

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE**

Present:-

The Hon'ble Justice Harish Tandon

And

The Hon'ble Justice Madhuresh Prasad

APO/205/2023

WITH

AP/351/2020

IA No. GA/1/2023

**KOLKATA METROPOLITAN DEVELOPMENT AUTHORITY
VS.
SOUTH CITY PROJECTS (KOLKATA) & ANR.**

For the Appellant	:	Mr. Kishore Dutta, Ld. AG Mr. Avishek Guha, Mr. Sirsanya Bandopadhyay, Ms. Akansha Chopra.
For the State Respondents	:	Mr. Abhrajit Mitra, Sr. Adv. Mr. Satadeep Bhattacharyya, Mr. Saptarshi Dutta, Mrs. Srinjita Ghosh, Mr. P.K. Pal, Mr. Samiruddha Sen, Mrs. Sriparna Mitra, Mr. Debdut Hore.
Judgment on	:	February 12, 2025

Madhuresh Prasad, J.:

1. The present appeal has been preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). The appellant seeks setting aside the decree passed by the Hon'ble Single Judge under Section 34 of the Act upholding the arbitral award

dated 22.06.2020 in favour of the claimants/respondents herein. The appellant has been held liable to pay to the respondents the following sums:-

(i)	<i>(a) The principal sum as mentioned in paragraph 54 of the Statement of Claim</i>	Rs.11,41,40,000.00
	<i>(b) Interest on the said sum at the rate of 15% per annum from 17th December 2007 till the date of the Award</i>	Rs.21,25,85,750.00
(ii)	<i>(a) Damage by way of expenses incurred by the Claimants towards preliminary and other expenses as claimed in prayer (b) of the Statement of Claim</i>	Rs.62,33,172.00
	<i>(b) Interest on the said sum as stated in paragraph 67(i)</i>	Rs.22,43,943.00
(iii)	<i>Damage under prayer (c) of the Statement of Claim</i>	Rs. 100.00
(iv)	<i>Interest on the Awarded sums at the rate of 12% per annum from the date of the Award till payment</i>	
(v)	<i>Costs of the proceedings</i>	Rs.45,00,000.00

2. **The brief factual background of the dispute** in the present proceedings is that the present appellant namely the Kolkata Metropolitan Development Authority ('KMDA' for short), invited bid for the development of residential-cum-office complexes at two separate locations. The two sites were located near the Ruby General Hospital and Nilachal Co-operative Society Housing Complex along R.B. Connector to Eastern Metropolitan Bypass. The two sites were

comprising of lands measuring a total of 132.20 kottahs and 1.487 acres respectively.

3. The present two respondents had submitted their bid as a consortium and were declared the selected bidder. A Memorandum of Understanding (MoU) was entered into by the consortium with the appellant on 17.12.2007.

4. As per MOU the appellant (KMDA) and the bidder (consortium) were to form a Joint Venture Company (JVCO). Both KMDA as well as consortium was required to contribute equally to the paid-up share capital of JVCO.

5. The consortium was required to pay 10% of the financial bid amount to the KMDA, on behalf of the proposed JVCO at the time of execution of the MOU as part payment of the premium for granting lease to the JVCO for developing the two sites.

6. The consortium was required to contribute its share in the paid-up capital of JVCO in cash. However, KMDA's contribution was to be adjusted against its receivable land premium, which was to be paid by JVCO by an amount advanced to the JVCO as a loan by the consortium.

7. Within 30 days of incorporation of the JVCO, the appellant KMDA was required to execute a development agreement in favour of JVCO granting it the right to develop the two sites and agreeing to grant a long-term lease upon completion of the development.

8. Within 30 days from execution of the development agreement the appellant was required to deliver possession of the sites to the JVCO.

9. Before taking of possession by the JVCO, the consortium was required to advance an unsecured loan to the JVCO equivalent to 50% of its financial bid less -

- a. The amount of 10% paid to the KMDA upon execution of the MOU, on behalf of the JVCO, and
- b. The amount earlier paid by the consortium to the JVCO, which was treated as KMDA's contribution towards share capital of the JVCO.

10. The MOU also provides other conditions for later stages of the project. The dispute, however, has arisen at the stage when the KMDA was required to execute the development agreement. We, therefore, do not consider it necessary to take note of the clauses governing the subsequent stages.

11. At the stage of handing over possession of the project sites and execution of lease deed the present appellants were allegedly procrastinating, and no development agreement was executed by and between the parties in terms of Clause 6 of the MOU. Physical and vacant possession of the two sites was also not handed over to the claimants (consortium).

12. At this juncture a supplemental MOU was entered into by and between the parties on 16.11.2011. The reason why the supplemental

MOU was entered into is that there were some incumbrance on the lands comprising of the two sites where the development work was to be undertaken as per the original MOU. After discussions and negotiations the project thus got restricted to 83.52 Kottahs of land instead of the earlier agreed area of land measuring 132.20 Kottahs at Ruby Complex and 1.487 acres at E.M. Bypass.

13. The new MOU also required the consortium to submit a financial analysis or Private Development Agreement as per the KMDA's letter dated 28/31st July, 2012.

