



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.228 OF 2024

1. Anand Khosla s/o Mr. Pawan
Khosla

2. Universal Test Solutions LLP

...*Petitioners*

V/s.

Punam Kumari Singh

...*Respondent*

Mr. Simil Purohit, *Senior Advocate with Ms. Naira Jejeebhoy, Mr. Anand Pai, Mr. Sahil Sayyed, Mr. Arun Panickar, Mr. Vinay Nair and Mr. Tanmay Pawar for the Petitioner.*

Mr. Sheelang Shah *i/b. Mr. Pankaj Uttaradhi for the Respondent.*

CORAM: SANDEEP V. MARNE, J.

JUDGMENT RESERVED ON: 16 DECEMBER 2025.
JUDGMENT PRONOUNCED ON: 24 DECEMBER 2025.

JUDGMENT:

1) The Petitioners have filed the present Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the **Arbitration Act**) challenging the Award of the learned sole Arbitrator dated 31 July 2019. By the impugned Award, the Arbitral Tribunal has held that expulsion of the Respondent by Petitioner No.1 from Respondent No.2-Company vide notice dated 1 April 2016 is valid and legal. The learned Arbitrator has also directed the Respondent to

pay amount of Rs.6,42,684/- wrongly transferred from the account of Petitioner No.2 -Company to the joint account of the Respondent and her husband together with interest. The Respondent is also directed to pay costs of arbitration in favour of the Petitioners. Though all the claims of the Respondents are rejected in the arbitral Award and though none of the directions therein are against Petitioners, they have still challenged the Award as the learned Arbitrator has not allowed the various counterclaims raised by them particularly, the counterclaim for loss of revenue.

2) Respondent is a software professional and was operating a proprietary concern in the name of M/s. Universal Test Solutions LLP (**proprietary concern**). It is claimed that the husband of Respondent No.1-Mr. Brajesh Kumar Singh was working on an idea for development of software product for automated test solutions. On account of his full-time employment, he had set up the proprietary concern in the name of his wife (Respondent). It is claimed that Respondent, with the help of her husband, had developed a software product labelled as 'Test Magic an Innovative Test Solution' in respect of which a label mark was also registered in the name of Respondent. In the year 2010, the trademark in respect of the product was also approved and registered in the name of Respondent. For expanding the business, Respondent needed funds, and she was introduced to Petitioner No.1, who was looking for business opportunity to invest in. Accordingly, Petitioner No.1 and Respondent entered into Memorandum of Understanding dated 1 September 2012, under which it was agreed to form a partnership. Petitioner No.1 agreed to bring in necessary funds, whereas Respondent No.1 was to bring in

her expertise in software industry. Accordingly, Petitioner No.1 and Respondent executed Limited Liability Partnership Agreement dated 16 October 2012 (**LLP Agreement**) and this is how Petitioner No.2 was incorporated and registered as Limited Liability Partnership firm (**LLP**) on 4 October 2012. It appears that in addition to Petitioner No.1, another limited liability company was incorporated in the United Arab Emirate in the name of 'Universal Test Solutions LLC' (**LLC**). The LLC was to obtain orders and do marketing for the LLP. Petitioner No.1 invested Rs.3,05,00,000/- in a staggered manner in the business of the LLP.

3) Disputes arose between Petitioner No.1 and Respondent No.1 and parties made allegations and counter allegations against each other with regard to management of the affairs of LLP. In the above background, Petitioner No.1 addressed legal notice dated 5 April 2016 expelling the Respondent from the LLP. The Respondent disputed the allegations by letter dated 31 May 2016 and invoked arbitration clause contained in the LLP Agreement. Petitioner No.1 thereafter took control of the LLP and removed the name of the Respondent from the records of Registrar of Companies, bank accounts, etc. The Respondent filed Arbitration Petition No.55 of 2016 under Section 11 of the Arbitration Act for appointment of an Arbitrator. By order dated 14 October 2016, this Court constituted Arbitral Tribunal comprising of the learned sole Arbitrator.

4) Respondent filed Statement of Claim challenging her expulsion, seeking reinstatement as partner of LLP and damages of Rs.50,00,00,000/-. The Respondent also sought injunction against

Petitioners from infringing the registered trademark and from dealing with assets and properties of the LLP. In addition to resisting the claim of the Respondent, Petitioners filed counterclaim seeking amounts of Rs. 42,50,00,000/- and 44,01,27,925/- from the Respondent *inter alia* towards losses suffered, expenditure incurred, service tax liability and loss of revenue. The Respondent resisted the Petitioners' counterclaim. The Arbitral Tribunal framed issues, both in the claim of the Respondent and counterclaim of the Petitioners. On behalf of the Respondent, her husband was examined as CW1. Petitioner No.1 examined himself as RW1. The Tribunal thereafter proceeded to make Award dated 31 July 2019 holding that expulsion of the Respondent from LLP was legal and valid. The Arbitral Tribunal rejected all the claims of the Respondent. However, instead of awarding the sums demanded in the counterclaim, the arbitral Tribunal has directed repayment of only Rs.6,42,684/- by Respondent, which was found to have been wrongfully transferred from the account of LLP in the joint account of the Respondent and her husband. The Respondent is further directed to pay costs of arbitration to the Petitioners. As observed above, the Respondent has not challenged the Arbitral Award despite rejection of her claims. Only Petitioners have challenged the Arbitral Award to the extent of non-award of the counterclaims.

