IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF OCTOBER, 2026

PRESENT

THE HON'BLE MRS. JUSTICE ANU SIVARAMAN

AND

THE HON'BLE MR. JUSTICE T.P.VIVEKANANDA

COMMERCIAL APPEAL NO.305 OF 2024

C/W

COMMERCIAL APPEAL NO.331 OF 2024

IN COMAP No.305/2024

BETWEEN:

FLOVEL ENERGY PVT. LTD.
A COMPANY REGISTERED UNDER THE COMPANIES ACT, 1956
HAVING ITS CORPORATE OFFICE AT
VATIKA MINDSCAPES
SUITE NO.101-A
TOWER B, 12/3
MATHURA ROAD
FARIDABAD-121003
HARYANA
REPRESENTED HEREIN BY ITS
COMPANY SECERETARY
MR. KISHOR CHAUHAN

...APPELLANT

(BY SRI. PROMOD NAIR, SR. COUNSEL A/W
SRI. K.S. PRADEEP SKANDAN, ADV.)

Digitally signed by PAVITHRA N
Location: High Court of Karnataka

AND:

SLV POWER PRIVATE LIMITED
A COMPANY REGISTERED
UNDER THE COMPANIES ACT, 1956
HAVING ITS OFFICE AT:
YMK COMPOUND
ASHOK NAGAR
MANGALURU 575006
REPRESENTED THROUGH ITS DIRECTOR
MR. Y. ABDULLA JAVEED

…RESPONDENT

(BY SRI. DHYAN CHINNAPPA, SR. COUNSEL A/W
SRI. CYRIL PRASAD PAIS, ADV.)

THIS COMMERCIAL APPEAL IS FILED UNDER SECTION 13 (1A) OF THE COMMERCIAL COURTS ACT, 2015 READ WITH SECTION 37 OF THE ARBITRATION AND CONCILIATION ACT, 1996, PRAYING TO I) CALL FOR RECORDS IN COMAP. NO. 201/2023 ON FILES OF LEARNED LXXXIII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU (CCH-84) (COMMERCIAL COURT), AS WELL AS THE ARBITRAL RECORDS WHICH ARE PLACED BEFORE THE SAID COURT AND ETC.

IN COMAP NO. 331/2024

BETWEEN:

FLOVEL ENERGY PVT. LTD.
A COMPANY REGISTERED UNDER THE COMPANIES ACT, 1956
HAVING ITS CORPORATE OFFICE AT
VATIKA MINDSCAPES
SUITE NO.101-A
TOWER B, 12/3
MATHURA ROAD
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REPRESENTED HEREIN BY ITS
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…RESPONDENT

(BY SRI. DHYAN CHINNAPPA, SR. COUNSEL A/W
SRI. CYRIL PRASAD PAIS, ADV.)

THIS COMMERCIAL APPEAL IS FILED UNDER SECTION 13(1A) OF THE COMMERCIAL COURTS ACT, 2015 READ WITH SECTION 37 OF THE ARBITRATION AND CONCILIATION ACT, 1996, PRAYING TO CALL FOR RECORDS IN COM.A.A. NO.352/2023 ON FILES OF LEARNED LXXXIII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU (CCH-84)(COMMERCIAL COURT), AS WELL AS THE ARBITRAL RECORDS WHICH ARE PLACED BEFORE THE SAID COURT AND ETC.

THESE COMMERCIAL APPEALS HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 18.08.2026 AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **ANU SIVARAMAN J.,** PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MRS. JUSTICE ANU SIVARAMAN
and
HON'BLE MR. JUSTICE T.P.VIVEKANANDA

CAV JUDGMENT

(PER: HON'BLE MRS. JUSTICE ANU SIVARAMAN)

Commercial Appeals No.305/2024 and 331/2024 are filed seeking to set aside the judgments and orders dated 29.06.2024 passed by the LXXXIII Additional City Civil and Sessions Judge (CCH-84), Bengaluru ('Commercial Court' for short) in Com.A.P.No.201/2023 and Com.A.A.No.352/2023, respectively. In Com.A.P.No.201/2023, the Commercial Court allowed the petition filed by the respondent herein under Section 34 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act' for short), and set aside the Arbitral Award dated 14.09.2023. In the light of the same, the Commercial Court also dismissed the petition filed under Section 9 of the Arbitration Act in Com.A.A.No.352/2023.