14. **The dispute before the learned Arbitrator** was that while the present appellant alleges lapse on the part of the consortium (claimant) in this regard, the claimant/ consortium alleged before the arbitrator that it was the duty and obligation of the present appellant in terms of the original MOU to execute a development agreement within 30 days from the date of incorporation (11.07.2009) of the JVCO, which they failed to execute despite the fact that draft and revised draft of the development agreement was forwarded by the claimants.

15. As per the claimant an order of status quo passed by the learned District Judge at Alipore in pending Miscellaneous Appeal No. 396 of 2008, since the time when the tender was floated, was operating in respect of one of the plots of land comprising of the two sites. The appellant had suppressed this fact and misrepresented that the plots were in their possession and free from all incumbrance.

16. After execution of the fresh MOU the total area of land forming subject matter of the scope of work was reduced to 1.37 acres (approximately 83 Kottahs) from 3.65 acres. The appellant, however, refused to proportionately adjust the consideration amount. The claimants asserted that the price was to be reduced in proportion to the reduction of the total area of land in the original MOU but the appellant paid no heed to such request. It is also alleged that since the appellant were not the assessee in respect of the 83 Kottahs of land for which the second MOU had been entered into it was virtually impossible to obtain a sanction for any building on the said land from the Municipal Corporation.

17. The sum and substance of the claim set forth by the consortium was that it was impossible to execute the development. The MOU and supplemental MOU were thus invalid. The claimants thus alleged that by resorting to misrepresentation and fraud they were induced to part with a sum of Rs. 11,41,40,000, to form a JVCO, and to maintain it at substantial cost and expenses, quantified at 62.663 lakhs. The claimants thus asked for refund of the above two amounts, interest thereupon at 15 per cent per annum, as also Rs. 61 Crores as damages. In the alternative they claimed that an enquiry to be conducted into the damage suffered by the claimant and for an award to be passed in terms of the amount quantified in such enquiry.

18. The present appellant who was the respondent before the arbitral tribunal submitted their counter statement of facts, a supplementary counter statement and amended statement of claim. The stand of the appellant before the arbitral tribunal was that the claimant before participating in the bid had visited the two sites in respect of which the tender had been floated. The appellant was in actual physical possession of the entirety of the land except a few pockets here and there, having encumbrance thereon. The extent of encumbrance was not such as to come in the way of development. It was also contended that the work could very well have proceeded. As per the appellants, the interim orders passed in the suit/s in respect of various pockets of land of the two sites had either been vacated or the suits decided in favour of the appellants. Therefore, there was no impediment in commencing the construction and development work with respect the lands, excepting few pockets. The original MOU dated 17.12.2007 did not contemplate creation of any right or obligation in favour of the claimant/s in respect of the immovable property.

19. It was also the appellants specific stand before the arbitrator that since the second MOU was executed on 16.11.2011, the claimants were estopped from alleging any breach of the terms of the earlier MOU. By executing the second MOU on 16.11.2011 the claimant had waived the alleged breach of the earlier MOU. The supplemental MOU was executed by the claimants knowing well that the scope of work now was in

respect of reduced land measuring 83.52 Kottahs without any proportionate adjustment of the consideration amount. The present appellant, thus denied and disputed the claim of the consortium before the learned Arbitrator.

20. **On behalf of the appellant,** it is also submitted by Mr. Kishore Dutta, learned Senior Advocate that it is the consortium that had proposed that the project be developed on the reduced land measuring 83.52 Kottah. Such proposal was communicated by its letter dated 2nd February, 2012. The present appellant only communicated its agreement to such proposal by its letter dated 28/31st July, 2012. This communication contained a clear and explicit condition that no money will be refunded owing to delimiting of the project from 220.40 Kottahs to 83.53 Kottahs. In such a circumstance, the claimant was estopped from claiming any proportionate adjustment in the cost of the works on the ground that the scope of work had substantially decreased as per the supplemental MOU, when compared with the original MOU. The claimant had proposed that the project be developed on the lesser area of land on the same terms, which resulted in execution of a supplemental MOU between the parties. Thus, they could not have terminated the MOU, as sought to be done by their letter dated 20th April, 2016. In addition thereto the present appellant has submitted before the arbitrator that the parties were *ad idem* that project area for development stood reduced. The claimant was thus obliged in terms of

KMDA's letter dated July 28/31 of 2012 to initiate necessary steps for execution of a development agreement confining the scope of development to around 83 Kottahs under Plot 1- 26 and thereafter to prepare a financial viability exercise for the project on the reduced area, in terms of the MoU. This was required to be submitted for review by the present appellants. Since such commitments have not been fulfilled by the claimants, no obligation was cast on the present appellants to make over possession of the land.

