*** wherein it has been held that the requirements of Section 7(5) are said to have been met when there is ‘conscious acceptance’ of the arbitration agreement contained in the prior agreement. The Supreme Court held that general reference to the priorly executed agreement is not adequate because such reference must be specific. Applying this test, Article 39 of the DPG specifically refers to the ‘*arbitration mechanism as set out in the DSA*’, and these words constitute specific and particular reference to the arbitration

agreement set out in the DSA. The plain words used clearly denote conscious acceptance of the arbitration agreement contained in the DSA and the arbitration mechanism of the DSA therefore stood incorporated into the DPG. Upon such incorporation the arbitration agreement must be read as a part of the DPG itself by operation of Section 7(5) of the Act. Hence the validity of the DPG is undisputed. He stated, once the arbitration mechanism set out in the DSA is now a part of the DPG as per Section 7(5) of the Act of 1996, the subsequent purported supersession of the DSA has no bearing.

93. Mr. Kumar submitted that the impugned award as a matter of fact finds that, Article 39 independently records the manifest intention of parties to submit their disputes to arbitration and clearly indicate the mutual intent of parties to settle disputes by arbitration and to be bound by such adjudication, and therefore, the invalidity of the appointment procedure is no ground to hold that the arbitration agreement is inoperative. In support of his submission, he has relied upon the Judgment of the Supreme Court in *Narayan Prasad Lohia v. Nikunj Kumar Lohia*³³ wherein it is held that the invalidity of the appointment procedure does not render the arbitration agreement ineffective. In *Jagdish Chander v. Ramesh Chander*³⁴ it was held that the intent of parties to submit to their disputes to a private tribunal for adjudication and the willingness to be bound by such adjudication constitutes a valid arbitration agreement and in the present case, Article 39 in this

³³ (2002) 3 SCC 572

³⁴ (2007) 5 SCC 719

context is broadly worded to submit all disputes for adjudication to arbitration and to be 'finally resolved' by such mechanism.

94. The respondent No. 1 invoked arbitration by invocation notice dated May 16, 2018 and appointed the Arbitral Tribunal to adjudicate the disputes between the parties. This Court in order dated August 07, 2018 recorded the parties' agreement that an Arbitral Tribunal has been constituted. The parties further consented to the petition under Section 9 to be referred to the Arbitral Tribunal for adjudication under Section 17 of the Act of 1996. As recorded in the said orders, the parties were *ad-idem* that the Arbitral Tribunal was duly constituted and possessed requisite jurisdiction to adjudicate the disputes between them.

95. He stated that the fact that the petitioners have not preferred an application under Section 16 before the Arbitral Tribunal also fortifies the fact that the present objections are only an afterthought and it would therefore be inequitable to permit the petitioners to raise these jurisdictional pleas at this stage.

96. The petitioners in their Statement of Defense filed before the Arbitral Tribunal only asserts that respondent No. 1 does not have the right to invoke the arbitration agreement contained in the DPG. Furthermore, under the DPA, the right to invoke arbitration as per the DSA was not transferred to the Debenture Holders for whose benefit respondent No. 1 acted. He stated that the petitioners in the present proceedings rely on Article 12 of the DPA to contend that the DSA invoked stood superseded; this assertion is entirely misconceived. Article 12 of the DPA was never cited or pleaded before the Arbitral

Tribunal and was neither set up before the Arbitral Tribunal in pleadings nor in the submissions recorded in the impugned award. Therefore, the petitioners cannot be permitted to raise this plea before this Court in the present proceedings under Section 34 of the Act of 1996.

97. He stated that the findings in the impugned award are in consonance with a plain reading of Article 39 of DPG and therefore at the very least constitute a plausible view. It is trite that such a finding of fact cannot be interfered with under Section 34 of the Act of 1996. He also stated that the present petition does not in any manner demonstrate any perversity in the findings of the Tribunal since these are borne out on a plain reading of the said Article.

98. That apart, the contention of the petitioners in relation to the purported supersession of the DSA requires a complete re-appreciation of evidence, interpretation of terms of the agreement and comprehensive factual inquiry. This course adopted by the petitioners is entirely contrary to a catena of judgments of the Supreme Court on the scope of the Section 34 of the Act of 1996. Consequently, he submitted that the present petition merits dismissal as being entirely beyond Section 34 of the Act of 1996.

99. He has sought to controvert the contention of the petitioners that there exists no valid arbitration agreement since the DPA supersedes the DSA and therefore, there is no valid arbitration agreement by stating that this is contrary to the express terms of the DPA itself. His contentions to demonstrate that the DPA reaffirms the validity of the DSA are as follows:

- a. Article 1.1 (ix), DPA specifically defines DSA and acknowledges it as Annexure 1 to the DPA itself. Further, Article 1.2(x) also states that reference to an Agreement includes its Annexures. Upon a combined reading of these terms, the DSA forms a part of DPA itself as it is an annexure to the DPA.
- b. Article 5.3 (iv) is a representation stating the terms of the DSA and other Transaction documents as defined in the DSA are read and understood by the petitioner.
- c. Article 7.1 of the DPA records that the parties to it including the petitioner confirm the rights and benefits accruing inter alia under the DSA are available to the purchaser of the said debenture. Article 7.1 of the DPA is reproduced below:

“7.1 The Company, each of the Promoters and the Sponsor confirm that on and from the Completion Date, all the right and benefits of the Debenture and all the Transaction Documents (as defined in the Debenture Subscription Agreement) shall be enjoyed by and be available to the Purchaser.”