5) Mr. Purohit, the learned Senior Advocate appearing for the Petitioners would submit that the Arbitral Tribunal has grossly erred in not awarding the counterclaim of the Petitioners despite it being fully proved that Respondent's husband has siphoned off monies from LLP, stolen clients and business of the LLP and acted

against the interest of LLP. That the very reason for expulsion of the Respondent from the LLP was on account of her own acts and those of her husband in acting against the interest of LLP. He would therefore submit that once fraudulent conduct of Respondent and her husband got proved, the Arbitral Tribunal ought to have awarded damages to the Petitioners arising out of their fraudulent conduct. He would invite my attention to the findings recorded by the Arbitral Tribunal in paragraph 147 of the Award, in which it is held that the contents of the paragraph 33 of Affidavit of Evidence is proved by the Petitioners. He would further submit that in paragraph 33 of the said Affidavit of Evidence, the Petitioners had produced *inter alia* the details of new confirmed business provided by the Respondent for the year 2016-17 with figures of confirmed revenue and anticipated revenue. That once contents of paragraph 33 of Affidavit of Evidence are held to be proved, grant of counterclaim of loss of profit was imminent. However, the Arbitral Tribunal has erroneously proceeded to hold that the Petitioners failed to produce evidence of damages on account of loss of profit.

6) Mr. Purohit would further submit that the documents of 'new confirmed business' prepared by the Respondent has been proved in evidence. The anticipated revenue figures were projected by the Respondent. However, since the Respondent and her husband acted against the interest of LLP, the anticipated revenue could not be generated. Thus, non-earning of anticipated revenue projected by the Respondent would naturally constitute loss for the Petitioners. That therefore the Arbitral Tribunal ought to have awarded loss of profit for the purposes of anticipated revenue figures projected by the

Respondent. Without prejudice, he would submit that the confirmed revenue figures indicated in the said document represented the incoming revenue from the existing clients of the LLP. That therefore the claim of loss of business at least ought to have been allowed on the basis of confirmed revenue figure of USD 8,71,826. Mr. Purohit would submit that the Arbitral Tribunal itself has recorded a finding in paragraph 149 that the profits of the LLP were in the range of 3% to 10% of the revenue. He would therefore submit that going by the findings of the Arbitral Tribunal, the loss of profit @ 10% ought to have been awarded at least on the confirmed revenue figures. He would submit that the Arbitral Tribunal has committed patent illegality in considering the figures in existing balance sheet without appreciating the position that the Respondent and her husband were responsible for bringing in the revenues of the LLP.

7) Mr. Purohit would further submit that the Arbitral Tribunal's refusal to adjudicate the issue of ownership of software product is against the public policy of India. That the Arbitral Tribunal has erroneously refused to adjudicate issue of ownership and LLP's entitlement to exclusively use the software. He would submit that the dispute amongst the parties is not about infringement of copyright. The issue is about the Respondent and her husband continuing to use and profiteer from software product falling in the ownership of LLP. He would take me through the covenants of MoU and LLP as well as through balance sheets to demonstrate that upon formation of the LLP, the title in the software product has passed on to the LLP. He would submit that the Arbitral Tribunal was called upon to adjudicate the dispute as to whether the Respondent and her

husband could continue to use software product after expulsion of the Respondent. He would submit that the LLP was formed in such a way that only contribution of the Respondent in the LLP was the software product whereas contribution by Petitioner No.1 was in the form of investment of Rs.3.50 crores. That the software product has become property of LLP and that therefore the Arbitral Tribunal ought to have granted prayer clause (h) in the counterclaim by restraining the Respondent and her husband from utilising the software 'TestMagic'. Mr. Purohit would accordingly pray for setting aside the arbitral Award to the extent of non-award of counterclaims relating to damages and injunction against the Respondent and her husband from utilising the software 'TestMagic'.

8) Mr. Shah, the learned counsel appearing for the Respondent would oppose the Petition submitting that the Arbitral Tribunal has passed a well-considered decision after taking into consideration the entire material on record. That the view expressed by the Arbitral Tribunal is a plausible view and that this Court cannot be urged to take a different view. That attempt of the Petitioners is to drive this Court into the realm of re-appreciation of evidence, which is not the scope of powers under Section 34 of the Arbitration Act. Mr. Shah would submit that the Arbitral Tribunal has rightly refused to allow counterclaim of the Petitioners under any of the heads as per the particulars in Exhibit-9 of the counterclaim. That Petitioners had claimed imaginary figure of Rs. 40 crores towards loss of revenue without pleading any material in support thereof. That the Arbitral Tribunal has rightly arrived at a conclusion that there are no pleadings as well as no evidence to prove actual loss of business or

damages on account of any of the acts of the Respondent or her husband. He would submit that the Petitioners themselves relied on statement of accounts indicating the incurring of losses by the LLP. Having itself approached the Arbitral Tribunal with the case of losses in the operation of LLP, raising of claim of loss of profit of Rs.40 crores by the Petitioners was itself bogus and has rightly been rejected by the Arbitral Tribunal. That the learned Arbitrator has recorded detailed reasons in support of his conclusion that no profits would have been generated on execution of contracts with SLK, Etisalat, NBF or 4M. That the major component of the alleged confirmed revenue figures was from SLK (USD 5,00,000) and the Arbitral Tribunal has recorded a finding of fact that no evidence was produced in support of claim of loss of business opportunity or revenue loss on account of any of the actions by the Respondent affecting relationship with SLK. He would submit that the Arbitral Tribunal has rightly noted that the Petitioners continued their business with SLK resulting in arbitral proceedings against SLK. He would therefore submit that no interference is warranted in the impugned Award rejecting the claim of loss of profit. Relying on judgment of *M/s. Uniobros V/s. All India Radio*¹ Mr. Shah would contend that claim for damages can never be awarded in absence of credible evidence.