21. After incorporation of the JVCO on 9th May, 2008, a separate entity came into existence. The JVCO itself was capable of suing and being sued, and was a necessary party to the arbitration. It was the newly created JVCO which had the right to carry on the development work as per the MOU. Therefore, even if alleged failure on the part of the present appellant is accepted, then it does not give rise to any corresponding right in favour of the consortium (claimants) to invoke the arbitration clause. Invocation of the arbitration clause could have been done by the JVCO and not by the claimants. This issue was raised by the claimant before the learned Single Judge who has considered the same in para 31 of the order and proceeded to hold that locus of the consortium for invoking the arbitration clause was to be questioned, before the arbitrator by filing an application under Section 16 of the Arbitration and Conciliation Act. Since the issue was neither raised by the claimant, nor considered by the arbitrator during the course of arbitral

proceedings, the learned Single Judge held that it would be grossly inappropriate and unfair to the consortium, if now the appellant is permitted to raise the issue before this Court at this stage.

22. Another ground urged on behalf of the appellant is that the consortium could not have resorted to termination of the MOU as the MOU does not provide any such termination clause. In case of default clause 20.1 to 20.10 of the MOU provides that the non-defaulting share holder may purchase the shares of the defaulting share holder in the JVCO in the manner prescribed therein, whereupon the agreement would stand terminated. Termination simpliciter by one of the parties to MOU is not contemplated. This issue has also not been considered by the learned Single Judge by assigning a reason that the same was not raised before the arbitrator.

The award is also assailed by the appellant on the ground that in such circumstance the award was violative of Section 28(3) of the Arbitration and Conciliation Act. The question of a termination of the contract, not being contemplated under Clause XX of the MoU, the termination of the agreement is unsustainable. There being no termination in the eyes of law the claimants could not have moved the arbitrator for resolution of the dispute.

23. Another submission of the appellant is that the amount of the award against the present appellant was actually an amount of loan granted to JVCO by the consortium (claimants) and could have been

recovered only from the JVCO. The arbitrator even found that this amount is shown as a loan in the books of account of JVCO. Such being the facts there was no scope for the claimant to proceed against or sue KMDA.

24. In support of these submissions the learned Senior Counsel has relied upon several authorities. Relying upon decision of the Apex Court in the case of **Cox and Kings Ltd. Vs. SAP India Private Limited and Another** reported in **(2024) 4 SCC 1** he submits that the JVCO was a non-signatory to the agreement between the parties and, therefore, the relief of the arbitration could not be resorted since there was no existence of an arbitration agreement between the JVCO and the consortium. Insofar as the appellant is concerned the remedy in case of alleged default by the appellant was limited to the extent of purchase of shares held by the appellant. He, therefore, submits that the arbitration proceedings itself was not maintainable and the nature of relief granted by the arbitrator is also unsustainable insofar as it is opposed to the terms of the contract between the appellant and the consortium. In this regard, he has also placed reliance on decision of the Apex Court in the case of **Chief General Manager (IPC), Madhya Pradesh Power Trading Company Limited and Another vs. Narmada Equipments Private Limited** reported in **(2021) 14 SCC 548**, **Kanwar Singh Saini vs High Court of Delhi** reported in **(2012) 4 SCC 307** and **J.G. Engineers Private Limited vs. Union of India and Another** reported

in **(2011) 5 SCC 758** to submit that there was thus an inherent lack of jurisdiction in the arbitrator to proceed with the arbitration, because there was no scope of arbitration between the appellant and the consortium, over the various claims made by the applicant, in view of the remedy being limited in terms of the agreement binding *inter partes*. Moreso, in absence of the JVCO, to whom the payments had been made by the applicant. There being an inherent lack of jurisdiction the decision of the arbitrator is a nullity. He, thus, submits that the invalidity of the award thus could be set up and declared at any stage. Such defect of jurisdiction was open to be raised before the Hon'ble Single Judge even if not being raised by the arbitrator. Thus, there was no justification for the Hon'ble Single Judge to reject the plea on the ground that it was being raised for the first time before the Hon'ble Single Judge in the proceedings arising out of Section 34 of the Act. This defect in the arbitral award based on an inherent lack of jurisdiction, and by deciding claims and awarding relief in respect thereof with respect to claims which are not available under the agreement amounts to a patent illegality. The Hon'ble Single Judge, therefore, has fallen in error by not setting aside the award on these grounds.

25. Further it is submitted that in view of the limited relief available to the non-defaulting party under the agreement, which did not contemplate grant of any interest whatsoever on its investments; and

limited the relief to a right to purchase the shares of the defaulting party, the arbitrator could not have awarded interest as has been done in the present case. Before the arbitrator the claimants have also not produced any proof of expenditure of Rs. 62.33 lakh towards jungle cutting and removal of bushes. The findings of the arbitrator thus in this regard is unsustainable. In this regard, he has placed reliance on decision of the Apex Court in the case of ***Union of India vs. Manraj Enterprises*** reported in ***(2022) 2 SCC 331***. The award, thus being against the specific terms of the contract the same is patently illegal and opposed to the public policy of India as per decision of the Apex Court in the case of ***Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation*** reported in ***(2006) 4 SCC 445***. In support of this contention reliance is also placed on decisions of the Apex Court in the case of ***Associate Builders vs. DDA*** ***(2015) 3 SCC 49*** as well as subsequent decision of the Apex Court in the case of ***State of Chhattisgarh and Another vs. SAL Udyog Private Limited*** reported in ***(2022) 2 SCC 275*** and a more recent decision of the Apex Court of ***Batliboi Environmental Engineers Ltd. Vs. Hindustan Petroleum Corporation Limited and Another*** reported in ***(2024) 2 SCC 375***.

