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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 24.01.2023

Judgment pronounced on: 23.02.2023

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+ **ARB.P. 997/2022**

SMT. SUNITA GARG

..... Petitioner

Through: Ms. Jahanvi Garg, Mr. Imran Khan, Mr.
Rohit Kumar, Advs.

versus

M/S SCRAFT PRODUCT P LTD

..... Respondent

Through: Ms. Priyanka Sethia, Adv.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed seeking appointment of an Arbitrator to adjudicate the disputes between the parties. The disputes between the parties have arisen in the context of a lease deed dated 15.12.2019 in respect of property bearing No. 26/7 (7-5), 8 (3-12), 13 (2-16), 14 (8-0) total measuring area 21 Kanal Marlekhewat No. 384, 387, Khata No. 422, 425 in Village Joshi Chauhan, District Sonapat, Haryana.

2. The petitioner is stated to be the owner of the aforesaid property by virtue of a registered sale deed dated 10.12.2019. The said sale deed has been placed on record by the petitioner. The respondent is stated to have been inducted as a tenant by virtue of the aforesaid lease deed dated 15.12.2019 in respect of area admeasuring approx. 25000 sq. feet on ground floor, 25000 sq.

feet on first floor, total area 50000 sq. feet which also includes the mezzanine floor sides, washroom and rooms at the back, genset panel and the sundry assets area etc. at a monthly rent of Rs. 8,00,000/- (Eight Lakhs only) exclusive of all other charges.

3. It is submitted by the petitioner/lessor that the respondent/lessee is a habitual defaulter in payment of rent. It is further submitted that the petitioner/lessor terminated the tenancy vide legal notice dated 04.05.2022 and also claimed arrears of rent amounting to Rs.29,49,350/-.

4. By way of another legal notice dated 24.05.2022, the petitioner invoked the Arbitration Clause contained in the lease deed dated 15.12.2019, and sought appointment of an arbitrator. The Arbitration Clause, as contained in the said lease deed is as under:

“Clause-25

That if any dispute may arise in regard to interpretation and/or implementation of terms and conditions of this deed the same shall be referred to the Arbitrator under Arbitration & Conciliation Act, 1996, whose decision shall be final and binding on both the parties and/or the same may be defended subject to Delhi Court Jurisdictions only.”

5. Learned counsel for the respondent opposes the present petition on the ground that the aforesaid Clause-25 of the lease deed dated 15.12.2019 does not constitute a valid arbitration agreement between the parties inasmuch as it is not in nature of a firm or mandatory stipulation and instead gives an option to the parties to either seek adjudication by way of an arbitration or, alternatively, to approach the civil courts in Delhi.

6. Attention is also drawn by learned counsel for the respondent to the following stipulation contained in the lease deed:

“Clause-27

That if the lessee violates and infringes the term and conditions of this agreement then the lessor is fully entitled to get the said demised

premises vacated through court of law under the suit for specific performance / possession at the costs and expenses of the lessee.”

7. It is contended by learned counsel for the respondent that a conjoint reading of the aforesaid Clauses 25 and 27, results in classification of claims inasmuch as the petitioner has been given the option to either invoke arbitration or to approach a civil court for getting the leased premises vacated in the event of any violation or infringement on the part of the lessee, whereas, for the purpose of the claims of the respondent, no such option has been given.

8. Learned counsel for the respondent relies upon the judgment of the Supreme Court in the case of **Wellington Associates Ltd. vs. Kirti Mehta** AIR 2000 SC 1379 and **Shri Chand Construction and Apartments Pvt. Ltd and Ors. Vs. Tata Capital Housing Finance Ltd.**, 2020 SCC OnLine Del 472.

9. Having heard respective counsel for the parties, no merit is found in the contentions raised on behalf of the respondent.

10. The first contention of learned counsel for the respondent that Clause-25 in the said lease deed gives an option to the petitioner/lessor to either take recourse to the arbitration or pursue her remedies in a court of law, is misconceived and is based on a misreading of the Arbitration Clause. The clause unambiguously provides that any disputes arising with regard to “*interpretation and/or implementation of terms and conditions of this deed the same shall be referred to an arbitrator under the Arbitration and Conciliation Act, 1996, whose decision shall be final and binding on both the parties*”. The later part of the clause i.e. the words “*and/or the same may be defended subject to Delhi Court Jurisdictions only*”, are evidently, intended to convey that any decision of the arbitrator would be subject to jurisdiction of the Delhi Courts. The Clause cannot be construed as giving an option to any party to either take recourse to arbitration or alternatively, file a civil suit.