100. He stated that the reliance placed by Mr. Mata on Article 12 of the DPA to assert that all previous agreements including the DSA stand revoked is contrary to the above cited unequivocal terms of DPA. The DSA being a part of the DPA itself and reaffirmed by its terms cannot be said to be superseded. That apart, the petitioner's contentions are entirely erroneous since the respondent No.1 is not a

party to DPA. Therefore, the DSA, Corporate Guarantee and Personal Guarantee under the DPG cannot be superseded by the DPA. He also stated that there is no dispute with regard to the non-existence of any specific instrument or contractual term in writing which revokes the DSA, Corporate Guarantee or Personal Guarantee under the DPG.

101. According to him, the DPA was executed expressly for the sale of the debentures and Article 19.16, envisions the debentures to be transferrable. It is further stipulated that the transfer or any change of ownership of the debentures does not discharge the DSA. The DSA alone records the principal terms of the debentures including the repayment obligations and applicable interest owed and it is inconceivable that the DPA would revoke these fundamental understanding of the debentures.

102. The terms of the DPG make it clear that it remains in force till the liability is discharged, owing to the following reasons:-

- a) Article 5 stipulates the liability of the petitioners to pay upon default and invocation of the guarantee.
- b) Article 11 stipulates the liability of the guarantors to be co-extensive with the Principal Borrower i.e. AUCPL. The liability of AUCPL is undisputed.
- c) Article 13 states that the DPG is binding till the discharge of the secured obligations and shall remain in effect till the Final Settlement Date. Further, Article 34 stipulates that the DPG expires on the Final Settlement Date.

- d) Article 16 states that the acts of Debenture Holders shall not release the petitioners from the obligations under the DPG.
- e) According to Article 18, no change or modification shall be valid unless it is in writing and signed by both parties.

103. He submitted that the impugned award has been passed pursuant to the arbitration agreement contained in Article 39 of the DPG, the arbitration mechanism as set out in the DSA which has been incorporated in the DPG. It is undisputed that the liability under the guarantee continues to operate, and therefore the DPG continues to be in force.

104. Additionally in support of his submissions, Mr. Kumar has relied on the following judgments:-

- a) *Chloro Controls India v. Severn Trent Water Purification Inc.*,³⁵
- b) *HTL Power Company v. State of Himachal Pradesh*³⁶
- c) *Delhi Development Authority v. Watercon Specialists Pvt. Ltd.*³⁷
- d) *Associate Builders (supra)*
- e) *Central Bank of India v. CL Vimla & ors.*³⁸
- f) *Industrial Investment Bank of India Ltd. v. Biswanath Jhunjunwala*³⁹

³⁵ (2013) 1 SCC 641

³⁶ (2022) 4 SCC 116

³⁷ 2022 SCC OnLine Del 1107

³⁸ (2015) 7 SCC 337

³⁹ (2009) 9 SCC 478

- g) *Gujarat Maritime Board (supra)*
- h) *Somawanti & Ors. v. State of Punjab*⁴⁰
- i) *Gian Chand and Brothers & Anr. v. Rattan Lal alia Rattan Singh*⁴¹
- j) *M/s. AIL (India) Limited (supra)*
- k) *Som Datt Builders Limited (surpa)*
- l) *Ssangyong Engineering & Construction Co. Ltd. (supra)*

FINDINGS

105. Having heard the learned counsel for the parties and perused the record, the submissions of Mr. Mata on behalf of the petitioner in O.M.P. (COMM) 290/2019 can be summed up as under:

- i. The Tribunal had no jurisdiction to entertain the disputes as there exists no arbitration agreement between the parties.
- ii. The DPA has brought the DSA to an end. Article 12.1 of the DPA clearly contemplates it to constitute the entire agreement between parties and supersedes any previous agreements relating to the subject matter of those documents.
- iii. The respondent No.1 had no instructions from the Debenture Holder for instituting a claim on their behalf and as such the maintainability of the claim goes to the very root of the matter and rendered the proceedings *non-est*.
- iv. The respondent No.1 has not disclosed any document to prove that all rights and benefits of the original Debenture Holder under the DSA were conferred to IIFL YEF and as such the claims were not maintainable.

