IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	**21.04.2026**
Pronounced on	**05.06.2026**

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN
and
THE HONOURABLE MRS. JUSTICE K. GOVINDARAJAN THILAKAVADI

O.S.A.No.98 of 2016

India Cements Ltd.,
Dhun Building,
827 Anna Salai,
Chennai-600 002. ...Appellant

Vs.

1.Zuari Cement Ltd.,
Rep., by Emiliyan Andreev
Chief Finance Officer,
No.1, 10th Main, Jeevan Bhima Nagar,
Bengaluru- 560 079

[* Sole Arbitrator deleted vide Court dated 24.06.2024
made in O.S.A.No.98/16 (MSJ & KGTJ]

...Respondent

Prayer: Appeal filed under Order 36 Rule 1 of O.S. Rules read with Clause

15 of the Letters Patent, against the judgment and decree dated 17.09.2013 passed in O.P.No.674 of 2011 on the file of Original Side of this Court.

For Appellant : Mr.P.S.Raman, Senior Advocate
Assisted by Mr.K.Harishankar
for Mr.C.Ramesh

For Respondent : Mr.M.Vijay Narayanan, Senior Advocate
for Mr.S.Rajmakesh
and Mr.G.R.Sri Ram Kumar

JUDGMENT

K. GOVINDARAJAN THILAKAVADI,J.

The Original Side Appeal is filed challenging the order dated17.09.2013 passed by the learned Single Judge in O.P.No.674/2011.

2.Facts:

The appellant/India Cements Limited (hereinafter referred to as ICL) initiated the arbitration proceedings by invoking clause 13.2 of the marketing agreement dated 18.05.2002 for passing an award directing the respondent/Zuari Cements Limited (hereinafter referred to as ZCL) to pay the

ICL a sum of Rs.74.40 crores with interest at 18% per annum from 18.05.2002 till the date of realization, directing the ZCL herein to pay the ICL the cost of arbitration proceedings and such other reliefs.

3. The case of the ICL as projected in the statement of claim is as follows:-

Sri Vishnu Cement Limited (hereinafter referred to as SVCL) was a subsidiary Company of the ICL. The ZCL herein is a joint venture company between Zuari Industries, an Indian Company and Ciments Francias (CF) a French Company. In the year 2001, ZCL approached ICL for taking over the share holding in SVCL Company as the said SVCL was under the control of ICL and India Cements Securities Limited. After complying with all the formalities for the acquisition of the shareholding, a Share Purchase Agreement (SPA) was entered into on 10.01.2002 between ICL and ICL Securities Limited and the ZCL. Pursuant to the share purchase agreement, the ZCL acquired 94.7% equity shares of SVCL. Besides payment of price as mentioned in the share purchase agreement, ZCL and ICL agreed that a sum of Rs.74.40 crores was payable by ZCL to ICL and it was agreed that the same was part of the purchase transaction between the parties and in view of the circumstances prevailing at the time of share purchase agreement, the parties agreed to have a marketing agreement for facilitating the same. The parties agreed that the marketing agreement was conceived only as a mechanism for the payment of Rs.74.40 crores to ICL and accordingly, the marketing agreement was entered into between ICL and ZCL on 18.05.2002 and it came into effect from 1st June 2002. It is the specific case of ICL that it was agreed by ZCL that they would pay a sum of Rs.74.40 Crores as part of the share purchase agreement and the marketing agreement was projected as a means to provide for the generation of funds by ZCL. It was only to facilitate ZCL to pay the said sum, ICL agreed for that agreement. Therefore, whatever be the terms of the agreement dated 18.05.2002, the obligation of ZCL to pay ICL Rs.74.40 crores remained in tact and that was unconditionally accepted by ZCL. An irrevocable letter of credit was issued by BNP Paribas Bank which was renewed on behalf of SVCL by ZCL and the whole objective was that the payment of Rs.74.40 crores would be made by SVCL itself. This was a method adopted by ZCL and it was also believed by ICL as the objective was only to get the balance money payable to them. With a view to enable ZCL to pay ICL Rs.74.40 cores, ICL agreed, just as a gesture of assistance, to ZCL to make the marketing agreement operational and in spite of ICL's helping the ZCL, ZCL did not act as per the terms in the marketing agreement which was for their benefit. The ZCL attempted to make it appear as if the ICL did not act according to the terms of the contract just to deny the legitimate claim of the ICL. Therefore, the ICL invoked the arbitration clause in the marketing agreement to claim Rs.74.40 crores from the ZCL.