11. The reliance placed by learned counsel for respondent in the case of **Wellington Associates** (*supra*) is completely misconceived. The relevant clause that fell for consideration in **Wellington Associates** (*supra*) was as under:

“Clause 4: It is hereby agreed that, if any dispute arises in connection with these present, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.

Clause 5: It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1940, by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay.”

12. It was in the context of the aforesaid clauses that the Supreme Court held as under:

“21. Does Clause 5 amount to an arbitration clause as defined in Section 2(b) read with Section 7? I may here state that in most arbitration clauses, the words normally used are that “disputes shall be referred to arbitration”. But in the case before me, the words used are ‘may be referred’.

22. It is contended for the petitioner that the word ‘may’ in Clause 5 has to be construed as ‘shall’. According to the petitioner’s counsel, that is the true intention of the parties. The question then is as to what is the intention of the parties? The parties, in my view, used the words ‘may’ not without reason. If one looks at the fact the Clause 4 precedes Clause 5, one can see that under Clause 4 parties desired that in case of disputes, the Civil Courts at Bombay are to be approached by way of a suit. Then follows Clause 5 with the words ‘it is also agreed’ that the dispute ‘may’ be referred to arbitration implying the parties need not necessarily go to the Civil Court by way of suit but can also go before an arbitrator. Thus, Clause 5 is merely an enabling provision as contended by the respondents. I may also state that in cases where there is a sole arbitration clause couched in mandatory language, it is not preceded by a clause like Clause 4 which discloses a general intention of the parties to go before a Civil Court by way of suit. Thus, reading Clause 4 and Clause 5 together, I am of the view that it is not the intention of the parties that arbitration is to be the sole remedy. It appears that the parties agreed that they

can “also” go to arbitration also in case the aggrieved party does not wish to go to a Civil Court by way of a suit. But in that event, obviously, fresh consent to go to arbitration is necessary. Further, in the present case, the same Clause 5, so far as the Venue of arbitration is concerned, used word ‘shall’. The parties, in my view, must be deemed to have used the words ‘may’ and ‘shall’ at different places, after due deliberation.”

13. It is evident from a bare perusal of the clauses that fell for consideration in **Wellington Associates** (*supra*) that the same is not couched in mandatory terms as is evident from the use of the word “**may**”. It was on that basis, coupled with the stipulation as contained in Clause 4 that fell for consideration in that case, that the Supreme Court found that there was no mandatory stipulation binding the parties to Arbitration, and that arbitration was not intended to be the sole remedy of the parties. On the contrary, in the present case, the arbitration clause is couched in mandatory terms and clearly provides “*that if any dispute may arise in regard to interpretation and/or implementation of terms and conditions of this deed the same shall be referred to the Arbitrator under Arbitration & Conciliation Act, 1996.*”

14. In the context of arbitration agreement embodied in lease deeds/ tenancy agreements, the Supreme Court in **Vidya Drolia vs. Durga Trading Corporation** (2021) 2 SCC 1, has expressly held as under:

“79. Landlord-tenant disputes governed by the Transfer of Property Act are arbitrable as they are not actions in rem but pertain to subordinate rights in personam that arise from rights in rem. Such actions normally [Ed. : Certainly in those cases where the dispute only affects the parties to the arbitration clause, third-party rights would not be affected, as in the facts of the present case. It is in such cases that “such actions under the TPA normally would not affect third-party rights or have erga omnes effect”. However, one may consider cases for instance, where a sub-tenancy exists or where the head lessee has taken a mortgage on the lease, and the landlord invokes the arbitration clause against the head lessee seeking to terminate the head lease, can the sub-tenant or mortgagee of the head

lessee seek to be impleaded in the arbitration proceedings? For termination of the head lease would also extinguish the rights of the sub-tenant and the mortgagee of the head lessee. The situations posited are relatively simple ones. Often there are numerous prior and subsequent transferees who might be affected by the result of a dispute between a landlord and tenant, or even between other transferees. In such complex situations involving prior and subsequent transfers, it would appear that the matter would be non-arbitrable as it would appear to satisfy the first two tests of non-arbitrability laid down herein—see Short notes B and C. In a case where the mortgagee is covered by the RDB Act and the SARFAESI Act, it might be rendered non-arbitrable by virtue of the fourth test as well—see Short notes E and G.] would not affect third-party rights or have erga omnes effect or require centralised adjudication. An award passed deciding landlord-tenant disputes can be executed and enforced like a decree of the civil court. Landlord-tenant disputes do not relate to inalienable and sovereign functions of the State. The provisions of the Transfer of Property Act do not expressly or by necessary implication bar arbitration. The Transfer of Property Act, like all other Acts, has a public purpose, that is, to regulate landlord-tenant relationships and the arbitrator would be bound by the provisions, including provisions which enure and protect the tenants.