9) So far as counterclaim of Petitioners to restrain the Respondent from using the software TestMagic is concerned, Mr. Shah would submit that the Arbitral Tribunal has rightly not entered into adjudication of disputes relating to ownership of copyright. That

¹ 2023 INSC 931

the Arbitral Tribunal has also recorded a finding of fact of absence of any evidence to indicate that same software of LLP is taken away by the Respondent or by her husband. That the Arbitral Tribunal has rightly recorded the findings of absence of pleadings and evidence to demonstrate that access to the software TestMagic was only through domain name and that the same was being accessed by the Respondent or by her husband. Mr. Shah would accordingly pray for dismissal of the Petition.

10) Rival contentions of the parties now fall for my consideration.

11) The arbitral proceedings were initiated at the behest of the Respondent, who got aggrieved on account of her expulsion from LLP by Petitioner No.1 vide notice dated 5 April 2016. Petitioner No.1 and Respondent initially entered into MoU dated 1 September 2012, which described Petitioner No.1 as having business background and possessing necessary financial acumen and business knowledge, whereas the Respondent is described as a software engineer having domain knowledge of software business. Petitioner No.1 and the Respondent agreed to form LLP with 50-50% share in the profit and loss. The MoU shows that the Respondent was already carrying on business of software development, which was taken over by LLP together with intellectual property (IP) rights in the software developed by the Respondent. There is no dispute to the position that Petitioner No.1 brought in the initial investment. There appears to be some dispute regarding the exact amount invested by Petitioner No.1 as Respondent claims investment amount of Rs.3,05,00,000/-,

whereas Petitioner No.1 claims investment of Rs.3,50,00,000/- in the LLP. It is not necessary to delve deeper into this aspect. However, the broad arrangement between the parties appears to be that Respondent brought in the LLP software developed by her and husband, whereas Petitioner No.1 brought in the capital investment. The LLP Agreement was entered into on 16 October 2012 and Petitioner No.2 was incorporated and registered as LLP on 4 October 2012. Disputes arose between the parties in the year 2016, which led to issuance of notice dated 5 April 2016 by Petitioner No.1 expelling the Respondent from the LLP.

12) Before the Arbitral Tribunal, the main grouse of the Respondent was with regard to her expulsion and she sought reinstatement as a partner in the LLP in addition to claiming damages of Rs.50 crores from Petitioners. The Respondent also sought injunction against the Petitioners from using or infringing the registered trademark 'Test Magic an Innovative Test Solution'. On the other hand, Petitioners raised counterclaim in the sum of Rs.42,50,00,000/- against the claimant in terms of the following particulars:-

Exhibit-"8"

Particulars of Claim

Sr.No.	Particulars	Amount
1	Investment made by the Claimant No.1	3,50,00,000
	Interest on investment at the rate of 10% p.a. from the time of investment till payment and/or realisation	
2.	Damages for loss of Goodwill, reputation.	13,00,00,000
3.	Damages for loss of business opportunity. (based on revenue	20,00,00,000

	generation projected by the Respondent fro the financial year 2016-17)	
4.	Damages for mental agony and trauma suffered by the Claimant No.1	5,00,00,000
	Total	42,50,00,000

13) Petitioners also claimed further amount of Rs.44,01,27,925/- from the Respondent in terms of following particulars

Exhibit- “9”

Particulars of Claim

Sr.No.	Particulars	Amount
1	Total loss suffered at the year ending on 31 st March, 2016(without interest)	2,76,86,335
2.	Expenditure incurred by accommodating employees in Bangalore	12,91,590
3.	Expenditure incurred at premises unnecessarily obtained on leave and license basis at Pune	51,50,000
4.	Service tax Liability of the Claimant No.2 (excluding interest)	60,00,000/-
	Together with interest on entries in point 1 to 4 hereinabove at the rate of 18% p.a. with effect from 1 st April, 2016 till payment and/or realisation	
4.	Loss of revenue of Claimant No.2 (based on revenue generation projected by the Respondent for the financial year 2016-17)	40,00,00,000/-
	Total	44,01,27,925/-

14) Petitioners also sought injunction against the Respondent and her husband from using the software ‘TestMagic’ claiming its ownership by the LLP.

15) In the impugned Award, the Arbitral Tribunal has upheld expulsion of the Respondent vide notice dated 5 April 2016. It is not necessary to go into the reasons adopted by the Arbitral Tribunal for upholding the expulsion of the Respondent from the LLP as she has not challenged her expulsion. Suffice it to note that the Arbitral Tribunal has recorded findings against Respondent and particularly against her husband of siphoning off funds, acting fraudulently using the LLP's funds for private purposes as well as making attempts to poach the clients of LLP. The Respondent has chosen not to challenge the Award upholding her expulsion from the LLP. The findings of siphoning off monies, acting fraudulently, poaching the clients, etc. have thus attained finality.