3.1. SVCL was the 1st respondent and ZCL was the second respondent before the Arbitral Tribunal. Later, SVCL merged with the ZCL with effect from 29.06.2007 and ZCL became the successor-in-interest of SVCL. SVCL filed a statement of defence raising their preliminary objection that as per the marketing agreement dated 18.05.2002, the ZCL company has no obligation with respect to payment under the said agreement and therefore, the ZCL is not a proper or necessary party to the dispute and the only obligation placed upon the ZCL under the said agreement is contained in clause 5 (b) (ii) wherein it mandates that if any shortfall is to be lifted by ICL or its nominees, SVCL shall, at its option supply either from its factory or from the factory of ZCL pursuant to the demand for lifting the shortfall by ICL and the only obligation placed upon ZCL was to supply cement to ICL in the event SVCL required the same. Therefore, there is no cause of action against ZCL.

3.2. SVCL also raised a question of law stating that marketing agreement is a separate independent transaction and as per the statement of claim filed by the ICL, ICL wanted a sum of Rs.74.40 crores to be paid as part and parcel of the consideration payable as per share purchase agreement dated 10.01.2002 and if it is to be treated as part of the purchase price, then the same is hit by Section 77 of the Companies Act, 1956 and also Section 9 of the Companies Act and hence, the claim of the ICL cannot be entertained as it is against the provisions of Section 77 and 9 of the Companies Act, 1956. It is further stated that the Arbitral Tribunal has to decide the dispute within the four corners of the marketing agreement under which a reference was made and no relief can be granted outside the purview of the marketing agreement and as per the marketing agreement, the ICL has to render marketing services to enable SVCL to achieve a market share of atleast 5.5% in the first 24 months of the agreement and as per the marketing agreement, 'shortfall' is defined to mean the difference between the product that SVCL should have despatched in order to achieve the specified market share in a given period and the actual despatched quantity during such period and the shortfall has to be computed by an independent authority and in order to lift the shortfall, the ICL or its nominee was required to place orders from time to time and SVCL has the option to supply cement to ICL pursuant to the indent from the factory of SVCL or from the factory of Zuari Cements Limited. A sum of Rs.52.80 crores was payable for rendering marketing services whereby SVCL would achieve the specified market share for a period of two years commencing from the operation date and such payment was called 'specified market share' payment. The ICL was also entitled to Rs.1680 lakhs after SVCL achieved the target market share during the period of 12 months commencing from the period of one year from the operation date and the ICL was also entitled to a sum of Rs.4.80 crores after SVCL achieved the specified market share by marketing the cements under the brand name "Vishnu" for a continuous period of 12 months and the payments under the agreement were contingent on the achievement of the said market shares. It is therefore, stated that the ICL cannot claim such amount payable under the marketing agreement when it has admittedly failed to perform its obligations under the said agreement. The ZCL also denied the allegation that it has to pay to the ICL a sum of Rs.74.40 crores irrespective of the assistance given by the ICL to enable SVCL to reach the specified market share within the specified period and also denied the allegation that marketing agreement was only a means to provide generation of funds by the ZCL and was conceived as a mechanism for the payment of Rs.74.40 crores to the ICL as part of amount payable under the share purchase agreement.

3.3. The ZCL also filed a separate statement of defence stating that it has no obligations with respect to payment under the marketing agreement and it is not a necessary or proper party and the only obligation placed upon the ZCL in the marketing agreement is clause 5 (b) (ii) referred to above and adopted the reply of SVCL.