2. We have heard Shri. Pramod Nair, learned Senior Counsel as instructed by Shri. K. S. Pradeep Skandan, learned Advocate appearing for the appellants in both the appeals and Shri. Dhyan Chinnappa, learned Senior Counsel as instructed by Shri. Cyril Prasad Pais, learned advocate appearing for the caveator/respondents in both the appeals.

3. The respondent and the appellant entered into a Supply Contract dated 20.05.2015, wherein the appellant undertook to design and supply electromechanical equipment for the respondent's project. It is contended that the respondent did not fulfill the contractual obligations which resulted in delays and also began defaulting on its payment obligations. The parties thereafter, executed a Memorandum of Understanding ("MoU" for short) dated 08.02.2018, which was in the nature of a one-time settlement affording the respondent an opportunity to clear its dues at a reduced sum. The MoU recorded the defaults alleged against the respondent under the Supply Contract and provided revised timelines for payment.

4. It is further contended that the respondent violated Clause 3 of the MoU by failing to pay the amount due, despite several reminders and opportunities to clear the payments. Therefore, the appellant issued a Demand Notice dated 20.07.2021 under Section 8 of the Insolvency and Bankruptcy Code, 2016 demanding payment of Rs.1,07,09,105/-, while expressly reserving its rights to

raise or revise its claims towards delays, damages, overheads, and interest as per applicable law. The respondent replied to the Demand Notice on 03.08.2021, by placing reliance on the original Supply Contract and disputing payment on the ground of the appellant's alleged failure to fulfil reciprocal obligations. The respondent did admit to an outstanding liability of at least Rs.98,25,510/-, without any corresponding payment being made. Thereafter, the appellant issued a Rejoinder Notice dated 21.10.2021 under Section 21 of the Arbitration Act, contending that it was no longer bound by Clause 3 of the MoU and was entitled to rescind the MoU and recover the entire original sum of Rs.2,48,30,815/- together with interest at 18% per annum and proposed the appointment of an Adjudicator. As on 21.10.2021, the appellant claimed that it was entitled to at least Rs.4.20 crores, with interest continuing to accrue. The respondent, in its reply dated 19.11.2021, disputed the enforceability of the MoU dated 08.02.2018 contending that it had been constrained to agree to its terms and that the MoU had not been executed of its own free will.

5. Pursuant to the invocation of arbitration, a three-member Arbitral Tribunal came to be constituted and held its first sitting on 11.03.2022. The appellant filed its Statement of Claim on 25.03.2022 quantified at over Rs.4,00,00,000/-, while the respondent by its Statement of Defence and Counter-Claim dated 15.09.2022, raised counter-claims quantified at Rs.1,50,00,000/- for alleged loss of revenue. The Arbitral Tribunal recorded the evidence adduced by the parties and passed a unanimous Arbitral Award dated 14.09.2023 holding that the appellant was entitled to a sum of Rs.3,75,44,030/- towards interest payable on delayed payments under the Supply Contract, together with a further sum of Rs.45,07,701/- towards the costs of the arbitration, with interest at the rate of 8.54% per annum on all sums awarded until the date of payment. The counter claim was dismissed.

6. The appellant filed a petition under Section 9 of the Arbitration Act along with an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908, as Com.A.A.352/2023, seeking a temporary injunction

restraining the respondent from alienating, mortgaging, dealing with, encumbering, transferring, creating third-party rights in, or parting with possession of its assets, to the extent of the awarded sum of Rs.4,20,51,731/- together with interest. Aggrieved by the Arbitral Award, the respondent filed a petition under Section 34 of the Arbitration Act before the Commercial Court, seeking to set aside the Award. On 29.06.2024, the Commercial Court, by the Impugned Judgment, allowed the Section 34 petition and set aside the Arbitral Award dated 14.09.2023, holding that it suffered from patent illegality.