26. We now proceed to consider the stand of the present appellant before the arbitrator, the Court considering the matter under Section 34 of the Act; as well as the present proceedings.

27. Insofar as the argument based on Clause XX of the agreement that the MoU could not be terminated for invoking the arbitration clause, and that at best a non-defaulting shareholder of the JVCO could require the defaulting shareholder to sell to the non-defaulting shareholder the shares held by the defaulting shareholder for the time being in the capital of the JVCO to the non-defaulting shareholder, we proceeded to examine Article XX of the MoU. We find that the submissions advanced by the learned Counsel for the appellant are based on a constrictive reading of Article XX, which contains the **“terms of default and termination”** which are enumerated therein. We are, therefore, of the opinion that for ascertaining the scope and intent of Article XX all these clauses are required to be looked into for ascertaining the scope and intent of the same based on a plain reading of these provisions. Without entering into any interpretation of Article XX we find from a plain reading of Clause 20.2 that the remedy of requiring the defaulting shareholder to sell to the non-defaulting shareholder the shares held by the defaulting shareholder is one of the remedies available under Article XX. Even this remedy is embedded with a clause which reads as follows:-

“...without prejudice to any other rights and remedies...”

The scope and intent of MoU is thus clear and explicit from a plain reading of Clause 20.2. As per Article XX the remedy of requiring the defaulting shareholder to sell its shares to the non-defaulting

shareholder is not absolute and is without prejudice to other rights. We also find that Article XX does not contain a clause ousting remedies legally available otherwise to the parties. This aspect of the matter has been considered by the arbitrator and decided against the appellant. The arbitrator has held that by failing to provide clear title to the properties as required under the MoU and by failing to give unencumbered possession of the property the appellant had committed a breach of the fundamental terms of the contract which went to the root of the contract. The arbitrator has thus held that the contract was terminated by the letter of termination dated 20.04.2016 issued by the claimant. Thus, the finding of the arbitrator that the claimants **“...were not precluded from pursuing their remedy or claiming damage....”** does not require any interference.

28. Insofar as the submission that the original MoU dated 17.12.2007 did not contemplate creation of any right or obligation in respect of immovable property in favour of the claimants we find that the arbitrator has taken note of the role of the KMDA in the JVCO as per Article 6 of the MoU. The arbitrator has thus taken note of clause 6.7, therein to note that the KMDA was required **“to make out a clear and marketable title of the two sites free from all incumbrances.”** The submission to the contrary advanced on behalf of the appellant, therefore, does not require any further consideration since such a submission is *de hors* clause 6.7 of the MoU. Thus, the submission that

there was no obligation on the KMDA to create any right or obligation in favour of the claimants in respect of the immovable property was rightly rejected.

29. The submission of the learned Counsel for the appellant that there was no impediment in commencing the construction and development work, except in few pockets is also considered by the arbitrator with reference to the evidence and material available on record. Upon consideration of the correspondence between the parties in between December 2007 to July 2011, as well as affidavit – evidence of C.W.1 the arbitrator has found that various civil suits were pending at various stages in Alipore Court. In some cases, orders of injunction had been passed restraining the KMDA from interfering with possession of the persons in occupation. The claimants were also requesting the KMDA to get the orders vacated as the various encroachments and encumbrances were coming in the ways of demarcation and construction of a boundary wall on the lands in question. In fact, the Senior Law Officer of the KMDA (appellant) as per one communication dated 29.06.2009, stated that three title suits were pending. The details of the property have also been specified. This letter has been found to contain details of the temporary injunction order passed in some of the suits. In the said letter, the Senior Law Officer has recorded that the appellants were facing problems because of the injunction order passed and requested the KMDA's lawyer to submit a report in this regard.

Orders passed by the Courts have also been considered by the arbitrator, as also other correspondence/(s) based on which the arbitrator has found existence of a fact that the KMDA through its officials were requesting for police assistance to overcome the issue of encroachment and resistance by the local people. Thus, such finding of the arbitrator based on material, cannot be interfered with within the limited scope of these proceedings; or the proceedings under Section 34 of the Arbitration Act.