⁴⁰ (1963) 2 SCR 774

⁴¹ (2013) 2 SCC 606

- v. Article 19.18 of DSA clearly stipulates that all rights of the Debenture Holder would be transferred to transferee provided that such rights shall be exercised by the Debenture Trustee on behalf of and for the benefit of the transferee and Article 1.2.6 of DTD provides that all rights exercised by the Debenture Trustee shall be under the instructions of the Debenture Holders. So, in that sense, the Debenture Trustee has no right to invoke the personal guarantee against the petitioners herein. In the absence of any instructions from the Debenture Holder, the claims by the Debenture Trustee, i.e., the respondent No.1 were not maintainable.
- vi. Even if Article 39 of the DPG survives independently of the mechanism set out in DSA, the procedure under DSA to unilaterally appoint a sole arbitrator by the respondent No.1 cannot be justified.
- vii. The arbitration has been carried out before the Arbitrator appointed by the respondent No.1 unilaterally purportedly in terms of Article 19.4 of the DSA.
- viii. Throughout the procedure the petitioners had raised the objection of non existence of arbitration in their Statement of Defence and written submissions in terms of Section 16 of the Act. In other words, the petitioners never submitted to unilateral appointment of the Arbitrator by the Debenture Trustee.

ix. It is settled law that in case of novation of an agreement containing an arbitration clause, the arbitration clause does not survive.

x. That the issue of arbitrability of the dispute can be subject matter of petition under Section 34 of the Act.

106. Similarly, the additional submissions of Ms. Ahuja in the petition being O.M.P. (COMM) 265/2019 are the following:

i. The Arbitrator while granting IRR @ 27% p.a. has failed to consider that the respondent No.1 has not claimed severance monies retained by the Principal Borrower but relied on an inoperable clause of the DSA to base its claims and sought profit out of claims by seeking IRR @ 27% after the date of purported default.

ii. The interest rate was 19.75% and the interest of 27% IRR is *ex facie* penal and contrary to the agreed rate of interest.

iii. The Arbitrator has failed to consider the aspects of loss of use of principal sum; the types of sums to which interest must apply; the time period over which interest should be awarded; internationally prevailing rates of interest; whether the interest awarded is commercially prudent; proportionality of the amount awarded as interest to the principles sums awarded.

iv. The Arbitrator erred in treating the respondent No.1's internal statements of computation as a bank statement evidencing competitions through XIRR functions of the software MS Excel.

v. The Arbitrator has erred to hold that Article 9 of Annexure 4 of the DSA renders the debentures non-marketable but has awarded interest through XIRR function, which inherently requires determination of present market value of debentures which was neither averred nor proved by the respondent No.1.

vi. The respondent No.1 failed to aver or prove as to how the value of 136,39,28,000/- was used by respondent No.1 to achieve IRR at 27%.

107. Having noted the broad submissions made by the counsel for the petitioners, first, I intend to deal with the submission of Mr. Mata on the maintainability of the reference/claim by the respondent No.1. The submission in that regard is that the current Debenture Holders have received their rights with respect to the debentures with the execution of the DPA, and as there is no incorporation of the arbitration clause of the DSA in the DPA, the Debenture Trustee could not have invoked arbitration on behalf of the current Debenture Holders who are not conferred with any powers to arbitrate. The similar plea made before the Arbitrator has been dealt with by him in the following manner:-

“102. The facts of the case in hand are completely different from the facts in the case of Som Datt Builders. Unlike Som Datt Builders, in the present case there are no principal and sub contracts. The three deeds in the present case are inextricably linked to each other and together they make one integrated arrangement. All the three deeds were executed by the same parties on the same date. The DSA does not only contain references to

the DTD and the personal deed of guarantee but defines, those two deeds, along with others, as "Security Documents" and their execution is stipulated in the DSA as "Condition Precedent" for the Subscriber to release the amounts against the debentures. A perusal of the three deeds makes the intent of the parties unmistakably clear that in case of default by the Debtor-AUPCL, the amount due to the debenture holders would be realisable (among several other means) by the Debenture Trustee from the two guarantors, by means of arbitration proceedings.

103. As noted, the facts of the present case are completely different from the facts in the case of Som Dutt Builders; nonetheless, if the principle of Incorporation by Reference is to be anyhow applied to this case, it is only to be noted that in clause 39 of the deed of personal guarantee there is a clear, direct and specific reference to the arbitration clause in the DSA Hence, the essentials for Incorporation by Reference also stands fully satisfied.

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111. The matter may be looked at in a different way. There can be no doubt regarding the claimant's competence to invoke arbitration for realising the amounts due from the two guarantors, as long as the debentures were in the hands of Indostar, the Subscriber. To be fair to Mr. Varma, he has not even contended otherwise. The question, therefore, arises whether the transfer of the debentures by Indostar to IIFL Income Opportunities Fund and the subsequent transfers of the debentures had the effect of denuding the claimant of its competence to invoke arbitration for and on behalf of the current debenture holders for realisation of the Amount Due from the two guarantors. To answer the question one needs to first consider a few other questions as under:

- i. Were the debentures issued under the DSA assignable?*

ii. Were the debentures validly assigned?

iii. In case of valid assignment of debentures, does the arbitration agreement in the DSA (under which the debentures were issued) also gets assigned to the assignees?

112. The answer to the first question lies in the terms of the DSA and the deed of personal guarantee.

113. Article 19.16 of the DSA deals with assignment and transfer and stipulates as under:

19.16 Assignment and Transfer

19.16.1 This Agreement shall be binding upon and enure to the benefit of each party hereto and its or any subsequent successors and assigns.