7. The Commercial Court dismissed the respondent's other grounds of challenge namely, as to constitution of the Tribunal/jurisdiction, non-arbitrability and limitation but held that the Arbitral Tribunal had erred in awarding the claims to the appellant under the Supply Contract dated 20.05.2015 despite execution of the MoU dated 08.02.2018. The Commercial Court held that the case was covered by Section 62 of the Indian Contract Act, 1872, in that the parties had agreed to substitute a new contract (MoU) in place of the

original Contract, which accordingly stood novated and need not have been performed. As a consequence of the setting aside of the Award, the Commercial Court also dismissed the appellant's Section 9 petition in Com.A.A.352/2023, on the ground that no question of granting interim relief to secure the awarded amount would arise once the Award itself had been set aside. Aggrieved by the Impugned Judgments dated 29.06.2024, the appellant has preferred the present Commercial Appeals under Section 13(1A) of the Commercial Courts Act, 2015, read with Section 37 of the Arbitration Act.

8. The learned Senior counsel appearing for the appellants contends that the Commercial Court sat in appeal over the Arbitral Award rather than confining itself to the grounds available under Section 34 of the Arbitration Act. It is submitted that Section 34(2A) of the Arbitration Act expressly bars setting aside an award merely for an erroneous application of law or re-appreciation of evidence, and that "patent illegality" does not extend to a mere error of law by the tribunal. It is also contended that courts must

not interfere with an Arbitral Award in a "casual and cavalier manner," and that where two interpretations of a contract are plausible, the arbitrator's choice between them is not open to correction under Section 34 or Section 37 of the Arbitration Act.

9. It is further contended that a party alleging novation under Section 62 of the Indian Contract Act, 1872 must specifically plead the facts on which novation is founded, which was not done either before the Arbitral Tribunal or before the Commercial Court. Therefore, the Commercial Court erred in holding that there was novation of contract.

10. It is further contended that the respondent had throughout the arbitral proceedings and again in its Section 34 petition taken the specific stand that the MoU dated 08.02.2018 was unenforceable, being the product of undue influence and fraud. It is contended that the Commercial Court's finding of novation could not stand, since the very instrument said to have effected the novation was on the respondent's own contentions void. It is further contended

that the respondent could not be permitted to "approbate and reprobate", by disowning the MoU as fraudulent while simultaneously relying on it to contest the arbitrability and quantification of the appellant's claims and that the Commercial Court had disregarded this inconsistency.

11. It is further contended that even where a subsequent agreement (MoU) is treated as a fresh contract, the settled principle is twofold: (a) where a subsequent agreement cannot be performed or enforced owing to the default of the defaulting party, the claimant is not deprived of the benefit of the original agreement merely because a subsequent agreement was entered into; and (b) where both parties, in substance, reject the subsequent agreement and fall back on the earlier one, the earlier contract revives and becomes binding. It is further contended that even considering the respondent's case, findings on novation or alteration of a contract are questions of fact falling squarely within the Arbitral Tribunal's domain, and a court exercising jurisdiction under Section 34 of the Arbitration Act cannot

substitute its own view for a plausible view taken by the Tribunal.

12. It is further contended that the reasoning of the Commercial Court was internally inconsistent, as on one hand, it held that execution of the MoU resulted in novation of the Supply Contract under Section 62 of the Indian Contract Act, yet on the other, it agreed with the Arbitral Tribunal's jurisdictional finding that any dispute arising out of the MoU was traceable to the original Supply Contract. It is therefore contended that these two findings could not co-exist and that this contradiction demonstrates the absence of any patent illegality in the Arbitral Award.

13. The learned senior counsel appearing for the appellant places reliance on the following decisions:-

- ***State of Maharashtra v. Hindustan Construction Company Ltd.,*** reported in ***(2010) 4 SCC 518;***
- ***Kanthamma Chandrashekhar & Anr. v. Rohan Housing Private Limited & Ors.,*** reported in ***2019 SCC OnLine Kar 3522;***
- ***Union of India v. Mago Constructions Pvt. Ltd.,*** reported in ***2026 SCC OnLine Del 166;***

- ***Prakash Industries Ltd. v. Bengal Energy Limited & Anr.,*** reported in ***2020 SCC OnLine Cal 971;***

- ***Chhogalal v. Kanayalal,*** reported in ***1958 SCC OnLine Raj 16;***

- ***Mausumi Bhattacharjee v. Jumbo Chemicals & Ors.,*** reported in ***2024 SCC OnLine NCLAT 2573;***

- ***Shrimoni Gurdwara Committee v. Jaswant Singh,*** reported in ***(1996) 11 SCC 690;***

- ***UHL Power Company Limited v. State of Himachal Pradesh,*** reported in ***(2022) 4 SCC 116;***