16) The grievance of the Petitioners is that despite recording scathing findings against the Respondent and her husband of acting against the interest of LLP, their counterclaims have not been allowed by the Arbitral Tribunal. I have already reproduced particulars of two counterclaims raised by the Petitioners in the sum of Rs.42.50 crores and Rs.44.01 crores (which included claim for loss of profits of Rs. 40 crores). Before me, what is mainly pressed is counterclaim of Rs. 40 crores for loss of revenue. Rest of the counterclaims are not strenuously pressed before me.

17) From the submissions of Mr. Purohit, it is clear that only two objections to the impugned Awards are urged before me. Firstly, it is contended that the Arbitral Tribunal ought to have allowed counterclaim of loss of revenue of Rs.40 crores or at least in some

reasonable sum. Secondly, he urged that the Arbitral Tribunal ought to have granted prayer clauses (h) and (i) of the counterclaim, which related to the right to use the software 'TestMagic'. Prayer clauses (h) and (i) of the counterclaim are extracted below:-

(h) This Hon'ble Tribunal be pleased to pass an order of permanent injunction restraining and/or prohibiting the Respondent or any other person claiming thorough or under her including but not limited to her husband Mr. Brajesh Kumar from in any manner directly and/or indirectly utilizing, copying, transmitting, communicating, selling transferring, sharing, and/or in any other manner divulging and/or dealing with and/or creating any third party right, title and/or interest of any nature whatsoever in the 'TestMagic' software, its source code and/or any other component thereof.

(i) This Hon'ble Tribunal be pleased to pass an order of permanent injunction restraining and/or prohibiting the Respondent or any other person claiming thorough or under her including but not limited to her husband Mr. Brajesh Kumar from in any manner directly and/or indirectly utilizing, dealing with and/or creating any third party right, title and/or interest of any nature whatsoever in the intellectual property rights associated with the 'TestMagic' software, especially the use of the trademark "Test Magic An Innovative Test Solution" and/or any other mark identical or deceptively similar to same;

18) So far as the first objection of non-award of claim for loss of revenue /profits is concerned, the same is based essentially on the document at Annexure E-7 to the Affidavit of Evidence of RW1(Petitioner No.1). This is clear from the description '*(based on revenue generation projected by the Respondent for the financial year 2016-17)*' in the particulars of the counterclaim. The said document at Annexure E-7 reads thus:-

2016-2017		
New Confirmed Business		
Customer	Revenue Confirmed	Revenue

		Anticipated
4M	36000	0
OIC	0	54000
Arab Bank	0	25000
etisalat	294921	200000
Quinnox	0	150000
SLK	500000	0
NBF	40905	161985
	871826	590985
		1462811
		Target- 4 to 6 MSUD

19) In paragraph 33 of the Affidavit of Evidence, Petitioner No.1 had stated as under:-

33. I say that for the financial year 2016-2017, the Respondent No.2 was eyeing a revenue generation of USD 4 to 6 million as per the projections made by the Claimant. Out of the said revenue, about USD 1 million was guaranteed from clients' such as 4M, Etisalat, SLK, National Bank of Fujairah whereas the balance was anticipated through new business leads. However, in furtherance of the fraud and malpractices, the Claimant diverted these clients to a firm in which Mr.Brajesh Kumar has acquired certain interest, which resulted in loss of business opportunity for the Respondent No.2. I say that the Claimant had herself prepared a target revenue generation table of Respondent No.2 for the financial year 2016-2017. I say that in or about January 2016 during a meeting held between Brajesh Kumar, the Claimant, myself, Mr. Anil Khosla, Mr. Suresh Khosla and Mr. Pawan Khosla in Sadguru Restaurant, Chembur, Mumbai, the Claimant had handed over the aforesaid target revenue generation table of Respondent No.2 for the financial year 2016 - 2017 to me. The said table prepared by the Claimant contained the names of the customers of Respondent No.2, the revenue which was purportedly confirmed for the year 2016 - 2017 and revenue which was anticipated for the year 2016-2017. The said table further showed the target of Respondent No.2 for the year 2016 - 2017 as 4 to 6 Million USD. I produce herewith the original target revenue generation table of Respondent No.2 which is annexed as Annexure- 7 herewith and a copy whereof is annexed at page No. 121 as Exhibit - 7 to the Counter Claim. I say that the said original table was handed over by the Claimant to me in the aforesaid meeting held in the month of January 2016 and I was personally present in the said meeting and the same be marked as an Exhibit and read in evidence.

20) The Arbitral Tribunal has held in paragraph 147 of the Award that *‘Having considered all of the above, facts and circumstances, I am of the view that the facts stated in paragraph 33 of the Affidavit in lieu of examination in chief have been proved by the Respondents.’* On the basis of above findings recorded by the Arbitral Tribunal, it is strenuously contended by Mr. Purohit that Petitioners proved the figures of confirmed revenue and anticipated revenue and that therefore, the claim of loss of revenue ought to have been granted by the Arbitral Tribunal. This contention raised on behalf of the Petitioners appears to be misconceived. What actually is proved is preparation of the concerned document at Annexure E-7 and presentation of the figures of confirmed revenue and targeted revenue for the financial year 2016-17 by her to Petitioner No. 1. This would not mean that Petitioners have established the actual revenue figures or projected revenue figures. Mere establishment of presentation of the concerned document at Annexure E-7 did not dispense with the requirement of proving the losses actually caused to Petitioner No. 2-LLP due to any of the acts of the Respondent. Respondent may have represented to the Petitioner No. 1 that during FY 2016-17, the LLP is likely to have confirmed and projected business of indicated figures. However, this does not mean that Respondent’s actions resulted in the LLP not achieving the said figures. For proving so, adducing of evidence was required. To illustrate, for proving non-achievement of ‘confirmed revenue’, Petitioners ought to have led evidence about the existing clients, who stopped the work with the LLP due to any action of Respondent. Similarly, to prove loss of ‘projected revenue’, Petitioners ought to