19.16.2. The Obligors shall not assign or transfer any of its rights and/or obligations under this Agreement.

19.17 The Subscriber may, at any time sell, transfer, securitize, assign (in whole or in part) the Debentures and all or any of its rights and benefits under any of the Transaction Documents without requiring the prior consent, or otherwise, of the Obligors. Further the parties agree that in all such instances and at all times, only the Debenture Trustee shall exercise the rights, obligations and benefits arising out of the Security Documents (other than this Agreement) on behalf of and for the benefit of any transferee(s) and assigns.

19.18 The Obligors irrevocably and unconditionally confirm that they shall continue to be bound by the terms of the Security Documents notwithstanding such transfer or assignment by the Debenture Holder(s) and that the transferee(s) shall acquire an interest in this Agreement and other Security Documents upon the transfer taking effect. All rights of the Debenture Holder(s) would be transferred to the transferee(s) and its designated representative,

provided that such rights shall be exercised by the Debenture Trustee on behalf of and for the benefit of the transferee(s).

(emphasis added)

114. *Further, the terms of the debenture are specified in Annexure 4 to the DSA and clause 5 of Annexure 4, dealing with transfer, provides as under:*

5 Transfer

The Debentures may at any time be transferred or assigned by the Subscriber to any Person on such terms as the Subscriber may deem fit, without the prior approval of the Company or the Promoters and without any restrictions or refrain in this regard.

115. *Furthermore, clause 1.1.23 of the DSA defines Debenture Holder to mean the holder of Debenture from time to time and includes their transferees or assigns or such other persons who are for the time being holders of the Debentures.....*

116. *Furthermore, clause 1.1.57 of the DSA defines Majority Debenture Holders, which clearly implies that at any point of time there may be more than one holder of debenture.*

117. *Furthermore, clause 1.2.6 of the DSA provides that all the right of the Debenture Holders would be exercised by the Debenture Trustee who would act under the instruction of the majority Debenture Holders; again, a clear implication being there maybe more than one Debenture Holders.*

118. *Furthermore clause 22.1.2 of the deed of personal guarantee stipulates that the guarantee would not be discharged, impaired, determined, prejudiced or in any way affected by any change in the constitution of the Debenture Holders/ Debenture Trustee.*

119. *Apart from the above, the DSA, the DTD and the deed of personal guarantee are replete with provisions that make it clear that the debentures were so designed*

as to make them freely transferable at the will of the Subscriber and following him the subsequent debenture holders without any approval, consent or intervention by any other parties to the three deeds. Further, on transfer the debentures would carry to the assignees all the rights and securities as available to the Subscriber under the three deeds. The debentures issued under the DSA were thus indubitably assignable.

120. As to the second question it may be noted that the first transfer of the debentures from the Subscriber, Indostar to IIFL Income Opportunities Fund was made by the Debenture Purchase Agreement dated 27 October 2015 which was also executed, (though not needed!) by the two respondents, along with the other Obligors in the DSA. Further, the subsequent transfers of the debentures in favour of the current holders were acknowledged by the Debtor AUCPL vide its letter dated 8 December 2017. Furthermore, even in course of the arbitration proceedings the Debtor has made payments in favour of the current debenture holders. There can therefore, be no dispute or doubt regarding the validity of the transfers of the debenture from the Subscriber Indostar to the current holders of the debenture.

121. This leads to the third question. On behalf of respondent no. 1, it is contended that the DPAS under which the debentures were transferred from the Subscriber, Indostar, first to IIFL Income Opportunities Fund and then further on, did not incorporate, either by reference or otherwise, the arbitration clause as contained in the DSA. Hence, there is no arbitration agreement between the purchasers, that is, the current debenture holders and the guarantors. In the written submission on behalf of respondent no. 1 it is stated in paragraph (f) as under:

*"Right to invoke arbitration can only be exercised based on existence of an "Arbitration Agreement"
Arbitration agreement is separate and*

independent agreement within a main contract/ agreement. It is standalone agreement separate from the main contract."

122. *The proposition farmed on behalf of respondent no.1 is quite erroneous and untenable in law. It is well settled that an arbitration clause in an agreement is also assigned with the assignment of the contract to a third party. The principle of assignment of the arbitration clause is very well discussed and developed in (1) a decision of Bombay High Court in "DLF Power Limited V. Mangalore Refinery & Petrochemicals Limited and (ii) another decision of the Delhi High Court in "Kotak Mahindra Bank V. S. Nagabhushan and Ors". The Delhi decision is on facts also quite close to the case in hand.*

123. *The rights of the current debenture holders for realisation of the Amounts Due and the right of the claimant to invoke arbitration for enforcing the guarantee for and on behalf of the current debenture holders are fully protected by the principle of assignment of the arbitration clause contained in a contract along with the transfer of the contract.*

124. *There is a third and a much simpler way to look at the matter, without any aid from the principles of Incorporation by Reference or Assignment by Transfer. In this regard the first thing to be made clear is the issue of the DPAs. This arbitration does not arise from the DPAs and any attempt to judge the jurisdiction of this arbitral tribunal and the validity of the present proceedings with reference to the DPAs is wholly erroneous and misleading and bound to lead to wrong conclusions. The current holders of the debentures undoubtedly derive their ownership of the debentures from the DPAs but their rights in the debentures (e.g. payment of interests and redemption of debentures on schedule etc.) and the securities for the enforcement of those rights, including the respondent's personal guarantees are all preserved under the three deeds,*

namely the PSA, the DTD and the deed of personal guarantee. Further, this arbitration is rooted in the breach of the covenants made by the Debtor and the two respondents in the DSA and the deed of personal guarantee. The validity of the arbitration has thus to be judged only in terms of the trilogy of the deeds without any reference to the DPAs.