- ***Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking,*** reported in ***(2023) 9 SCC 85;***

- ***Dr. Sasidaran v. India Cements Capital Limited & Ors.,*** reported in ***2010 SCC OnLine Mad 6038;***

- ***Reliance Industries Ltd. v. Gail (India) Ltd.,*** reported in ***2020 SCC OnLine Del 2041;***

- ***United Bank of India v. Ramdas Mahadeo Prashad & Ors.,*** reported in ***(2004) 1 SCC 252;***

- ***Chrisomar Corporation v. MJR Steels Private Limited and Anr.,*** reported in ***(2018) 16 SCC 117;***

- ***Manohur Koyal v. Thakur Das Naskar,*** reported in ***MANU/WB/0010/1888;***
- ***Phani Bhusan Gupta v. Sm. Mira Roy,*** reported in ***1986 SCC OnLine Cal 73;***
- ***M. Farisa Begum & Ors., v. Smt. Syed M. Fathima & Anr.,*** reported in ***1990 SCC OnLine Ker 116;*** and
- ***Steel Authority of India Ltd. v. Union of India & Ors.,*** reported in ***(2006) 12 SCC 233.***

14. The learned senior counsel appearing for the respondent contended that the appellant had itself failed to supply, install, and commission the E&M equipment within the stipulated time and that this delay, was not due to any default of the respondent. It is contended that the MoU was not executed of the respondent's free will but was itself the product of undue influence and fraud. It is further submitted that the MoU contained no arbitration clause, was an agreement entirely independent of the Supply Contract, and that any claim to enforce its terms lay before a civil court of competent jurisdiction, and the Arbitral Tribunal had no jurisdiction to grant relief founded on the MoU at all.

15. It is further contended that if the claim rested on the Supply Contract, it ought to have been raised within three years of 20.05.2015 and was therefore time-barred and that even if founded on the MoU, the three-year period expired on 07.02.2021, before the Section 21 notice of 21.10.2021. It is further contended that the Chairman, Institution of Engineers (India) as opposed to the Chairman, Institution of Engineers, Bengaluru, who alone was empowered under Clauses 6.1 and 6.2 of the Supply Contract. Further, the contractually mandated pre-arbitral step of appointing an Adjudicator was never undertaken, as the appellant had proceeded straight to nominating an arbitrator without following this procedure, therefore the Arbitral Tribunal was illegally constituted and without jurisdiction to adjudicate the dispute at all.

16. It is further submitted that the transformers and diesel generators supplied did not meet the specifications needed to run all three turbine generators simultaneously, causing the respondent an alleged revenue loss of approximately Rs.1.5 crore from August 2021 onward. It is

contended that the Arbitral Tribunal wrongly declined to appoint a court commissioner to assess the defects. It was further contended that the Arbitral Tribunal erred in dismissing the respondent's counter-claim solely for non-payment of arbitration fees, thereby denying the respondent an opportunity to lead evidence on its counter-claim.

17. The learned Senior counsel appearing for the respondent has placed reliance on the following judgments:-

- ***J.C. Budhraja v. Chairman, Orissa Mining Corporation Ltd. and Another,*** reported in ***(2008) 2 SCC 444;***

- ***Union of India v. Kishorilal Gupta & Bros.,*** reported in ***1959 SCC OnLine SC 6;***

- ***State of Chhattisgarh & Anr., v. Sal Udyog (P) Ltd***., reported in ***(2022) 2 SCC 275;*** and

- ***Gimpex Private Limited v. Manoj Goel,*** reported in ***(2022) 11 SCC 705.***

18. Having considered the contentions advanced, we notice that three questions had been raised for consideration before the Commercial Court. The preliminary question was with regard to the jurisdiction of the Arbitral Tribunal to

adjudicate the dispute between the parties. The question of limitation applicable to the claims and thirdly the effect of the MoU dated 08.02.2018 upon the Supply Contract dated 20.05.2015 and the legality of the arbitral proceedings were also raised apart from the questions of fatcs. All the 3 questions were found in favour of the claimant by the Arbitral Tribunal, and the first two questions were found in favour of the claimant by the Commercial Court as well. It was only on the third question that the award has been set aside by the Commercial Court, on a finding that the issue of Novation of contract had not been considered by the Arbitral Tribunal.