prove the loss of anticipated clients with figures of revenue they could have earned for the LLP and how Respondent's actions resulted in loss of those clients. Therefore, mere proof of the Respondent presenting the figures of confirmed and projected revenue did not absolve Petitioners of need of leading evidence to prove cause of loss.

21) In fact, the very counterclaim of Rs. 40 crores raised by the Petitioners was towards 'loss of revenue of Claimant No.2'. 'Loss of revenue' does not automatically become 'loss of profit' as it is not even Petitioners' case that entire revenue earned would have automatically become profits for the LLP. Furthermore, the description of claim of 'loss of revenue' of Rs.40 Crores was indicated as '*based on revenue generation projected by the Respondent for the financial year 2016-17*'. Thus the whole of figure of projected revenue was claimed from Respondent. The counterclaim was thus totally misconceived and deserved rejection considering the manner in which the same was raised.

22) In the counterclaim, Petitioners raised following vague pleadings in paragraph 9 in support of its claims for Rs.42.5 crores and Rs. 44.01 Crores:

9. The Claimant No. 1 has not only suffered huge loss on its investment of Rs 3.5 crores in the Claimant No. 2 but has also suffered loss of business opportunity, goodwill and reputation on account of the illegal acts of the Respondent in poaching employees and customers of the Claimant No. 2. This despite the fact that the Claimant No.1 put his heart and soul in to the business of the LLP, keeping all his other, business interests on the back burner and made significant contribution to the growth, development of the TestMagic software. The conduct of the Respondent has also caused significant mental trauma and agony to the Claimant No. 1 being a victim of systematic fraud and

breach of trust played by the Respondent and her husband. The Claimant No.2 on the other hand has suffered tremendous loss of revenue and incurred huge financial losses on account of the fraudulent conduct and malpractices on part of the Respondent in mismanaging the affairs of the Claimant No. 2. It is evident from the aforesaid facts and circumstances as also a mere perusal of books of accounts of the Claimant No. 2 for the financial years ended 31st March, 2013 to 31st March, 2016 that the Respondent who was in charge and responsible for the day to day affairs of the Claimant No. 2 has connived with her husband Mr. Brajesh Kumar and has defrauded and caused wrongful loss to the Claimants. It is therefore just and necessary and in the interest of justice that the Respondent is directed to pay the Claimant No. 1 an amount of Rs. 42,50,00,000/- as per the particulars of claim annexed and marked as Exhibit "8" or such other amount as this Hon'ble Tribunal deems fit to be due and payable to the Claimant No. 1, towards the entire business loss suffered and reflected in the books of accounts of the Claimant No. 2, loss of business opportunity, goodwill, reputation, capital invested in the Claimant No. 2 together with interest thereon, mental trauma and agony suffered by the Claimant No. 1 on account of the fraud and breach of trust committed by the Respondent. **It is also just and necessary and in the interest of justice that an award be passed directing the Respondent to pay the Claimant No. 2 an amount of Rs. 440127925/- as per particulars of claim at Exhibit "9" or such other amount as this Hon'ble Tribunal deems fit to be due and payable to the Claimant No. 2 towards loss of revenue, goodwill, reputation on account of the fraud and breach of trust committed by the Respondent as aforesaid.**

(emphasis and underlining added)

23) Thus, why and how the figure of Rs.40 crores was claimed in the counterclaim has not been pleaded in any manner. Beyond describing the said figure of Rs.40 crores as loss of revenue, based on revenue generation projected by the Respondent for one financial year, no particulars were pleaded as to why said sum was claimed by the Petitioners. Thus there are no pleadings in the counterclaim to support the demand of Petitioners of sum of Rs. 40 crores towards loss of revenue.

24) Having held that Petitioners proved presentation of confirmed and projected revenue figures by Respondent, the Tribunal proceeded to examine as to whether Petitioners adduced evidence in support of proof of damages suffered by them. The Tribunal proceeded to reject the claim of loss of business opportunity based on projected figures by holding in paragraph 148 as under:-

148. With respect to the proof of the damages caused to the Respondents on account of loss of business opportunity /revenue, the Respondents have relied upon the table at Exhibit R-75, which was furnished by CW-1 to Respondent No.1. The table contains two kinds of revenue for the year 2016-17. One is revenue confirmed and the other is revenue anticipated. Over and above these two types of revenues which aggregate to 1.46 million approximately, a target revenue of USD 4 to 6 million has been set out in this table. Though it is relevant that this table was handed over by the Claimant to Respondent No.1, in my view, in the absence of evidence, anticipated revenue and target revenue cannot be awarded as damages. A reasonable nexus between the act and the damage caused must be shown. The Respondents have not produced any material whatsoever, from their end to substantiate, in what manner would the anticipated revenue be achieved or what was the basis of the target revenue of USD 4 to 6 million. There is absolutely no evidence at the Respondents' end with respect to any deal between these parties in consideration, or the steps which were being taken by the Respondents towards the same. In my view, the portions of the anticipated revenue and target revenue cannot be said to be proved only because CW-1 had at some point of time made a representation that the same could be achieved. Only on this count, the same cannot be awarded as damages as the same are on the basis of hypothetical anticipated revenue and target projection.