80. In view of the aforesaid, we overrule the ratio laid down in Himangni Enterprises [Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706 : (2018) 1 SCC (Civ) 82] and hold that landlord-tenant disputes are arbitrable as the Transfer of Property Act does not forbid or foreclose arbitration. However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration.”

15. In **Suresh Shah Vs. Hipad Technology (India) (P) Ltd.** (2021) 1 SCC 529, taking note of the judgment of the Supreme Court in the case of **Vidya Drolia (supra)** in the context of disputes between landlords and tenants, and considering the provisions incorporated in Sections 114 and 114A of the Transfer of Property Act, it has been held as under:-

“17. Such equitable protection does not mean that the disputes relating to those aspects between the landlord and the tenant is not arbitrable and that only a court is empowered to waive the forfeiture or not in the circumstance stated in the provision. In our view, when the disputes arise between the landlord and tenant with regard to determination of lease under the TP Act, the landlord to secure possession of the leased property in a normal circumstance is required to institute a suit in the court which has jurisdiction. However, if the parties in the contract of lease or in such other manner have agreed upon the alternate mode of dispute resolution through arbitration the landlord would be entitled to invoke the arbitration clause and make a claim before the learned arbitrator. Even in such proceedings, if the circumstances as contained in Sections 114 and 114-A of the TP Act arise, it could be brought up before the learned arbitrator who would take note of the same and act in accordance with the law qua passing the award. In other words, if in the arbitration proceedings the landlord has sought for an award of ejectment on the ground that the lease has been forfeited since the tenant has failed to pay the rent and breached the express condition for payment of rent or such other breach and in such proceedings the tenant pays or tenders the rent to the lessor or remedies such other breach, it would be open for the arbitrator to take note of Sections 114 and 114-A of the TP Act and pass appropriate award in the nature as a court would have considered that aspect while exercising the discretion.”

16. In the present case, not only is the arbitration agreement couched in mandatory terms, reference to Arbitration is also clearly mandated in terms of the legal position settled in **Vidya Drolia** (*supra*) and **Suresh Shah** (*supra*).

17. The second contention of the learned counsel for the respondent to the effect that Clause 25 read with Clause 27 results in classification of claims, is also without merit. The contention is premised on a misplaced assumption that the petitioner/lessor has the option to either take recourse to arbitration or to approach a Court of law for adjudication of its claims, whereas the respondent/lessee has been given no such option and any claim that may be sought to be raised by the respondent/lessee has to be referred to arbitration only. Clause 27 does not control the amplitude and width of the Arbitration

stipulation incorporated in Clause 25. The arbitration clause is binding and operable not only qua the claims of the petitioner but also qua the claims of the respondent and as such, there is no question of any classification of claims.

18. The judgment in the case of ***Shri Chand Construction and Apartments Private Limited and Another Vs. Tata Capital Housing Finance Limited*** 2020 SCC OnLine Del 472, relied upon by the respondent is wholly inapplicable to the facts of the present case inasmuch as the arbitration clause that fell for consideration in the case was as follows:

“12.18 DISPUTE RESOLUTION

If any dispute, difference or claim arises between the parties hereto in connection with this Agreement or the security hereof or the validity, interpretation, implementation or alleged breach of this Agreement or anything done or omitted to be done pursuant to this Agreement or otherwise in relation to the security hereof, the parties shall attempt in the first instance to resolve the same through negotiation / conciliation. If the dispute is not resolved through negotiations / conciliation within thirty days after commencement of discussions or such longer period as the parties agree to in writing then the same shall be settled by arbitration to be held in Chennai / Delhi / Mumbai in accordance with the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to a person to be appointed by TCHFL. In the event of death, refusal, neglect, inability, or incapability of the person so appointed to act as an Arbitrator, TCHFL may appoint a new arbitrator. The award of the arbitrator shall be final and binding on all parties concerned.