30. Regarding another submission on behalf of the appellant that the claimants had come to terms with the fact that the MoU/ agreement could not be discharged with respect to the entire area of lands, contemplated therein, since the claimants had executed a second MoU on 16.11.2011 restricting the scope of work now to 83.52 Kottahs of land without any proportionate adjustment of the consideration amount; and thus they could not allege any breach of terms of the earlier MoU, we find the conclusions of the arbitrator as well as the Court exercising jurisdiction under Section 34 of the Act does not require any interference. The arbitrator has considered that on 16.11.2011 the claimants and respondents had voluntarily indicated therein the intention of the parties to stand by the original MoU. The supplementary MoU, was found to be entered into since such a situation had arisen where the parties were *ad idem* on the issue that the scope of work under the original MoU was incapable of being taken

up, till the various issues including encumbrances in respect of a large part of the lands was resolved. On the basis of correspondence available on record, the arbitrator has recorded a finding, contemplating implementation of the terms of the original MoU and execution of works thereunder, after execution of the works under the supplemental MoU on 16.11.2011. Taking note of significant developments thereafter based on the correspondence between the parties, the arbitrator has found that the claimants informed the appellant that for the time being the project can be developed on 83.52 Kottahs of land, provided the encroachments thereon are removed. It was considered imperative by the claimant that the lands be assessed separately, and municipal premises number be assigned by the KMC to the said lands, failing which it would not be possible for the claimant to submit, much less get approval of any building plan with the KMC. Annexure-W has been considered in this regard. It is in response to such communication, that the appellants allowed the claimants to limit the scope accordingly. The claimants were asked to initiate necessary steps for execution of development agreement incorporating these developments but **“for the time being”**, which shall be extended to other portions of land as and when such land is/are available without any encumbrances.

31. The appellants were not willing to refund any money in view of the scope of work being reduced and therefore they called upon the claimants to submit a financial analysis and a draft development

agreement for consideration of KMDA as per Annexure-X which was tendered in evidence through C.W.1.

32. The evidence of C.W.1 has also been considered by the arbitrator from which factual findings have been recorded regarding C.W.1 conceding that there was some encroachments on these lands. A factual finding had been recorded based on his evidence that without encroachments being removed the development of even the reduced lands measuring 83.52 Kottahs of land was not possible. On a consideration of this material before the arbitrator, the arbitrator has recorded a finding that there was no novation of the contract. The original MoU remained effective, but was restricted for the time being to 83.52 Kottahs.

33. Such findings based on the correspondence noted above is again a finding, which requires no interference in the limited scope and jurisdiction of the Court. The submission of the learned Counsel for the appellant that the claimant had waived the alleged breach of earlier MoU, in our opinion, has rightly been rejected by the arbitrator.

34. Another submission on behalf of the appellant, requiring consideration is that since a separate entity "JVCO" came into existence, having the right to carry on the development work, there was no scope for the claimant being one of the parties to the JVCO to make any claim from the KMDA by invoking the arbitration clause. We find that this submission was not raised by the claimant before the

arbitrator. The Court exercising jurisdiction under Section 34 of the Act, in this regard has rightly concluded that the issue of non-maintainability of the arbitration proceedings was required to be raised before the arbitrator by filing an application under Section 16 of the Arbitration and Conciliation Act. Since no such issue was raised in the arbitral proceeding, the claimant had no opportunity to meet such issue in the arbitral tribunal. Thus, it would be grossly unfair to the claimant to take up this issue at the belated stage.

35. The arbitrator has found on interpretation of the terms of the MoU that the KMDA was under an obligation to make out the clear and marketable title of the two sites in question. It also held that the KMDA was under an obligation to make over vacant possession of the two sites to the claimant. It has further gone on to consider the evidence on record that the KMDA could not make out a clear and marketable title of the two sites free from all incumbrances. Considering the letters dated 2nd February, 2012 and 28/ 31 July, 2012 the arbitrator held that the MoU/original agreement dated 17th December, 2007 was not superseded or modified and remained fully effective. These findings of the arbitrator based on appreciation of evidence and interpretation of the terms of the MoU as also the scope and effect of the contract are decisions which lie within the exclusive domain of the arbitrator. These findings are based on evidence and correspondence available on record, after considering Clause 7.9 of the MoU, and cannot be re-looked by the

Court exercising jurisdiction under Section 34 of the Act, or by this Court. In this regard reliance placed by the learned Senior Counsel for the respondents on the decision of the Apex Court in the case of ***UHL Power Company Limited vs. State of Himachal Pradesh*** reported in **(2022) 4 SCC 116** merits consideration. We advert to paragraph 19 of the report which reads:

“22. In the instant case, we are of the view that the interpretation of the relevant clauses of the implementation agreement, as arrived at by the learned sole arbitrator, are both, possible and plausible. Merely because another view could have been taken, can hardly be a ground for the learned Single Judge to have interfered with the arbitral award. In the given facts and circumstances of the case, the appellate court has rightly held that the learned Single Judge exceeded his jurisdiction in interfering with the award by questioning the interpretation given to the relevant clauses of the implementation agreement, as the reasons given are backed by logic.”

36. Insofar as the issue regarding lack of jurisdiction of the arbitrator to award interest we consider with approval the submissions advanced on behalf of the respondents that since the arbitrator held that there was a total failure of consideration, the direction for refund of the payments made by the aggrieved party on the principles of restitution embodied in Sections 65, 70 and 72 of the contract, would require no interference. The arbitrator has recorded a specific finding to the effect that the claimant has been able to prove the rate of interest claimed (15% per annum) on the basis of SBI's benchmark prime lending rate and the stipulations of MoU itself. As per Clause 7.14 of the MoU the

claimant were required to treat the amount of 50% of the total financial bid submitted by them and paid to the KMDA as a loan advanced by them to the JVCO carrying interest at 15% per annum. The arbitrator has thus found that since the respondent appellants could have claimed interest at 15% per annum in terms of the MoU on any unpaid financial bid amount the claimant would also been entitled to charge some interest at the same rate on amounts payable by the respondents to them or either of them. The evidence (C.W.2) led by the claimants regarding SBI's benchmark prime lending rate of interest in between April, 2007 to October, 2016 was rightly taken into consideration by the arbitrator. It is manifest from the award and a fact not in dispute that there was no cross-examination by the respondents on any of such evidence.