125. Coming next to the three deeds, it is clear that the deed of personal guarantee has an arbitration clause quite independently, and again, without any aid from the principles of Incorporation by Reference or Assignment by Transfer.

126. An arbitration clause can be divided into two parts: the first part, the core, records and expresses the intent of the parties to get any disputes arising from the contract resolved by means of arbitration and not through adjudication by a court or by mediation or by any other means of dispute resolution; the second part of arbitration clause which may be described as 'procedural' deals with the procedural parts of the arbitration, e.g. composition of the arbitration tribunal (whether it would consist of a sole member or several members), the applicable law, the language in which the proceedings would be conducted, the seat of arbitration and such other matters. Keeping this in mind let us revert to clause 39 of the deed of personal guarantee which reads as under:

Notwithstanding anything contained herein, it is agreed that any dispute, controversy, claim or disagreement of any kind whatsoever between or among the parties in connection with or arising out of this Guarantee or the breach, termination or invalidity thereof shall be referred to and finally resolved in accordance with the arbitration mechanism as set out in the DSA.

127. As I read the clause, it clearly records the intent of the parties to get any disputes arising under the

guarantee, decided through arbitration and it is for the procedural part, that is, with regard to composition of the arbitration tribunal, the applicable law, the language in which the proceedings would be conducted, the seat of arbitration etc. that it adverts to article 19.4 (b) and (c) of the DSA.

128. In light of the discussions made above, I find and hold that there is no merit or substance in the challenge to the jurisdiction of the tribunal. Equally, there is no merit in any of the points resisting the claimant's claim on merits."

(emphasis supplied)

108. I agree with the reasoned conclusions arrived at by the learned Arbitrator. Additionally the following need to be stated for rejecting the plea regarding maintainability advanced by Mr. Mata, as adopted by Ms. Ahuja.

- i. The petitioners could not have taken the plea of maintainability of the reference of the claims as no such objection was taken to the notice of invocation dated May 16, 2018 whereby the respondent No.1 invoked Article 39 of the DPG seeking appointment of an arbitrator through the mechanism envisaged under the DSA. That apart, as is clear from the order of this Court dated August 07, 2018 in OMP (I) (COMM.) 195/2018 between the Debenture Trustee and the petitioners herein in a petition filed under Section 9 of the Act by the respondent No.1, wherein the factum that the Tribunal has been constituted was brought to the notice of this Court by the parties. In fact, in the hearing, a

submission was made that the petition under Section 9 may be sent to the arbitrator to be treated as an application under Section 17. Though Mr. Mata has vehemently argued that the same shall not be construed to mean that the parties have submitted to the jurisdiction of the Tribunal, the fact remains that there was no contention raised at that point of time, with regard to the jurisdiction of the Tribunal. The submission made depicts that both the parties have agreed/concurred to the appointment of Justice Aftab Alam (Retd.) as the sole arbitrator without any demur.

- ii. No doubt, the plea of jurisdiction of the arbitrator was taken by the petitioners in their Statements of Defence and submissions, but in view of the fact that no opposition was raised with regard to the maintainability of the arbitration proceedings either at the time of invocation of the arbitration or before this Court in the petition under Section 9, the plea appears to be an afterthought. In any case, as Mr. Mata and Ms. Ahuja have based their arguments on that contention, I intend to answer the same, for which it is necessary to delineate the arbitration clauses of the DSA and DPG on one hand and DPA on the other.

“19.4 Arbitration

(a) Any dispute arising out of or in connection with this Deed (Including any dispute relating

to arising from or in connection with this Agreement and any dispute regarding the existence, validity or termination of this Agreement) (“Dispute”) shall be referred to arbitration.

(b) The arbitration shall be conducted by a sole arbitrator appointed by the Subscriber/Debenture Trustee.

(c) The seat of arbitration shall be at Delhi or such other seat in India as may be agreed to by the Parties and the arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996. The language of the arbitration proceedings shall be English. The award shall be final, conclusive and binding on all parties concerned. The arbitration tribunal may lay down from time to time the procedure to be followed in conducting arbitration proceedings and shall conduct the arbitration proceedings in such manner as it considers appropriate.”

xxxx

xxxx

xxxx

“39. Notwithstanding anything contained herein, it is agreed that any dispute, controversy, claim or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Guarantee or the breach, termination or invalidity thereof shall be referred to and finally resolved in accordance with the arbitration mechanism as set out in the DSA.”