Notwithstanding anything contained hereinabove, in the event due to any change in the legal status of TCHFL or due to any change or amendment in law or notification being issued by the Central Government or otherwise, TCHFL comes under the purview of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the "DRT Act"), which enables TCHFL to enforce the security under the SARFAESI Act or proceed to recover dues from the Borrower under the SARFAESI Act and / or the DRT Act, the Arbitration provisions hereinbefore contained shall, at the option of TCHFL, cease to have any effect and if arbitration proceedings are commenced but no award is made, then at the option of TCHFL such

proceedings shall stand terminated and the mandate of the arbitrator shall come to an end from the date when such law or its change / amendment or the notification, becomes effective or the date when TCHFL exercises its option of terminating the mandate or arbitrator, as the case may be. Provided that neither a change in the legal status of TCHFL nor a change / amendment in law or issuance of notification as referred to in this sub paragraph above, will result in invalidating an existing award passed by an Arbitrator pursuant to the provisions of this Agreement.

The Borrower's liability hereunder shall not be affected, terminated or prejudiced by the death, insolvency or any incapacity of the Borrower, but such liability shall continue in full force and effect and shall be binding on the Borrower's successors provided in the title and as the case may be."

In the light of the aforesaid clause, the Court found that the arbitration clause itself, on the face of it, would cease to have effect in the event of the claimants therein becoming entitled to invoke the provisions of SARFAESI Act. It was contended by the defendant in that case, that even if the defendant's claims were held to be non-arbitrable, the plaintiff's claim/s would nonetheless be subject to Arbitration. It was in the context of such a submission that the Court observed as under:-

"26. I have enquired from the counsel for the defendant, that once the defendant has come under the purview of the SARFAESI Act, whether not the second part of the clause aforesaid in the agreement would apply, ceasing the effect of the arbitration clause.

27. The counsel for the defendant states that the arbitration clause will cease to have effect only as far as the claim of the defendant against the plaintiffs is concerned but will continue to have effect as far as the claims of the plaintiffs against the defendant are concerned.

28. On enquiry, whether there can be a valid arbitration clause providing for arbitration of claims of one of the party and providing for the remedy of the Court or any other for a for claims of the other party, the counsel for the defendant is unable to cite any law.

29. Section 7 of the Arbitration Act defines an 'arbitration agreement' as meaning an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them

in respect of a defined legal relationship, whether contractual or not. In my view, the words “all or certain disputes” permit classification of disputes but do not permit classification of claims. The said words, in my view, do not allow a provision providing for claims of one of the parties arising in respect of a defined legal relationship to be adjudicated by arbitration but the claim of the other party arising in respect of the same legal relationship to be adjudicated by any other mode. The same would be contrary to the public policy prohibiting splitting up of claims and causes of action as enshrined in the provisions of the CPC and would result in multiplicity of proceedings, with claims of one of the parties to a legal relationship being decided by one forum and the claims of the other party to the same legal relationship being decided by another forum and possibility of conflicting findings. Such cannot be the interpretation of the words “all or certain disputes”. The said words have to be interpreted as permitting the parties to specify the disputes of a particular nature/class to be submitted to arbitration, whether the said dispute arises from the claim of one or the other party.”

19. The aforesaid observations are completely inapplicable to the facts of the present case inasmuch as the arbitration agreement in question is applicable not only qua claim/s of the petitioner but also qua claim/s of the respondent.

20. Regarding the ostensible dichotomy between Clauses 25 and 27, it is well settled that if there is any contractual stipulation which undermines the scope of arbitration clause contained in any contract, the same will be accorded an interpretation which gives full effect to the arbitration agreement between the parties. In this regard, it has been observed by the Supreme Court in the case of ***Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and Others*** (2013) 1 SCC 641, as under:-

“96. Examined from the point of view of the legislative object and the intent of the framers of the statute i.e. the necessity to encourage arbitration, the court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers.”

21. Also, in **MTNL v. Canara Bank**, (2020) 12 SCC 767, it was observed as under:

“9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An "arbitration agreement" is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities.”

22. In **A. Ayyasamy v. A. Paramasivam**, (2016) 10 SCC 386, Dr D.Y. Chandrachud, J. in his separate opinion observed that:

“53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle.”