37. The principles based on the provisions contained in the Indian Contract Act (Sections 65, 70 and 72), are axiomatic in this regard. A person enjoying an advantage under a contract and rendered void by breach of terms of the contract by such a person would undoubtedly give rise to a claim for restitution as well as compensation in favour of the person (claimant) from whom the benefit/ advantage was received. We find that the payments made were not gratuitous and were under the terms of the contract mandating such payment being made by the claimant under the contractual obligation. We, therefore, approve of the

reliance placed by the learned Senior Counsel on the above noted three provisions of the Contract Act.

38. Insofar as the authorities relied upon by the appellants as regards the non-maintainability of the arbitration proceedings, we venture to consider the decisions. The first decision in this regard, **Cox and Kings Ltd. (supra)** we find that the same would have no application to the present facts and circumstance to sustain the submissions on behalf of the appellants. At the very outset we would observe that in this case the Apex Court was considering whether Court exercising jurisdiction under Section 8 could consider whether the expression in Section 8 “**claiming through or under**” could be interpreted to include the “**group of company’s doctrine**” as expounded by **Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc and Others** reported in **(2013) 1 SCC 181**. In the present case there is no such issue of referral under Section 8 of the Act. In the present case in fact issue regarding inherent lack of jurisdiction has been raised for the first time before the Hon’ble Single Judge exercising jurisdiction under Section 34 of the Act. The issue of inherent lack of jurisdiction or maintainability of the arbitration proceedings, is required to be raised before the arbitrator under Section 16 of the Act, which admittedly was not done by the respondents. In this circumstance, we would take into consideration the provisions contained in Section 7(4)(c) of the Act. As per this provision an arbitration agreement as per the Act “**is in**

writing if it is contained in an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.”

39. The existence of the arbitration agreement was not denied or disputed by the respondents before the arbitrator. They have also chosen not to raise the issue of jurisdiction or question the jurisdiction of the arbitrator by filing any objection as contemplated under Section 16 of the Act. We, therefore, approve of the decision of the Hon'ble Single Judge exercising jurisdiction under Section 34 of the Act to conclude that in such circumstance the issue could not be raised before him for the first time. Since the issue of alleged inherent lack of jurisdiction was never raised before the arbitrator the other decisions relied upon by the learned Senior Counsel for the appellant, such as ***Chief General Manager (IPC), Madhya Pradesh Power Trading Company Limited (supra)*** is also found to be inapplicable to the facts and circumstances of the present case. In the said decision an order passed under Section 11(6) of the Act, appointing an arbitrator was in issue. In view of Section 86 (1) (f) of the Electricity Act, 2003 it was found that the State Electricity Commission was vested with exclusive jurisdiction to adjudicate upon disputes between licensees and generating companies. Under the circumstances the appointment of the arbitrator under Section 11(6) of the Act by the High Court, even if with consent was found to be unsustainable. There is no such special law

being relied upon by the learned Counsel for the appellant to oust the jurisdiction of the arbitrator as suffering with the vice of inherent lack of jurisdiction.

40. The submission of the learned Counsel that the arbitrator had no jurisdiction, is based on the objections that the JVCO was not made a party, there was no liability of the appellant and that the remedy under the MoU was limited to purchase of shares of the defaulting party by the non-defaulting party. As considered above this issue has already been decided against the present appellants. Therefore, reliance placed on the decisions in the case of **Chief General Manager (IPC), Madhya Pradesh Power Trading Company Limited (supra)** or the decision in the case of **Kanwar Singh Saini (supra)** also on the same issue being inapplicable to the facts and circumstances of the present case, does not help the case of the appellant insofar as the submission regarding lack of jurisdiction of the arbitrator in the present case.

41. This takes us to the next issue raised by the appellant regarding there being no basis before the arbitrator nor any scope under the terms of the MoU to award any interest to the applicants, we find that the decisions of the Apex Court in this regard in the case of **Manraj Enterprises (supra)** is inapplicable to the present facts and circumstances. In the case of **Manraj Enterprises (supra)** the agreement between the parties contained a specific bar under Clause 16.2 thereof on entitlement of interest on the amounts payable under

the contract. It is nobody's case that there is any such bar in the MoU entered into between the parties in the present case. We, therefore, find that by awarding interest, the arbitrator has not awarded any relief contrary to the specific terms of the contract so as to invite the vice of patent illegality or a criticism on the ground that the award is opposed to public policy of India. Viewed thus, find that the reliance placed by the learned Counsel for the appellant in the case of **Hindustan Zinc Ltd. (supra)**, **Associate Builders (supra)**, **Batliboi Environmental Engineers Limited (supra)** and **SAL Udyog Private Limited (supra)** would not be applicable to the facts and circumstances of the present case where it cannot be said by any stretch of imagination that the award would attract the patent illegality ground, for setting aside of the same.