19. We notice from the pleadings and materials on record that the initial contract between the parties was the Supply Contract entered into on 20.05.2015. The said contract provided a mechanism for settlement of disputes as well as for arbitration. Clause 6.1.1 provided that, if any dispute arises between the employer and the contractor in connection with or arising out of the contract, the parties

shall seek to resolve such dispute by mutual consultation and on failure thereof, the dispute shall be referred in writing by either party to the adjudicator with a copy to the other party. It is clear that there is no named adjudicator as provided in the contract. Thereafter, Clause 6.2 provides that if either the employer or the contractor is dissatisfied with the adjudicator's decision, or if the adjudicator fails to give a decision within 28 days of the dispute being referred to him, then either the employer or the contractor may within 56 days of such reference, give notice to the other party with a copy for information to the adjudicator of the intention to commence arbitration.

Clause 6 of the Supply Contract, reads as under:-

> "*6. Settlement of Disputes*
>
> *6.1 Adjudicator*
>
> *6.1.1 If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity or termination, or the execution of the Facilities—whether during the progress of the Facilities or after their completion and whether before or after the termination, abandonment or breach of the Contract—the parties shall seek to*

resolve any such dispute or difference by mutual consultation. If the parties fail to resolve such a dispute or difference by mutual consultation, then the dispute shall be referred in writing by either party to the Adjudicator, with a copy to the other party.

6.1.2 The Adjudicator shall give his decision in writing to both parties within twenty-eight (28) days of a dispute being referred to him. If the Adjudicator has done so, and no notice of intention to commence arbitration has been given by either the Employer or the Contractor within fifty-six (56) days of such reference, the decision shall become final and binding upon the Employer and the Contractor. Any decision that has become final and binding shall be implemented by the parties forthwith.

6.1.3 The Adjudicator shall be paid a daily fee at the rate of Rs. 6000.00 plus reasonable expenditures incurred in the execution of his duties as Adjudicator, and these costs shall be divided equally between the Employer and the Contractor.

6.1.4 Should the Adjudicator resign or die, or should the Employer and the Contractor agree that the Adjudicator is not fulfilling his functions in accordance with the provisions of the Contract, a new Adjudicator shall be jointly appointed by the Employer and the Contractor. Failing agreement between the two within twenty-eight (28) days, the new Adjudicator shall be appointed at the request of either party by the Appointing Authority, i.e., The Chairman, Institution of Engineers, Bangalore.

6.2 Arbitration

6.2.1 If either the Employer or the Contractor is dissatisfied with the Adjudicator's decision, or if the Adjudicator fails to give a decision within twenty-eight (28) days of a dispute being referred to him, then either the Employer or the Contractor may, within fifty-six (56) days of such reference, give notice to the other party, with a copy for information to the Adjudicator, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given.

6.2.2 Any dispute in respect of which a notice of intention to commence arbitration has been given, in accordance with GCC Sub-Clause 6.2.1, shall be finally settled by arbitration. Arbitration may be commenced prior to or after completion of the Facilities.

6.2.3 Any dispute, controversy or claim arising out of, or relating to this contract or breach, termination or invalidity there of which has not become final and binding pursuant to G.C.C. Clause 6.1.2, shall be settled by arbitration by arbitral tribunal as under.

The arbitral tribunal shall have full power to open-up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Project Manager and any Recommendation(s) of the Adjudicator relating to the dispute.

(i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof.

The arbitral tribunal shall consist of three arbitrators, one each to be appointed by the Employer

and the Contractor and the third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the Chairman of the Institution of Engineers, Bangalore. For the purpose of this sub-clause, the term "Indian Contractor" means a Contractor who is registered in India and is a juridic person created under Indian law as well as a joint venture between such a Contractor and a Foreign Contractor.

(ii) In the case of a dispute with a foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. The arbitral tribunal shall consist of three Arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman of the Institution of Engineers, Bangalore. For the purposes of this Clause 6.2 the term "Foreign Contractor" means a Contractor who is not registered in India and is not a juridic person created under Indian law.

(iii) Neither party shall be limited in the proceedings before such tribunal to the evidence or

arguments before the Arbitrator for the purpose of obtaining its Recommendation(s) pursuant to Sub-Clause 6.2.2. No recommendation shall disqualify any Adjudicator from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

(iv) Arbitration may be commenced prior to or after completion of the Works provided that the obligations of the Employer, the Project Manager, the Contractor and the Adjudicator shall not be altered by reason of the arbitration being conducted during the progress of the Works.