- iii. The aforesaid clauses indicate that there is a separate arbitration clause between the parties to the DPG, as has been held by the learned Arbitrator. The plea of Mr. Mata and Ms. Ahuja, though, looked appealing on a first blush, on a deeper consideration I am in agreement with

the conclusion arrived at by the learned Arbitrator in paragraph 125 of the award, wherein he stated that the DPG has an arbitration clause quite independent of the DSA and again without any aid from the principles of incorporation by reference or assignment by transfer. In other words, there is no incorporation of the arbitration agreement from DSA to the DPG, but the DPG itself contemplates the intention between the parties therein, i.e., the petitioners and the respondent no. 1, to arbitrate.

- iv. I also agree with the conclusion of the learned Arbitrator that the reference made to DSA in Article 39 of the DPG is only with respect to the procedural mechanism to be employed for the constitution of the Tribunal, which is distinguishable from the substantive part of Article 39 which manifests the intention of the parties to refer disputes to arbitration.
- v. The mechanism / procedure contemplated in Article 19.4 of the DSA has been incorporated by specific reference into the DPG, as has been held by the learned Arbitrator in paragraph 103 of his award, already reproduced above.
- vi. One of the plea of Mr. Mata was by relying upon Article 12 of the DPA. According to him, DPA being a complete agreement, all past agreements including the DSA stand superseded, and as such the Debenture Trustee/respondent No. 1 could not have invoked

arbitration in terms of the DPG and the DSA. This plea is without merit, for the reason that the respondent No.1 was not a party to the DPA and hence is not bound by the terms thereof. Additionally, such a plea shall not be sustainable in view of the fact that the invocation was of the independent arbitration clause in the DPG to which the petitioners and the respondent No. 1 were party.

- vii. Even otherwise, in terms of Articles 7.1 and 7.2 of the DPA which is reproduced below clearly reveal that all the rights and benefits of the debentures and transactions documents as defined in the DSA shall be enjoyed and available to the purchaser, and that the company, through its promoters and sponsors agreed and confirmed that the security created or intended to be created under the Security Documents already executed in favour of the Debenture Trustee shall continue to be valid and binding and the Debenture Trustee shall continue to hold such security for the benefit of the purchaser as if the purchaser was the original subscriber to the debentures.

“7.1 The Company, each of the Promoters and the Sponsor confirm that on and from the Completion Date all the rights and benefits of the Debentures and all the Transaction Documents (as defined in the Debenture Subscription Agreement) shall be enjoyed by and be available to the Purchaser.

7.2 The Company, each of the Promoters and the

Sponsor further irrevocably and unconditionally agree and confirm that the security created or intended to be created under the Security Documents (including those created under the Security Documents already executed in favour of the Debenture Trustee as set out in Schedule 3) shall continue to be valid and binding and the Debenture Trustee shall continue to hold such security for the benefit of the Purchaser as if the Purchaser was the original subscriber to the Debentures.”

- viii. In other words, the purchaser on purchasing the debentures shall step into the shoes of the subscriber and the relationship between the respondent No.1 the purchaser/subscriber and the petitioners (including others) shall continue to be binding *inter se*.
- ix. But as stated by the learned Arbitrator, the same has no bearing on the maintainability of the arbitration proceedings initiated by the respondent No.1. This for the reason that one the DPA cannot bind the respondent No.1 who was not a party either in the DSA or the DPA. Even otherwise, novation of DSA can have no bearing on DPG. Even otherwise, the DPG independently has an arbitration clause which would govern the parties. Article 19.4 (b) of the DSA contemplates that the arbitration shall be conducted by a sole Arbitrator to be appointed by the Subscriber / Debenture Trustee. This stipulation enabling the Debenture Trustee to appoint a sole Arbitrator is because of the arbitration clause in the

DPG. To that extent, even assuming DSA stands novated, the right of the Debenture Trustee to appoint an Arbitrator in view of Article 19.4 of the DPG has not been taken away. Moreover, in terms of Article of 22 of the DPG, the guarantee will not be discharged impaired, determined, prejudice or in any way effected by any change of the constitution of the Debenture Holders/Debenture Trustee.

- x. Mr. Mata has endeavoured to impress upon this Court that the omittance of an arbitration clause in the DPA would speak to the intention of the parties to do away with arbitration itself. This submission of Mr. Mata is also liable to be rejected for the multitude of reasons already stated above, and additionally for the specific reason that the Debenture Trustee / respondent No.1 is not a party to the DPA, and as such is not bound by it. Any decision to do away with arbitration as specified in the DPG would require consent / agreement of the Debenture Trustee.
- xi. Yet another argument of Mr. Mata is that there is no assignment of the contract from DSA to DPA, as held by the learned Arbitrator, but only a transfer of shares. Suffice it to state, this plea appears to be contrary to his argument that the DPA has superseded the DSA, while saving the rights and obligations of the Debenture Holders. In any case, this issue is also an issue of fact

which would require detailed examination, which this Court is precluded from conducting in the limited jurisdiction conferred by Section 34 of the Act of 1996.

- xii. Another contention of the learned senior counsel is that if DPG is the sole basis for invocation of arbitration, in vacuum to the DSA, then the procedure under Article 19.4 (b) of the DSA could not have been followed. This contention is rejected, in view of the finding of the learned Arbitrator that there is an incorporation of the procedure / mechanism contained in Article 19.4 (b) of the DSA into the DPG, with which I have already agreed. Even otherwise, the petitioners having participated in the arbitration proceedings before the Sole Arbitrator, it is now too late in the day for Mr. Mata to raise this contention.