42. The submission of the learned Counsel for the appellant that the amounts were paid by the appellant to the JVCO in the form of a loan, we find no force in such submission. The payments were made in terms of the MoU which clearly contemplated the payments being made on behalf of the present appellants. The payments were thus substantially made to meet the liability of the KMDA in respect of the JVCO which came into existence as a result of the joining of the KMDA with the claimant. In our opinion, having regard to the facts and circumstances under which the payments have been made in accordance with the terms of the MoU the Court is required to see the substance and not the

form of the payments made by the claimant to the JVCO. In substance the payments were made to meet the liability of the JVCO and, therefore, it would be incorrect to conclude that it was not a payment made to the KMDA, but made exclusively to the JVCO. Since we are not inclined to uphold such submission, the objections founded thereon that the claimant had the only option of proceeding against the JVCO, and not the KMDA is unsustainable.

43. Having recorded the above conclusions sustaining the arbitral award and the order of the Court exercising jurisdiction under Section 34, we hasten to add that the party autonomy in an arbitration proceeding is subject to very limited interference under Section 34 of the Act or under Section 37 of the Act. Referring to the various judgments dealing with the scope and principles governing intervention of Courts when an award is challenged, recently the Apex Court in the case of ***Batliboi Environmental Engineers Limited vs. Hindustan Petroleum Corporation limited and another*** reported in **(2024) 2 SCC 375** has after referring to Section 34 of the Act, held that such a recourse is available to a party seeking setting aside of an award but within the limited scope as per sub-Sections (2) and (3) of Section 34 of the Act.

44. Tracing the development of law in this regard, the Apex Court has held as follows:

“40. Nevertheless, the decision in Saw Pipes case [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] holds that mere error of fact or law in reaching the conclusion on the disputed question will not give jurisdiction to the court to interfere. However, this will depend on three aspects:

(a) whether the reference was made in general terms for deciding the contractual dispute, in which case the award can be set aside if the award is based upon erroneous legal position;

(b) this proposition will also hold good in case of a reasoned award, which on the face of it is erroneous on the legal proposition of law and/or its application; and

(c) where a specific question of law is submitted to an arbitrator, erroneous decision on the point of law does not make the award bad, unless the court is satisfied that arbitrator had proceeded illegally.

In Saw Pipes case [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] , the Court set aside the award on the ground that the award had not taken into consideration the terms of the contract before arriving at the conclusion as to whether the party claiming the damages is entitled to the same. Reference was made to the provisions of Sections 73 and 74 of the Contract Act, which relate to liquidated damages, general damages and penalty stipulations. This view had held the field for a long time and was applied in subsequent judgments of this Court in Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445] , Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd. [Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245] , DDA v. R.S. Sharma & Co. [DDA v. R.S. Sharma & Co., (2008) 13 SCC 80] , J.G. Engineers (P) Ltd. v. Union of India [J.G. Engineers (P) Ltd. v. Union of India, (2011) 5 SCC 758 : (2011) 3 SCC (Civ) 128] , and Union of India v. L.S.N. Murthy [Union of India v. L.S.N. Murthy, (2012) 1 SCC 718 : (2012) 1 SCC (Civ) 368] .

41. In 2006, this Court in McDermott International Inc. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] despite following the ratio of Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] ,

made succinct observations regarding the restrictive role of courts in the post-award interference. In addition to the three grounds introduced in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , as noticed above, an additional ground of “patent illegality” was introduced in Saw Pipes Limited, for exercise of the court's jurisdiction in setting aside an arbitral award. This Court, in McDermott International Inc. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , held that patent illegality, must be such which goes to the root of the matter. The public policy violation should be so unfair and unreasonable as to shock the conscience of the court. Arbitrator where s/he acts contrary to or beyond the express law of contract or grants relief, such awards fall within the purview of Section 34 of the A&C Act. Further, what would constitute public policy is a matter dependent upon the nature of transaction and the statute. Pleadings of the party and material brought before the Court would be relevant to enable the Court to judge what is in public good or public interest, or what would otherwise be injurious to public good and interest at a relevant point. So, this must be distinguished from public policy of a particular government.

42. A similar view was expressed in Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306] with the clarification that where a term of the contract is capable of two interpretations and the view taken by the arbitrator is a plausible one, it cannot be said that the arbitrator travelled outside the jurisdiction or the view taken the arbitrator is against the terms of the contract. The Court cannot interfere with the award and substitute its view with the award and interpretation accepted by the arbitrator, the reason being the Court does not sit in appeal over the findings and decision of the arbitrator, while deciding an application under Section 34 of the A&C Act. The arbitrator is legitimately entitled to take a view after considering the material before him/her and interpret the agreement. The judgment should be accepted as final and binding.