25) I am in complete agreement with the above findings recorded by the Arbitral Tribunal as Petitioners failed to produce any material to indicate as to how the anticipated revenue figures were possible of being achieved. They did not lead any evidence to prove

as to how it was possible to generate revenue figures reflected in the document at Annexure E-7. Beyond producing the document at Annexure E-7, Petitioners did not lead any evidence to demonstrate as to how the LLP was prevented from earning the anticipated revenue on account of actions of the Respondent / her husband. As observed above, mere establishment of Respondent's presentation of anticipated and projected revenues figure cannot be the basis for awarding any percentage of said figures as 'loss of profit/loss of business opportunity'. There is no evidence to establish that it was possible to achieve those revenue figures and that the acts of the Respondent prevented the LLP from earning the same.

26) Coming to the figure of 'revenue confirmed' in the document at Annexure E-7 the Arbitral Tribunal has held in paragraph 149 to 151 as under:-

149. As regards the revenue confirmed as appearing in the table, the Claimant has herself handed over the table reflecting such confirmed revenues. There was no explanation forthcoming from the Claimant with respect to the same. D to D The Respondents have claimed the entire revenue as damages. In my view, the entire revenue generated cannot be considered to be the damages caused. The damages that would be caused to Respondent No.2 would be the loss of projects as a result of the revenues lost. There is absolutely no evidence from the Respondents on the profit generated on the revenues being achieved. No submissions were made with respect to the profit potential of these revenues. If the previous financial statements on record are considered, the balance sheet on record for the year 2013-14, 2014-15, it appears that the profits that the Respondent No.2 made after incurring operating expenses was in the the range of 3% to 10% of the revenue. The net profit for the period FY 2014- 15 was Rs. 31,37,021/- when the sale /revenue was Rs. 3,70,58,018/-. Similarly, for the FY 2013-14, the net profit is shown as Rs. 5,70,310/- when the sale/revenue was Rs. 2,05,91,840/-. In fact, it is the Respondents' case that even these profits were actually not made by Respondent No.2 and that there was a net loss in these financial years of Rs. 2.5 crores (para 4 of SOD, para 30 of Affidavit of Evidence of RW-1). Further, this accumulated loss as on 31st March 2016, which was not

reflected in the preceding financial years was incorporated by the Respondents when Respondent No.1 appointed a new chartered accountant to file the return. What is interesting is to note that even for the FY2016-17 when the sale/revenue are shown to be Rs. 2,96,18,975/-, the expenses incurred as shown as Rs. 2,86,94,244/- thereby leaving a profit of only approximately Rs. 10,00,000/-. The loss, which the Respondents claim has not accounted for by the Claimant in the previous financial years is then, reflected in the balance sheet of Respondent No.2 for the FY 2016-17. Respondent No.1's case of capitalized losses as reflected in Exhibit R-74, is unclear and the cross examination in this regard shows that RW-1 did not have any personal knowledge with reference to the same. The Respondents have chosen not to lead the evidence of the chartered accountant. In these circumstances where negligible profits have been made in the preceding 3 financial years though revenues of approximately Rs. 3 crores were generated and considering the fact that the Respondents themselves claimed that even these negligible profits were not made and in fact losses of Rs. 2.76 crores were made, there is no evidence on record to show the profits generated had Respondent No.2 executed the contracts with SLK or even with Etisalat, NBF, 4M. The Respondents have chosen not to lead evidence in this regard. In my view, in the absence of any evidence, the Respondents cannot be granted any damages as claimed by them towards loss of business opportunity or revenue loss.

150. SLK was the only entity in respect of which there was an existing contract with Respondent No.2 (apart from Arab Bank where zero revenue was shown in the table) and the previous years statements showed negligible profits earned through this contract. In fact, according to the Respondents, there was a loss on the execution of the contract. The confirmed business from SLK for the year 2016-17 was USD 5 million. However, this was only the gross revenue generation which was confirmed and would not necessarily translate into profits for Respondent No.2. There is absolutely no evidence with respect to the co-relationship between revenue and profits.

151. Further, there are certain ongoing proceedings between SLK and Respondent No.2. Respondent No.1 was called upon to produce the said proceedings. Respondent No.1 was however refused to produce the same. In my view, in these circumstances, it cannot be said that Respondent No.2 did not enter into any subsequent contract with SLK or did not have any further dealings with SLK. The fact that Respondent No.1 refused to produce proceedings which were pending between the Respondents and SLK, adverse inference ought to be drawn and the loss of revenue as regards SLK is also rejected.