(v) If one of the parties fail to appoint its arbitrator in pursuance of Sub-Clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Chairman of the Institution of Engineers, Bangalore, both in cases of foreign Contractors as well as Indian Contractors shall appoint the arbitrator. A certified copy of the order of the Chairman of the Institution of Engineers (India) making such an appointment shall be furnished to each of the parties.

(vi) Arbitration proceedings shall be held at Bangalore, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be in English.

(vii) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc., of its proceedings as

also the fees and expenses paid by the arbitrator appointed by such party or on its behalf shall be borne by each party itself.

(viii) The arbitrator(s) shall give reasoned award.

6.3 Notwithstanding any reference to the Adjudicator or arbitration herein,

(a) the parties shall continue to perform their respective obligations under the Contract unless they otherwise agree

(b) the Employer shall pay the Contractor any money, except for those in dispute, due to the Contractor."

20. The MoU dated 08.02.2018, records that the second party, that is, the claimant has raised certain monetary claims against the respondent herein as per the terms of the contract on account of balance money payable and that the respondent wishes to settle the claims of the second party and the parties therefore enter into the Memorandum of Understanding. It is therefore abundantly clear that the MOU is entered on a mutual understanding between the parties to resolve the disputes which have arisen between them arising out of the original Supply Contract dated 20.05.2015. It is an effort between the

parties to the initial contract to settle their differences which has given rise to the MOU dated 08.02.2018.

21. The respondent had taken up a contention with regard to the jurisdiction of the Tribunal and had filed a Section 16 application challenging the legality and validity of the constitution of the Arbitral Tribunal. It was contended that there is no arbitration clause in the MoU dated 08.02.2018. In the original contract, the parties had agreed for the appointment of an adjudicator either on mutual consent, failing which through the Chairman, Institution of Engineers Bangalore. It was contended that the name of Adjudicator was suggested by the claimant, it was not accepted by the respondent and therefore the authority to appoint the Adjudicator was vested in the Chairman Institution of Engineers, Bangalore. No such procedure having been followed, the claimant proceeded to initiate arbitration proceedings which is contended to be a violation of the contract. It is further contended that the Presiding Arbitrator also ought to have been appointed by the Institution of Engineers, Bangalore and his appointment is to

be certified by the Chairman Institution of Engineers, India. It is contended that since no appointment was made by the Institution of Engineers Bangalore, the appointment made by the Institute of Engineers, India is incorrect. The Tribunal considered the contentions and found that the respondent's jurisdictional challenge on the ground that the MOU does not contain an Arbitration Clause has to fail, in view of the fact that the claims flow directly from the Supply Contract dated 20.05.2015.

22. Further, it was found that the arbitration clause in the Supply Contract requires any dispute, controversy or claim arising out of or relating to this contract to be resolved for arbitration and the language being wide, the present disputes would fall under the ambit of the said clause. Further, it was found that the initial contract does not name an adjudicator and the claimant could not be expected to comply with a process that is inherently unworkable.

23. The further contention with regard to the appointment was also found against on the ground that the

contract only provided for appointment of an adjudicator by the Chairman, Institution of Engineers, Bangalore, if either an existing adjudicator dies or resigns, or if the claimant and respondent both felt that the adjudicator appointed had failed to fulfil its functions. It was found that this clause did not apply to a situation where no adjudicator was named in the contract. It was found that the said clause did not stand in the way of either party initiating arbitration. It was further found that the Constitution of the Arbitral Tribunal was perfectly legal and valid.

24. On the question of limitation also, the Tribunal found that there were several communications between the parties and part-payments had been made in pursuance to the contractual terms as late as on 08.06.2021 and there were acknowledgments in writing of the liability to make the payments in terms of the original Supply Contract. The Arbitral Tribunal found that the period of limitation was extended until at least 07.06.2024 and the claimant had initiated the arbitration on 21.10.2021, well within the period of limitation.

25. We find that the Commercial Court has upheld the findings of the Arbitral Tribunal on both these points, holding that any dispute arising out of the MoU would be ultimately traceable to the original supply contract which contains arbitration clause. On limitation, the Commercial Court held that the payment of Rs.50 lakh on 08.06.2021 extended the period of limitation under Section 19 of the Limitation Act and consequently rejected the contention that the claim was barred by limitation.