43. Subsequently, in ONGC Ltd. v. Western Geco International Ltd. [ONGC Ltd. v. Western Geco

*International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] (for short Western Geco), a three-Judge Bench of this Court observed that the Court, in Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] , did not examine what would constitute “fundamental policy of Indian law”. The expression “fundamental policy of Indian law” in the opinion of this Court includes all fundamental principles providing as basis for administration of justice and enforcement of law in this country. There were three distinct and fundamental juristic principles which form a part and parcel of “fundamental policy of Indian law”. The first and the foremost principle is that in every determination by a court or an authority that affects rights of a citizen or leads to civil consequences, the court or authority must adopt a judicial approach. Fidelity to judicial approach entails that the court or authority should not act in an arbitrary, capricious or whimsical manner. The court or authority should act in a bona fide manner and deal with the subject in a fair, reasonable and objective manner. Decision should not be actuated by extraneous considerations. Secondly, the principles of natural justice should be followed. This would include the requirement that the Arbitral Tribunal must apply its mind to the attending facts and circumstances while taking the view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best done by recording reasons in support of the decision. As noticed above, Section 31(3)(a) of the A&C Act [“31. Form and contents of arbitral award.—(1)-(2) * * *(3) The arbitral award shall state the reasons upon which it is based, unless—(a) the parties have agreed that no reasons are to be given, or(b) the award is an arbitral award on agreed terms under Section 30”] states that the arbitral award shall state the reasons on which it is based, unless the parties have agreed that no reasons are to be given. Sub-clauses (i) and (iii) to Section 34(2) also refer to different facets of natural justice. In a given case sub-clause to Section 34(2) and sub-clause (ii) to clause (b) to Section 34(2) may equally apply. Lastly, is the need to ensure that the decision is not perverse or irrational that no reasonable person would have arrived at the same or be sustained in a court of law. Perversity or irrationality of a decision is tested on the touchstone of Wednesbury principle of reasonableness [As expounded in Associated*

***Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA).]* . At the same time, it was cautioned that this Court was not attempting an exhaustive enumeration of what would constitute “fundamental policy of Indian law”, as a straightjacket definition is not possible. If on facts proved before them, the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which on the face of it, is untenable resulting in injustice, the adjudication made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards, may be challenged and set aside.**

44. The decision of this Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] elaborately examined the question of public policy in the context of Section 34 of the A&C Act, specifically under the head “fundamental policy of Indian law”. It was firstly held that the principle of judicial approach demands a decision to be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would not satisfy the said requirement.

45. Referring to the third principle in Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in State of Haryana v. Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] (for short Gopi Nath & Sons) and Kuldeep Singh v. Delhi Police [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] clarifies that a finding is perverse

when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral Tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be overturned under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious. Referring to the third ground of public policy, justice or morality, it is observed that these are two different concepts. An award is against justice when it shocks the conscience of the court, as in an example where the claimant has restricted his claim but the Arbitral Tribunal has awarded a higher amount without any reasonable ground of justification. Morality would necessarily cover agreements that are illegal and also those which cannot be enforced given the prevailing mores of the day. Here again interference would be only if something shocks the court's conscience. Further, "patent illegality" refers to three sub-heads : (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the Arbitral Tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the

transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do.

*46. As observed previously, we need not examine the amendment made to the A&C Act vide Act 3 of 2016 with retrospective effect from 23-10-2015 and the judgments that deal with the amended Section 34 of the A&C Act. Pertinently, the amendment to Section 34 of the A&C Act was effected, pursuant to the observations of the Supplementary Report to Report No. 246 on Amendments to Arbitration and Conciliation Act, 1996 by the Law Commission of India, titled “Public Policy — Developments post-Report No. 246” published in February 2015. This Supplementary Report observed that the power to review an arbitral award on merits under Section 34 of the A&C Act, as elucidated in *Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12]*, subsequently followed in *Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]*, is contrary to the object of the A&C Act and international practice on minimisation of judicial intervention. A reference can also be conveniently made to *MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293]* (for short *MMTC*) and *Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]* (for short *Ssangyong Engg*), which examine the scope of intervention of courts under Section 34 of the A&C Act as amended by Act 3 of 2016. *MMTC [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293]* and *Ssangyong Engg [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]*, and other judgments which deal with the amended Section 34 of the A&C Act that are not applicable in the present case.*

47. We have extensively analysed the award, its patent flaws and illegalities which emanate from it, like the

manifest lack of reasoning in arriving at the conclusions and the calculation of amounts awarded, which, in fact, amount to double or part-double payments, besides being contradictory, etc. In view of our aforesaid reasoning, the award has been rightly held [Hindustan Petroleum Corpn. Ltd. v. Batliboi Environmental Engineers Ltd., 2007 SCC OnLine Bom 1016] to be unsustainable and set aside by the Division Bench of the High Court exercising power and jurisdiction under Section 37 read with Section 34 of the A&C Act.”

The legal position being settled as apparent from decision of the Apex Court ***Batliboi Environmental Engineers Limited (supra)***, we find no scope and reason to interfere with the impugned award.

45. The appeal is dismissed.

46. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties, expeditiously after complying with all necessary legal formalities.

(Madhuresh Prasad, J.)

I agree.

(Harish Tandon, J.)