27) I am again in agreement with the above findings recorded by the Arbitral Tribunal in the light of absence of any evidence by the Petitioners to prove past history of profits on gross revenue. The Arbitral Tribunal has rightly considered the balance sheets for the financial years 2013-14 and 2014-15. The balance sheets indicated that the net profit for Financial year 2014-15 was only Rs.31,37,021/- as against total sale /revenue figure of Rs.3,70,58,018/-. Similarly, for the Financial Year 2013-14 the net profit was Rs.5,70,310/- against revenue collection of Rs.2,05,91,840/-. The Arbitral Tribunal has further considered statement made in paragraph 30 of the affidavit of evidence of Petitioner No.1 that the LLP had suffered huge losses as on 31 March 2016, which was not reflected in the preceding financial years. The Arbitral Tribunal has further taken note of the fact that for Financial Year 2016-17, the revenue collection was shown as Rs.2,96,18,975/- and profit figure of just Rs.10,00,000/-. Petitioners thus specifically pleaded and led evidence to prove cause of losses in the operations of the LLP. In the above circumstances, the Arbitral Tribunal is right in concluding that negligible profits were made by the LLP in the three financial years of its operations.

28) As observed above, in the present case, it was incumbent for Petitioners to lead specific evidence of cause of loss for claiming damages from the Respondent. It is well settled position of law that in absence of proof of cause of loss, the claim for damages cannot be entertained. Reliance by Mr. Shah on the judgment of the Apex Court in *M/s. Uniobros* (supra) in this regard is apposite, in which the Apex Court has held in paragraph 19 as under:-

19. The law, as it should stand thus, is that for claims related to loss of profit, profitability or opportunities to succeed, one would be required to establish the following conditions: first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability. On perusal of the records, we are satisfied that the fourth condition, namely, the evidence to substantiate the claim of loss of profitability remains unfulfilled in the present case.

29) In absence of specific evidence to prove sufferance of any loss by the LLP, the Arbitral Tribunal has rightly not awarded vague claim of 'loss of revenue of Rs.40 crores' in favour of the Petitioners.

30) Faced with the above difficulty, Mr. Purohit has raised an alternate plea that since the Arbitral Tribunal has itself recorded finding of profit potentiality of 3% to 10%, at least the claim of loss of profit @ 10% of 'confirmed business' figures ought to have been granted. I am unable to agree. The profit margin of 3% to 10% is for the Financial Years 2013-14, 2014-15. The same fell drastically by the year 2016-17 in which LLP made profit of just Rs.10,00,000/-. The Petitioners did not produce any evidence to indicate that earning of particular percentage of profit was possible through the operations. The Arbitral Tribunal was faced with a situation where it did not have any evidence before it for awarding the claim for loss of profits. On the contrary, Petitioners themselves pleaded the case of the LLP suffering losses through the operations. Though the Respondent is sought to be blamed for incurring of such losses, no evidence is produced as to how the acts of Respondent has resulted in such losses. Producing of figures of anticipated and targeted revenue was

not sufficient for sustaining the claim of loss of profits. Similarly mere establishment of Respondent and her husband acting against the interest of LLP was also not sufficient to award claim for damages. Petitioners ought to have walked a step further by leading evidence to demonstrate as to how the figures reflected towards confirmed and targeted revenue were achievable and how much profit therefrom could have been earned. In absence of any evidence before it, it was impossible for the Tribunal to award any claim for loss of profit.

31) This Court is not expected to re-appreciate the evidence, which is in the exclusive domain of the Arbitral Tribunal. By appreciating the evidence on record, the Arbitral Tribunal has arrived at a finding that sufferance of loss of profits by Petitioner No. 2 is not proved. No element of perversity can be traced in the said findings. The Arbitral Tribunal has taken a plausible view while denying the vague claim for loss of profit. Petitioners cannot urge that I should take different view by awarding at least 3%-10% amount on confirmed revenue figures, in absence of any tangible evidence of loss of profit being produced by the Petitioners. I am therefore not impressed by the first objection to the impugned Award raised by the Petitioners.

32) So far as the second objection relating to failure to adjudicate prayer for injunction in respect of software 'TestMagic' is concerned, the Arbitral Tribunal has held in paragraphs 153 to 158 as under:-

153. As regards the claim for damages to the tune of Rs. 3.5 crores, which was the amount allegedly invested by Respondent

No.1 in Respondent No.2, it is submitted that the Test Magic software which was the asset of Respondent No.2, for which such large investments were made, was taken away by CW-1/Claimant. The submissions were made to distinguish the ownership of the property i.e. the software vis-à-vis the ownership of the copyright in the software. The submissions proceeded on the basis /concession that the arbitrator would not have the jurisdiction to decide the ownership of the copyrights in the software, however, the arbitrator can decide the issue of ownership of the software itself. The Respondents have relied on clauses 12, 13 and 14 of the MOU to contend that the ownership of the software vested with Respondent No.2 and that the use of the product i.e. the software by CW-1/the Claimant after their expulsion was in violation of the property rights of Respondent No.2. The learned counsel for the Respondents relied upon law of Copyright and Industrial Designs by P. Narayanan, Fourth Edition more particularly paragraph 10.5, which draws a distinction between ownership of copyright and ownership of work.

154 I have considered the submissions on this aspect. In the present case, the Claimant has denied the Respondent No.2 is the owner of the software or the IP Rights associated thereto. The work on the software had commenced prior to the MOU and the LLP Agreement. The software was developed when CW-1 was a consultant of Respondent No.2 and the Claimant was a partner of Respondent No.2. To come to a conclusion that Respondent No.2 is the owner of the software would necessarily imply that the Intellectual Property rights associated with the same also belong to Respondent No.2. This is not a case of software licensing but of ownership of a software which was developed under certain terms and conditions. There would be questions as to who had developed the software and what was the nature of the owner's agreement with the authors. In the event the arbitrator gives any finding on the ownership of the software, the same would resultantly decide the ownership of the copyright in the software.