3.4. The ICL filed rejoinder reiterating its stand that the marketing agreement was always considered as part of the deal reached between CF and ICL, the ICL and it was at the request of CF through the ZCL two agreements were finalized and part I was termed as share purchase agreement and part II was termed as marketing alliance. The ZCL has acquired the shares and also acted on behalf of CF and therefore, the ZCL was a necessary party to the Arbitration. It is further stated that the claim under part I and II of the offer made by CF and accepted by the ICL was towards USD 10 million which is equivalent to Rs.52.80 crores and the material lifted by the ICL was in order to give incentive beyond this figure as contained in clause 7.1 (b) and (c) of the marketing agreement. SVCL adopted an attitude of non-cooperation which prevented the ICL from working towards getting the consideration made in clause 7.1 (b) and (c). The ICL reiterated that the acquisition of SVCL was brokered by Lazard on behalf of CF through the ZCL and the offer right from the beginning comprised of 2 parts. Part I was the payment of USD 90 millions with necessary adjustments and part II for the payment of USD 10 million over two to four years and CF assured the ICL that payment under part II would be seamless and smooth with many flexibilities built into the agreement and sent a letter dated 15th September 2001 through Lazard and that would prove that both share purchase agreement and marketing agreement were dealt with and initiated cumulatively with predefined amount in both the proposed agreements which were to flow to the ICL. Further, ICL was given to understand that SVCL shall be 100% owned by the ZCL, will ensure that the payment committed by them will be honoured and that was the reason for arraying ZCL as a party to the agreement. It is further stated that both the agreements viz., share purchase agreement and marketing agreement were floated together, but, the marketing agreement was dated 18.05.2002 which falls immediately after the closing date in the offer and that was done for the benefit of the ZCL. It is further stated that as per Clause 8.1. of the marketing agreement adequate flexibility was provided in the marketing agreement for modification of specified market share and target market share as envisaged in clause 6 of the marketing agreement and that would also reflect that ZCL was a necessary party for monitoring the payments to be made to ICL.

3.5.On an overall consideration of the facts and circumstances, evidence on record, conduct of the parties, the learned Arbitrator said that India Cements could not support SVCL due to non-cooperation of Zuari Cements. The Tribunal decided that ICL deserves to be granted 50% of the amount that was payable under the agreement, i.e., Rs.52.80 Crores and passed an Award of Rs.26.40 Crore directing SVCL to pay the same.

4.Aggrieved by this, ZCL filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 before the learned Single Judge of this Court. The learned Single Judge held that without reference to Clause 7 (a) (ii) of the marketing agreement and without any basis the Tribunal awarded 50% of the amount payable under the agreement and therefore, it is against the specific term in the contract, and it is unfair and unreasonable and therefore, the Award is liable to be set aside. The order added that ICL has invoked the arbitration Clause under share purchase agreement and made it clear its stand that they are claiming the amount only under the share purchase agreement. Therefore, the claim is against the provisions of Section 77 of the Companies Act.

5.Assailing the order passed by the learned Single Judge, the present appeal is preferred by ICL.

6.Mr.P.S.Raman learned Senior counsel appearing for the ICL submitted that the learned Arbitral Tribunal correctly appreciated the scope of the issue and considering the various terms of the marketing agreement and the earlier correspondence, rightly held that the main claim was the liquidated sum payable by the ZCL as part of the consideration for taking over SVCL and the marketing agreement was only a mechanism to make their payment and the marketing agreement was only a sham and nominal document and was never intended to be acted upon and it was only a camouflage disguising the true nature of the transaction viz., the said amount quantified and liquidated as part of consideration for the sale of shares. The learned Senior Counsel also brought to the notice the earlier correspondence between CF and ICL in that regard and the Arbitral Tribunal also rightly relied upon the earlier correspondence to appreciate the true nature of the transaction. The learned Senior Counsel further submitted that even according to the marketing agreement, if there is any shortfall in the market share by SVCL, the ICL will not get anything and the ICL will get the amount only when SVCL reaches the market target and therefore, the Arbitral Tribunal rightly held that the agreement viz., the marketing agreement creates a doubt regarding the nature of transaction and rightly relied upon the earlier correspondence and antecedent circumstances for understanding the true nature of the transaction. He also brought to the notice the earlier correspondence dated 30.07.2001, letter issued by Lazard wherein the offer was stated in two parts and after convening a meeting between CF and Mr.Sreenivasan of ICL, on 15.09.2001, the Lazard forwarded SMIFS a memorandum of understanding for acquisition of shares wherein it has been specifically stated that simultaneous with the execution of the share purchase agreement, an escrow account with an escrow agent appointed by ZCL would be created and it was also agreed that along with other documents an undated marketing agreement between SVCL and ICL shall be deposited and therefore, it was made clear that the marketing agreement was only a sham and nominal document and the amount payable by ICL was not depending upon the services to be rendered by ICL as per the marketing agreement and the amount was already fixed towards transfer of shares and therefore, the ICL was entitled to claim that amount. He also submitted that the Tribunal has rightly held that the provisions of the Evidence Act cannot be made applicable to the Arbitration proceedings as per Section 16 of the Arbitration and Conciliation Act, 1996 and Section 1 of the Evidence Act also bars the application of the Evidence Act to Arbitration proceedings and therefore, the Tribunal was right in holding that Sections 91 and 92 cannot be a bar to understand the true nature of the transaction. He further submitted that the Tribunal rightly held that the claim made by the ZCL was an additional amount over and above the consideration amount fixed in the share purchase agreement and therefore, the agreement was not violative of Section 77. He also submitted that though as per the marketing agreement, the ICL is entitled to Rs.74.40 crores, the ICL has accepted the award passed by the Tribunal and therefore, there is no necessity to interfere with the award and the award has to be upheld.