109. Another argument of Mr. Mata is that there was no direction from the Debenture Holders to respondent No.1 to invoke the personal guarantees on their behalf. This submission is contradictory to the plea taken by him that the DPA supersedes the DSA, as this plea presupposes there being a valid arbitration clause which binds the respondent No.1 and the petitioners. That apart, it is clear from the email communications dated April 20, 2018 between the Debenture Holders No. 1 and 2 to the Debenture Trustee that the Debenture Trustee was acting under instructions from the Debenture Holders even at the time of filing of the first petition under section 9. If that be so, the plea also needs to be rejected.

110. Another plea of Ms. Ahuja is that the use of the word “*debt due*” evidences crystallisation of amounts, which are payable *in presaenti*. Therefore, when a sum is payable *in presaenti* it has to crystallise and the only remedy available to the respondent No.1 is to claim severances on the money retained by the Principal Borrower, and as such the IRR of 27% is *in terrorem*. The said argument is without any merit, as the DSA and the DPG clearly stipulate that the liability of the petitioners would arise upon an “event of default” and penal IRR at 27% would be applicable thereon. The amounts due have arisen out of contractual obligation, which cannot now be defeated.

111. One of the pleas of Ms. Ahuja is that the XIRR function would require computation to be made in MS Excel and there is nothing placed on record by the respondent to show that MS Excel was used to compute the IRR. In this regard it may be stated here that Article 1.1.54 of the DSA stipulates that for computation of IRR, if MS Excel is not available, any other similar program can be used. In that sense there was certain discretion on the respondent to calculate XIRR at 27% on the basis of any software available. That apart, both the computations placed on record by the petitioners and the respondent No.1 are largely not at variance. That apart, the petitioners having not averred before the Arbitrator that this issue needs to be examined in evidence, cannot now raise the issue, which is intrinsically an issue of fact, in a petition under Section 34 of the Act of 1996.

112. Another plea of the learned counsel for the petitioners is that the respondent No.1 has not disclosed any document or otherwise proved that all rights and benefits of the Debenture Holders under the

DSA were conferred on IIFL YEF and as such, it cannot be stated that IIFL YEF is a Debenture Holder to instruct the claimant to invoke arbitration in respect of alleged default. A connected argument was also that the learned Arbitrator has failed to give any decision on scope of rights assigned to IIFL YEF and has instead given the issue a go by by observing that IIFL and IPRU currently hold the dematerialised debentures. According to them, mere ownership of the debentures does not disclose as to what rights under the DSA has been conferred, and therefore the arbitrator has rendered no decision on a foundational issue. The observation of the learned Arbitrator is reproduced below:-

“I do not find any merit or substance in the submission. It is noted above that among the many documents produced by the claimant is the D-MAT holding statements of IPRU AIF and IIFL dated 04 July 2018 showing IPRU AIF Holding 83,00,000 debentures and IIFL Holding 17,00,000 debentures issued by the Debtor AUCPL (Pages 151-152 Volume CD-2). There is no reason for the tribunal not to accept the same and I hold and find that the current holders of the debentures as stated by the claimant are (i) IPRU AIF to the extent of 83,00,000 debentures and (ii) IIFL to the extent of 17,00,000 debentures.”

113. I must state, this argument is an issue of fact and surely under Section 34 of the Act of 1996, this Court would not differ with the finding given by the learned Arbitrator on a fact, unless it is shown to be perverse. According to me, the finding is not perverse in view of the letter of ANSAL APIL dated March 20, 2017 which reads as under:-

“March 20, 2017

1. *IIFL Asset Management Limited
(Investment Manger to IIFL Cash Opportunities Fund*

- and IIFL Yield Enhancer Fund)*
IIFL Centre, Kamala Mills Compound,
Senapati Bapat Marg, Lower Paret,
Mumbai
2. *IIFL Wealth Finance Limited.*
IIFL Centre, Kamala Mills Compound,
Senapati Bapat Marg, Lower Paret,
Mumbai
 3. *ICICI Prudential Asset Management Company Limited*
(Investment manager to ICICI Prudential Real Estate AIFII)
One BKC, 13th Floor, A Wing,
Bandra Kurla Complex,
Mumbai

Re: Payment of interest in respect of secured non-convertible debentures issued by Ansal Urban Condominiums Private (“Company”) pursuant to the Debentures Subscription Agreement dated July 28, 2015 and the Debenture Purchase Agreement dated March 03, 2016 (“Debentures”)

Dear Sir,

IIFL Yield Enhancer Fund currently holds 4,300,000 Debentures pursuant to the Debenture Subscription Agreement as well as the Debenture Purchase Agreement referred above and secondary market trades thereafter.

We understand that IIFL Yield Enhancer Fund proposes to transfer 2,600,000 Debentures (“Transferred Debentures”) to ICICI Prudential Real Estate AIF II on March 20, 2017 (“Transfer Date”) subject to the terms of the Debentures as specified in the Debentures Subscription Agreement and the Debenture Purchase Agreement referred above.