26. It is only on the question of novation that the Commercial Court has set aside the arbitral award. We notice that the question of novation, which was considered by the Commercial Court as a patent illegality to set aside the Award was never taken up specifically as a defence by the respondent before the Arbitrator. As regards novation, the terms of the MoU specifically refer to the supply contract and records as follows:-

> *"x x x x x*
>
> *WHEREAS the First Party had awarded a contract bearing no. SLV/AMHS/E&M-1/2015 dated 20.05.2015 to the Second Party for design, manufacture, test,*

supply, transport & insurance of certain facilities, viz. Electro-Mechanical Equipment for Aniyur Mini Hydel Scheme (MHS) (3 x 8000 KW + 10% COL) near Gandubagilu, Neriya Village, Belthangadi Taluk of Mangalore District, Karnataka.

x x x x x

AND WHEREAS the First Party now wishes to settle the claims of the Second Party and the Parties are, therefore, entering into this MoU."

27. It therefore contemplates the continuation of the contractual relationship for completion of the project. Though the expression "novation" was not expressly employed in the original pleadings, the effect of MoU and the appellant's entitlement to pursue its original claims were considered by the Tribunal under Issue No.3. The Arbitral Tribunal considered the rival contentions and found that the Supply Contract continued to govern the parties, subject to the modifications introduced by the MoU. In the Section 34 petition filed before the Commercial Court, the respondent herein had contended as follows:-

"49. The findings of the Tribunal that the MOU was the instrument executed for the settlement of dues that arose under the original contract. The key question that arose is whether subsequent to the execution of the instrument, the claim was the liberty to rescind the MOU

and revive its claims under the main contract, the said view expressed by the learned Arbitrators is erroneous suffers from non-application of mind and liable to be interfered with."

28. However, it is abundantly clear that there were no specific pleadings or proof to support the plea of novation of contract either before the Arbitral Tribunal or the Commercial Court. In ***Lata Construction v. Dr. Rameshchandra Ramniklal Shah*** reported in ***(2000) 1 SCC 586***, the Apex Court held that an essential requirement of novation under Section 62 of the Indian Contract Act is the complete substitution of a new contract in place of the earlier contract by agreement between the parties. The subsequent arrangement must have the effect of rescinding, altering or extinguishing the earlier contractual obligations.

29. However, the Commercial Court came to the conclusion that the Arbitral Tribunal has not appreciated the decisions relied on by the parties correctly in concluding that on breach of the MoU, the original claims would revive. It was found that the claimant had continued to raise the claims under the MoU alone and therefore, the parties had

agreed to a novation of contract. The finding of the Arbitral Tribunal on the point was therefore found to a patent illegality that vitiates the award.

30. In exercising jurisdiction under Section 37 of the Arbitration Act, this Court is required to examine whether the Commercial Court's interference remained within the limits prescribed by Section 34. The Commercial Court could not have substituted its interpretation for a reasonably possible view adopted by the Tribunal. In the present case, the Tribunal's conclusions on jurisdiction, the effect of the MOU and limitation are supported by its consideration of the contractual provisions and the material on record. The Commercial Court has substantially agreed with the Tribunal on the questions of jurisdiction, constitution of the Tribunal as well as on the question of limitation. However, the Commercial Court has set aside the award on the sole ground of novation, which is not a ground specifically taken by the opposite party in the arbitration proceedings.

32. The learned counsel for the appellant has placed reliance on the decisions in the cases of ***Dr. Sasidaran v. India Cements Capital Limited*** reported in ***2010 SCC OnLine Mad 6038***, ***Reliance Industries Ltd v. Gail (India) Ltd*** reported in ***2020 SCC OnLine Del 2041*** and ***Chrisomar Corporation v. MJR Steels Private Limited and Another*** reported in ***(2018) 16 SCC 117,*** to show as to how pleading of novation of contract is to be raised and considered. It is clear from a reading of Section 62 of the Indian Contract Act that consent of all parties to the earlier contract is imperative for novation of the contract to be set up as a defence. The contention of novation of a contract has not only to be pleaded specifically, but also to be proved for the same to be taken into account in a contractual dispute.