7.Therefore, the reasoning of the learned Single Judge that the award of the learned Arbitral Tribunal is without any basis and the reasons are unreasonable and irrational, shocks the conscious of the Court is without any basis and therefore, the order passed by the learned Single Judge is liable to be set aside.

8.To support his contention, the learned Senior Counsel has relied upon the judgements in

1.2006 (11) SCC 181

2.2015(3) SCC 49

3.2019(4)SCC163

4.2022 (2) SCC 275

5.2022 (1) SCC 131

6.2022 (4) SCC 116

7.2023(9) SCC 85

8.2024 (2) SCC 613

9.2024 (1) SCC 479

10.2025 (2) SCC 417

9. On the other hand, Mr. Vijay Narayanan, the learned Senior counsel appearing for the ZCL submitted that the learned Arbitral Tribunal, having

held that the share purchase agreement and marketing agreement are two separate independent agreements, ought to have held that the ICL is not entitled to claim any amount under the marketing agreement without fulfilling the obligations as per the marketing agreement. The learned Senior Counsel further submitted that the learned Arbitral Tribunal failed to appreciate the case projected by the ICL. As per the claim statement and also as per the evidence given by the ICL, their specific case was that the amount claimed by them was part of the consideration payable under the share purchase agreement and Mr.Srinivasan, who was examined as witness on the side of the ICL, made it clear that their claim of Rs.74.40 crores was based not on the terms of the marketing agreement, and in the claim statement also, the ICL made it clear that besides the price mentioned in the share purchase agreement, the ZCL and the ICL agreed that a sum of Rs.74.40 crores was payable by the ZCL to the ICL and the marketing agreement was conceived only as a mechanism for the payment of Rs.74.40 crores to the ICL. He therefore, submitted that having come to court with specific pleading that a sum of Rs.74.40 crores was payable only as a part of consideration under the share purchase agreement and the marketing agreement was devised only as a mechanism for the payment of that amount, the same is prohibited under Section 77 of the Indian Companies Act and therefore, the learned Arbitral Tribunal ought not to have entertained the claim made by the ICL as it is opposed to law and ought to have rejected the reference.

10.The learned Arbitral Tribunal arbitrally fixed the amount at 50% and passed the award of Rs.26.40 Crores. The learned Senior Counsel further submitted that the reference to arbitration was made only as per the clause in the marketing agreement and therefore the Tribunal derived its authority to decide the matter only under the terms of marketing agreement and therefore, the Tribunal ought to have framed an issue whether the first respondent herein is entitled to claim Rs.74.40 crores as per the marketing agreement without proving that it has performed its obligations as per the the marketing agreement and without framing an issue to that effect, ought not to have passed an award for Rs.26.40 crores in favour of the ICL. He further submitted that the Arbitral Tribunal, having held that the ICL did not lift the shortfall as mentioned in the certificates as there was a genuine grievance regarding the correctness of the certificates by reason of SVCL and ZCL not supplying necessary information to E&Y and E&Y not verifying the relevant records, ought to have held that the only course open to the ICL was to have approached E&Y for providing necessary information or records so as to enable the ICL to comply with the obligations. He further submitted that the Arbitral Tribunal was not correct in holding that but for the non-cooperation and impediment created by the ZCL, ICL could have performed its obligation qua the specified market share, in the absence of any pleading or evidence to that effect. He further submitted that no complaint has been made by the ICL regarding denial of any access to the records of SVCL and the ICL proceeded on the basis that they were entitled to claim Rs.74.40 crores as part of the consideration payable under the share purchase agreement and therefore, the Arbitral Tribunal was not correct in holding that the ZCL did not co-operate with the ICL in complying with the obligations as per the marketing agreement, without properly appreciating the terms of the marketing agreement.