We unconditionally and irrevocably confirm that the Company shall pay all accrued interest on the Transferred Debentures till the Transfer Date to IIFL entities as set out in Annexure – I (pursuant to secondary market trades among these entities) and interest payable in respect of the Transferred Debentures from the Transfer Date shall be paid to ICICI Prudential Real Estate AIF II subject to the terms of the Debentures as

specified in the Debenture Subscription Agreement and the Debenture Purchase Agreement referred above.”

(emphasis supplied)

114. From the letter it is clear that ANSAL API of which company the petitioner in OMP (COMM) 290/2019 is the Managing Director, was in the knowledge that IIFL Asset Management Ltd. was the Investment Manager to IIFL Income Opportunities Fund and IIFL YEF and in fact, also acknowledges the fact that IIFL YEF holds 43,00,000 debentures and they intent to transfer 26,00,000 debentures to IPRU on March 20, 2017. Even as per the notice invoking arbitration dated May 16, 2018 was sent by the Debenture Trustee *inter alia* on behalf of IIFL YEF. It is a matter of record that petitioners had agreed for appointment of the arbitrator without any demur, as is clear from the discussion above. If that be so, they cannot contest the ownership of debentures by IIFL YEF, more so in this petition.

115. Another submission has been put forth that the personal guarantee as contained in the DPG is not enforceable as it is contrary to Section 133 of the Contract Act as the consent of the surety is required and this requirement cannot be waived off by the parties. Needless to state, one cannot be permitted to blow hot and cold at the same time. The petitioners having signed the DPG without any demur or protest, cannot now question its validity. This plea is rejected.

116. This Court is not inclined to accept the submission of Mr. Mata that AUCPL was required to transfer certain amount of shares in favour of the petitioner in OMP (COMM) 290/2019 or his companies, which has not been done and as such the DSA is *void ab initio*. The learned Arbitrator has rightly held as under:-

“84. The submissions are noted only to be rejected. The commitments made by the respondent no.2 and the obligations undertaken by him under the DSA, DTD and his personal guarantee are absolutely unconditional and unqualified. There is no reference in the three deeds to any alleged inter se arrangement between the Ansal Group and the Landmark Group and the covenants made in the three deeds are not dependent upon any continued goodwill between the two groups.”

117. Mr. Mata and Ms. Ahuja have relied upon the following judgments for their corresponding propositions:-

- (i) ***M.R. Engineers and Contractors Pvt. Ltd.(supra)***, and ***Inox Wind Ltd.(supra)*** for the proposition that mere reference to a document would not incorporate the arbitration clause therein into the contract.
- (ii) ***GAIL (India) Ltd. (supra)*** to contend that once an award is found to be perverse, the Court is duty bound to interfere.
- (iii) ***Som Datt Builders Ltd. (supra)*** to contend that the requirement of reasons in support of an award under Section 31(3) of the Act of 1996 is not an empty formality.
- (iv) ***North Western Rubber Co. (supra)***, and ***M. Dayanand Reddy (supra)*** to contend that an arbitration agreement does not classify the rights of the parties.
- (v) ***Air Liquide North India Pvt. Ltd.(supra)***, and ***Gatx India Pvt. Ltd. (supra)*** to contend that the subject matter of a contract includes an arbitration agreement.
- (vi) ***Kishorilal Gupta & Bros. (supra)***, ***Damodar Valley Corporation (supra)***, and ***Young Achievers (supra)*** to

contend that an arbitration clause does not survive novation of the main agreement.

- (vii) ***Associate Builders (supra)***, and ***Ssanyong Engineering & Construction Co. Ltd. (supra)*** to contend that an award ignoring vital and material evidence is liable to be set aside.
- (viii) ***Vidya Drolia & Ors. (supra)*** to contend that this Court can have a second look into the aspect of validity of an arbitration agreement.
- (ix) ***Raman Iron Foundry (supra)*** to contend that there must be an existing obligation to pay a sum of money for a debt due.
- (x) ***Kesoram Industries (supra)*** to set out the essential characteristics of a debt.
- (xi) ***Moujilal Shaw (supra)*** to contend that the respondent cannot be allowed to profit out of its own inaction / delay.
- (xii) ***Vedanta Ltd. (supra)*** to set out the principles regarding grant of interest under Section 31(7) of the Act.
- (xiii) ***Associated Engineering Co. (supra)***, ***Food Corporation of India (supra)***, and ***M.S.K. Projects (I) (JV) Ltd. (supra)*** to contend that any decision contrary to the underlying agreement is liable to be set aside.

118. Though there is no dispute to the propositions laid down in the judgments, in the peculiar facts of this case and in view of my above discussion, the judgments would not aid the case of the petitioners.

119. In view of the foregoing, this Court holds that the challenge of the petitioners to the award dated March 25, 2019 is devoid of merit. The petitions are dismissed, without any order as to costs.

I.A. 9346/2019 in O.M.P. (COMM) 265/2019

I.As. 10329/2019 & 15542/2019 in O.M.P. (COMM) 290/2019

In view of my above decision, these applications have become infructuous and are dismissed as such.

V. KAMESWAR RAO, J

MAY 23, 2023/aky/jg