33. In the instant case, novation as a ground was not pleaded much less proved by the respondent before the Arbitral Tribunal. It is also clear that a ground which is not raised before the Arbitrator cannot be taken up in the first instance before the Section 34 Court to challenge the award

of the Arbitrator which has been passed on the material and the evidence placed before the Arbitrator.

34. The scope of interference under Section 37 of the Arbitration Act, where the Court exercising jurisdiction under Section 34 has exceeded its statutory limits, has been considered by the Apex Court in the following decisions. In ***UHL Power Company Ltd. v. State of Himachal Pradesh*** reported in ***(2022) 4 SCC 116***, at paragraphs 14 and 21, the Apex Court approved the Appellate Court's conclusion that the Court exercising jurisdiction under Section 34 had exceeded its jurisdiction by reappreciating the Tribunal's findings and adopting a different interpretation of the agreement. It was held that, where the arbitrator's interpretation was possible and plausible, the availability of another interpretation could not justify interference with the award.

35. Further, in ***AC Chokshi Share Broker Private Ltd. v. Jatin Pratap Desai*** reported in ***2025 INSC 174***, the Apex Court reiterated that an award cannot be interfered with by reappreciating evidence or displacing a reasonable

interpretation of contractual terms adopted by the Arbitral Tribunal. It was further held that the Court exercising jurisdiction under Section 37 must determine whether the Court under Section 34 exercised its jurisdiction properly and without exceeding its permissible scope.

36. In ***Konkan Railway Corporation Ltd. v. Chenab Bridge Project Undertaking*** reported in ***(2023) 9 SCC 85***, the Apex Court reiterated that the jurisdiction exercised under Sections 34 and 37 of the Arbitration Act is not akin to ordinary appellate jurisdiction. It held that the mere possibility of an alternative view on the facts or interpretation of the contract does not justify interference with the findings of the Arbitral Tribunal. A plausible interpretation adopted by the Tribunal cannot, therefore, be displaced merely because the Court considers another interpretation preferable.

37. In the instant case, the Arbitral Award has been set aside on the sole ground of novation of contract which was not specifically pleaded or proved before the Arbitral

Tribunal. We are therefore of the opinion that the setting aside of the award by the Commercial Court was an erroneous exercise of jurisdiction and is completely unsustainable.

38. COMAP No.331/2024 challenges dismissal of the Section 9 petition, wherein the Commercial Court held that since the Arbitral Award had been set aside in Com.A.P.No.201/2023, there was no question of granting any interim relief for securing the awarded amount.

39. We notice that the Section 9 petition was dismissed solely on the ground that the Arbitral Award had been set aside. We have held that the Commercial Court exceeded its jurisdiction in setting aside the Award, and have set aside the judgment in Com.A.P.No.201/2023 and restored the Award. Therefore, the question that remains is the status of the Section 9 petition. Section 9(1) of the Arbitration Act enables a party to seek interim measures after the making of the Arbitral Award but before it is enforced in accordance with section 36 of the Arbitration Act. The challenge to the

Award under Section 34 of the Arbitration Act having now failed, the Award is liable to be enforced, and the interim protection under Section 9 of the Arbitration Act shall be granted only until enforcement proceedings are taken. The respondent's assets have remained subject to a restraint to the extent of the awarded amount as recorded in Order dated 23.09.2024.

40. In the above view of the matter, the judgment dated 29.06.2024 passed by the Commercial Court in Com.A.A.No.352/2023 is also liable to be set aside. Therefore, the Section 9 petition is ***allowed in part***, with a direction to the respondent not to alienate or encumber its assets to the extent of the awarded amount, pending enforcement of the Arbitral Award.

41. In the result:-

(i) COMAP No.305/2024 is accordingly ***allowed.***

(ii) COMAP No.331/2024 is *disposed of*, retaining the Interim Order dated 23.09.2024 passed in these appeals.

(iii) The order dated 29.06.2024 passed by the LXXXIII Additional City Civil and Sessions Judge (CCH-84), Bengaluru in Com.A.P.No.201/2023 is set aside.

(iv) The Arbitral award dated 14.09.2023 passed in Arbitration No.1/2022, is revived and shall govern the parties.

There will be no order as to costs.

All pending interlocutory applications shall stand *disposed of* in both the appeals.

Sd/-
(ANU SIVARAMAN)
JUDGE

Sd/-
(T.P.VIVEKANANDA)
JUDGE

PN/CP*