11.The learned Senior Counsel further submitted that as per Clause 5 of the agreement, ICL shall render marketing services to SVCL to enable SVCL to achieve the market share of atleast 5.5% (specified market share) in the territory for the period of 24 months commencing from the operation date and shall raise the market share of SVCL from the specified market share to 6%

(target market share) in the territory for the period of 12 months commencing from the expiry of one year from the operation date and as per clause 7.1 depending upon the ICL rendering marketing services to SVCL as per the agreement, SVCL shall, based on receipt of certificate of independent authority as specified in Section 8.2(b), pay to ICL a sum of Rs.52.80 crores for rendering marketing services and also shall pay various other amounts as per clause 7.1(a)(ii-i). He therefore, submitted that a duty was cast upon ICL to provide marketing services to SVCL and even a provision was made for the shortfall as per clause 5.2(b) and under clause 5.3, a provision was made for lifting of shortfall and therefore, it is not open to the ICL to put the blame on ZCL that they have not co-operated with ICL in achieving the target and finding to that effect by the Arbitral Tribunal is also not correct. He further submitted that the Arbitral Tribunal, having held that the parties are governed by the terms of the marketing agreement, ought not to have referred to the earlier correspondence to understand the agreement between the parties without properly appreciating clause 16 of the marketing agreement which specifically provides that the marketing agreement and the exhibits and annexures filed thereto shall supersede any prior agreements, whether oral or written and communications among the parties relating to the subject matter of this agreement.

12.He, therefore, submitted that the learned Arbitral Tribunal was not right in relying upon the earlier correspondence and ought to have held that letting in evidence contrary to the terms of the marketing agreement is hit by Sections 91 and 92 of the Evidence Act. He further submitted that the Arbitral Tribunal, having held that the marketing agreement and share purchase agreement are two separate agreements, ought to have held that relying upon prior correspondence and antecedent circumstances for understanding the true nature of transaction is quite justified and ought not to have relied upon the earlier correspondence.

13.The learned counsel further argued that the learned Arbitral Tribunal also accepted that the amount claimed by the ICL was part of the share purchase agreement and therefore, the Arbitral Tribunal ought to have held that the same is prohibited under Section 77 of the Companies Act and ought not to have entertained the reference. He further submitted that the main contention of the ICL was that the marketing agreement was not intended to be acted upon and it was a sham document and they are entitled to Rs.74.40

crores as per the earlier correspondence and that was part of the consideration payable under the share purchase agreement and evidence was let in to that effect and therefore, the learned Arbitral Tribunal need not have discussed the documentary evidence to hold that the ZCL did not co-operate with ICL in achieving the market share. He further submitted that the ICL cannot be permitted to project the case without any pleading and evidence and as a matter of fact, the learned Arbitral Tribunal proceeded on the basis as if the ICL claimed that amount under the marketing agreement and the ICL also proved that there was no deficiency on its part in complying with the obligations as per the marketing agreement without properly appreciating the case of the ICL in the statement of claim as well as in evidence.