23. In **Govind Rubber Ltd. v. Louids Dreyfus Commodities Asia (P) Ltd.**, (2015) 13 SCC 477, it has been held as under:-

“17. We are also of the opinion that a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it. On the principle of construction of a commercial agreement, Scrutton on Charter Parties (17th Edn., Sweet & Maxwell, London, 1964) explained that a commercial agreement has to be construed, according to the sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense (see Article 6 at p. 16). The learned author also said that the agreement has to be interpreted "in order to effectuate the immediate intention of the parties". Similarly, Russell on Arbitration (21st Edn.) opined, relying on Astro Vencedor Compania Naviera S.A. v. Mabanft GmbH [(1970) 2 Lloyd's Rep 267], that the court should, if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed. The learned author has also referred to

another judgment in Paul Smith Ltd. v. H and S International Holdings Inc. [(1991) 2 Lloyd's Rep 127] in order to emphasise that in construing an arbitration agreement the court should seek to "give effect to the intentions of the parties".

24. The same approach to interpretation of arbitration agreements has been followed across jurisdictions. For instance, the United States Supreme Court in ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*** 473 U. S. 614, 626 (U.S. S. Ct. 1985), has affirmed as under:-

"... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

25. Similarly, in the United Kingdom, in ***Premium Nafta Products Ltd & Others v. Fili Shipping Company Ltd and Others*** [2007] UKHL 40 (House of Lords), it was held as under:-

"The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to face issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressively. Otherwise, they will be taken to have agreed on a single tribunal for the resolution of all such disputes."

26. With regard to the view taken in some older authorities to the effect that the arbitration clauses must be interpreted restrictively, it is stated by **Gary B. Born** in ***International Arbitration: Law and Practice, Third Edition*** as under:

"The "restrictive" presumption is generally explained on the grounds that arbitration is a derogation from otherwise available access to civil justice and the "natural judge" of the contract, and that such derogations must be construed narrowly. Thus, in an older decision,

a French appellate court declared that “[t]he arbitration agreement must be strictly interpreted as it departs from the norm – and in particular from the usual rules as to the jurisdiction of the courts.” ‘This restrictive interpretative presumption is archaic and out of step with the ordinary intentions of commercial parties; it is generally not applied in contemporary decisions.’

27. It is also noteworthy that the Supreme Court has emphasized that while exercising jurisdiction under Section 11, the Court is to take a ‘*prima facie*’ view on issues relating to existence of arbitration agreement, and that issues of arbitrability/validity are matters to be adjudicated by the arbitral tribunal. The only narrow exception is to “cut the deadwood”. It has been emphasised that the watchword for the Court is “when in doubt, do refer”. In this regard, reference is apposite to the observations of the Supreme Court in ***Intercontinental Hotels Group (India) Pvt. Ltd. v. Waterline Hotels Pvt. Ltd*** (2022) 7 SCC 662, as under:

“19. At the outset, we need to state that this Court's jurisdiction to adjudicate issues at the pre-appointment stage has been the subject-matter of numerous cases before this Court as well as the High Courts. The initial interpretation provided by this Court to examine issues extensively, was recognised as being against the pro-arbitration stance envisaged by the 1996 Act. Case by case, Courts restricted themselves in occupying the space provided for the arbitrators, in line with party autonomy that has been reiterated by this Court in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549], which clearly expounds that Courts had very limited jurisdiction under Section 11(6) of the Act. Courts are to take a “prima facie” view, as explained therein, on issues relating to existence of the arbitration agreement. Usually, issues of arbitrability/validity are matters to be adjudicated upon by arbitrators. The only narrow exception carved out was that Courts could adjudicate to “cut the deadwood”. Ultimately the Court held that the watchword for the Courts is “when in doubt, do refer”.

28. In the circumstances, there is no impediment in constituting an Arbitral Tribunal to adjudicate the disputes between the parties. Accordingly, Mr. Vikas

Mehta, Advocate (Mobile No. 9810536903) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

29. It is also clarified that the respondent shall be entitled to raise any objection/s as to jurisdiction/existence/validity of arbitration agreement before the Sole Arbitrator, which shall be decided by the sole Arbitrator in accordance with law.

30. The learned arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the Arbitration and Conciliation Act; and in the event of any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

31. The learned arbitrator shall be entitled to fees in accordance with Fourth Schedule to the Arbitration and Conciliation Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

32. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned arbitrator on their merits, in accordance with law.

33. Accordingly, the petition stands disposed of.

SACHIN DATTA, J.

FEBRUARY 23, 2023

CL/AK/ssc