155. Further, in order to show that the property i.e. that very self same software which was available with Respondent No.2 was taken away by CW-1/the Claimant, it would be essential to plead and prove that, that very product was taken away by the Claimant /CW-1 and that Respondent No.2 is no longer in a position to access or use the software. These pleadings and evidence are admittedly absent. A case of simultaneous use of software or use of software by making copies of the same, would also enter into the realm of ownership of copyrights in the software.

156. CW-1 has admitted that he continues to access the domain name uts-global.com and that he has blocked the access of the

domain name, server, user name, passwords etc. to the Respondents. These questions were asked in the context of use of the email ids and not in the context of use of the software. There are no pleadings, evidence or cross examination to the effect that the access to the software is only through the domain name.

157. In the present case, the Claimant had filed an application under Section 17 inter alia for restraining the Respondents from using the trade mark /logo "Test Magic". The Respondents has raised an issue of jurisdiction of the arbitrator to decide issues with respect to infringement of intellectual property rights. The said issue was decided in favour of the Respondents and it was held that the arbitrator did not have jurisdiction to decide the issues with respect to infringement of intellectual property rights.

158. In my view, the submissions of the Respondents with respect to the property rights and property rights being distinguishable from intellectual property rights as a proposition are accepted. However, as stated above, in the absence of pleadings and evidence to show that in the present case also property rights can be distinguished from intellectual property rights, I am unable to make any observation with respect to the ownership of the software. As already stated, any observations with respect to the same would transgress the jurisdiction of the arbitrator and enter the realm of deciding issues with respect to ownership of intellectual property rights. Thus, I am refraining from giving any finding as regards the ownership of the property i.e. the software and the use of the software by way of copy or otherwise by the Claimant after the termination.

33) Adjudication of prayer clauses (h) and (i) in the counterclaim would require decision of issue of ownership of rights in the trademark of the software 'TestMagic' and Mr. Purohit has fairly conceded this position. There appears to be serious disputes between the parties with regard to ownership of the software 'TestMagic'. The Respondent claims ownership in the mark of the said software. She claims that the software is developed by her and by her husband. There are disputed issues of ownership of intellectual property rights in respect of the software. The rights arising out of ownership of the mark TestMagic would be rights in *rem* incapable of being resolved through private arbitration. The Arbitral Tribunal has

rightly restrained itself from adjudicating the dispute relating to ownership of the software. If Petitioners believe that LLP is the owner of the mark or label, they will have to file a suit to restrain Respondent/her husband from using, selling, marketing, licensing the same.

34) It is sought to be contended on behalf the Petitioners that ownership of the software can easily be deciphered from balance sheets of the LLP. I am afraid, the issue of ownership of rights in respect of software cannot be decided only on the basis of balance sheets prepared at the behest of the Petitioners. Petitioners have prepared the balance sheet of the LLP reflecting therein the asset of 'software development-TestMagic' valued at Rs.2,23,72,578/-. Whether the Respondent continues to own the mark in the software 'TestMagic' after execution of LLP or whether the ownership in the mark got assigned to LLP is something which cannot be decided in private arbitration as the rights in respect of the said mark are claimed against the whole world.

35) Even otherwise, the Arbitral Tribunal has recorded a finding of fact that the Petitioners were unable to prove that the same software is being used or licensed by the Respondent/ her husband. Specific finding of absence of pleadings or evidence in this regard is recorded. Again, the Arbitral Tribunal has held that adjudication of right to use software TestMagic or licence the same by making the copies, would amount to deciding the rights in *rem*. If Petitioners believe that they or any one of them are owners in respect of the software TestMagic and that the Respondent or her husband cannot

use license, make copies or sale the same to third parties, they will have to adopt necessary proceedings in that regard since issues relating to ownership of copyright are non-arbitrable as held by the Apex Court in *Booz-Allen & Hamilton Inc vs SBI Home Finance Ltd*² and *Vidya Drolia and Others Versus. Durga Trading Corporation*³. Therefore, even the second objection to the impugned Award fails.

36) Considering the overall conspectus of the case, I do not find that any of the grounds enumerated under Section 34 of the Arbitration Act are made out warranting interference in the impugned Arbitral Award. Petitioners have succeeded in getting the claims of the Respondent rejected. Her expulsion from the LLP is upheld and she is not granted any monetary claim. Petitioners are granted certain monetary claims. Their claim for loss of profit has rightly been rejected due to failure on their part to lead evidence. Petitioners have thus substantially succeeded in the arbitral proceedings. Petitioners have to blame themselves for rejection of counterclaim towards loss of profits. The issue of ownership of IP rights in the software is rightly not adjudicated by the Arbitral Tribunal.

37) The findings recorded in the Award are based on evidence on record and Petitioners have been unable to demonstrate an element of perversity therein. The Arbitral Tribunal has not travelled outside the contract between the parties. It has not foisted a new commercial bargain on the parties. Therefore, the Award cannot

² AIR 2011 SC 2507

³ (2021) 2 SCC 1

be said to be in conflict with public policy of India. There is no patent illegality in respect of any of the findings in the Award. The impugned Award, to my mind, appears to be unexceptionable.

38) The Arbitration Petition fails and is accordingly **dismissed**. Considering the facts and circumstances of the case, there shall be no orders as to costs.

[SANDEEP V. MARNE, J.]