14. The learned Senior Counsel for the ZCL relied upon the judgments in ***Roop Kumar Vs. Mohan Thedani (2003) 6 SC 595, Gangabai Vs. Chhabubai (1982) 1 SCC 4, Krishnabai Dukh Vs.Appasaheb Nimbalkar (1979) 4 SCC 60, Puttrangamma V. Ranganna (AIR 1968 SC 1018)*** and in support of his contention that under Sections 91 and 92 of the Evidence Act, letting in of oral evidence to vary the terms of the contract is prohibited. The learned Senior Counsel further submitted that Section 92 prohibits only the varying of the dispositive operative terms of the document and not the

memorandum or recital of facts and therefore, Section 92 is a substantive law and not a procedural law and therefore, Section 92 of the Evidence Act will have application even in respect of arbitration proceedings and therefore, it is not open to the ICL to lead any oral evidence varying the terms of the contract. He also relied on the judgment of the Honourable Supreme Court reported in ***ONGC Ltd. V. Saw Pipes Ltd., (2003) 5 SCC 705, Indu Engineering & Textiles Ltd. V. Delhi Development Authority (2001) 5 SCC 691, Rajasthan State Mines & Minerals Ltd. V. Eastern Engineering Enterprises (199) 9 SCC 283*** and ***Delhi Development Authority V.R.S.Sharma & Co (2008) 13 SCC 80*** and contended that the Hon'ble Supreme Court laid down the principles in those judgments for setting aside the award and having regard to the principles stated therein, the award passed in this case is liable to be set aside. He also submitted that the learned Arbitral Tribunal, having framed points for determination, did not answer those points for determination and arbitrarily passed an award stating that the ICL is entitled to claim 50% claim and awarded Rs.26.40 Crores without any basis and therefore, the award is not a reasonable one and applying the principles laid down in ***Municipal Corporation of Delhi V. Jagan nath Ashok Kumar (1987) 4 SCC 497)*** that when the award is not a reasonable one and it is arbitrary, the same is liable to be set aside. He also submitted that when the award is against the provisions of statute, it is liable to be set aside as per the judgment of the Hon'ble Supreme Court in ***(2003) 5 SCC 705 and (2008) 13 SCC 80***. He also submitted that it is not the case of the ICL that they have fulfilled their obligations under the marketing agreement or they were prevented by the ZCL from fulfilling their obligation under the marketing agreement and it was the specific case of the ICL that a sum of Rs.74.40 crores was liable to be paid as part of consideration payable under the share purchase agreement irrespective of the compliance of the terms and conditions as provided under the marketing agreement and the evidence of the Vice President Mr.Srinivasan was also very specific that their entire claim was based upon understanding and agreement which they had with CF and therefore, the claim of Rs.74.40 crores was not based on the terms of the marketing agreement. Therefore, the finding of the learned Arbitral Tribunal that the ICL was willing to perform its obligations till the end of December 2002 and the ZCL was not co-operative and they did not supply the required information to E&Y for proper certification and the ICL was willing and able to fulfil its obligations of lifting the shortfall and there was no denial of it cannot be correct. He further submitted that the finding of the Arbitral

Tribunal that the ZCL failed to prove that ICL suffered from any disability in performing its obligations under the agreement and they also failed to prove that they performed their obligations promptly and as required by the agreement was not also correct inasmuch as it was not the case that was projected by the ICL before the Arbitral Tribunal.

15.In other words, the learned Senior Counsel submitted that when the ICL came to the Tribunal with the specific plea that they were entitled to claim Rs.74.40 crores as part of consideration payable under the share purchase agreement and the marketing agreement was only a mechanism to provide for the payment of that amount, there was no necessity for the ZCL to prove that they performed their obligations as per the agreement and they were also willing to perform their obligations and ICL did not act according to the terms of the agreement. He also submitted that the learned Arbitrator should not have gone into the details to give a finding that the ICL was willing to fulfill its obligations and the ZCL was at fault and the ZCL was not co-operating with the ICL in fulfilling their obligations of the contract as per the marketing agreement when it was not the case of the ICL. The learned Single Judge considering the above facts and circumstances of the case, rightly set aside the award passed by the learned Arbitrator, warrants any interference by this Court.

16.Heard on both sides and records perused.

17.Admittedly, the two entities, ICL and ZCL centered on a high states corporate and contractual dispute over a share purchase agreement and associated marketing agreement. ICL and ZCL were entangled in a corporate transaction where 74.40 Crores was allegedly owed to ICL. ICL argued this amount was an agreed upon consideration from the share purchase agreement. Zuari Cement contended that a parallel marketing agreement was entirely separate, independent, and strictly for marketing services to achieve a specific market share, not a hidden mechanism to pay the aforementioned Rs.74.40 Crores. ICL argued that besides the payment of price as per the share purchase agreement, the parties agreed that a sum of Rs.74.40 Crore was payable by ZCL and ICLs' specific case was that it was agreed by ZCL that it would pay the money as part of the share purchase agreement and the marketing agreement was projected as a means to provide for the generation of funds by ZCL. It is further argued that as per the marketing agreement, ICL has to render marketing services to enable SVCL to achieve a market share of atleast 5.5% in the first 24 months of the agreement. A sum of Rs.52.80 Crore was payable for rendering marketing services whereby SVCL would achieve the specified market share for a period of two years commencing from the operation dated and such payment was called specified market share payment.

18.The learned Arbitrator held that there is no violation of Section 77 of the Companies Act and held that the marketing agreement is a separate agreement and it was executed by the Companies after completion of the process of acquisition of ICL group's shareholding in SVCL by ICL and what was to be paid under the agreement was an additional amount over and above the consideration amount fixed under the share purchase agreement and therefore, there is no question of violation of Section 77 of the Companies Act.

19.Where as, the learned Single Judge, addressed the admissibility of oral evidence under Section 91 and 92 of the Indian Evidence Act. It ruled that the arbitral Tribunal erred by ignoring the strict written terms of the marketing agreement. The learned Single Judge further held that the Tribunal

Could not use oral evidence to radically alter the true nature of the transaction or convert an independent contract into a covert payment mechanism for the share purchase agreement, and set aside the arbitral award.

20.Therefore, the question arises for consideration in this appeal are as follows:

1.Whether the provisions of Sections 91 and 92 of the Indian Evidence Act, 1872 is applicable in the arbitration proceedings?

2.Whether Section 77 of the Companies Act 1956 places an embargo upon a company in dealing with its own shares?

3.Whether the learned Single Judge was justified in setting aside the award passed by the learned Arbitrator?

21.No doubt, Arbitration, as a means and manner of dispute resolution mechanism is conducted by an independent forum which is constituted on the basis of the terms and conditions of the arbitration agreement entered into between the parties. Party autonomy is one of the most lucrative characteristics under this form of dispute resolution mechanism. The arbitrator/arbitral tribunal is bound by the terms of such agreement and the procedure of arbitration is defined within the limits of the same with minimal Court interference.

22.Section 19 of the Arbitration and Conciliation Act, 1996 (A&C Act) provides for the determination of rules of procedure, in clear express terms. It states that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (CPC) or the Indian Evidence Act, 1872 (Indian Evidence Act). The A&C Act, under section 19, also provides freedom to the parties to agree on the procedure to be followed by the arbitral tribunal in conducting the pro-ceedings. Further, the tribunal has been bestowed with the power to determine the admissibility, relevance, materiality and weight of any evidence. In ***N.P.C.C. Limited vs. Jyoti Sarup Mittal Engineers, Contractors & Builders 2006 SCC OnLine Del 1496***, the Hon'ble Supreme Court held that the technical procedures of evidence shall not apply to arbitration. In ***Hindustan Shipyard Limited vs. Essar Oil Limited 2004 SCC OnLine AP 745,*** the Hon'ble Supreme Court clarified that when the terms of the arbitration procedure have not been agreed between the parties, the arbitral tribunal must resort to statutory procedure and the discretion as to the decision of relevancy and admissibility of the evidence has been granted to the tribunal under section 19 of the A&C Act.(The decision has been reversed by the Hon'ble Supreme Court in ***(2015) 10 SCC 642 (Essar Oil Limited vs. Hindustan Shipyard Limited)***, but on a different proposition.) Although the rules of evidence do not apply in the case of arbitration, it is mandatory for the tribunal to adhere to the principles of natural justice. The Courts have time and again stressed on the duty of the tribunal to conform to the principles of natural justice. In ***Maharashtra State Electricity Board vs. Datar Switchgear Ltd. (2002) SCC Online Bom 983***, the Hon'ble Supreme Court interpreted the provisions of Section 19 and held that rather than being a prohibition, these words encourage the Arbitral Tribunal to draw "sustenance from the fundamental principles underlying the Civil Procedure Code or Evidence Act...." These are words of amplitude and not of restriction. The Bombay High Court in ***Pradyuman Kumar Sharma vs. Jaysagar M. Sancheti 2013 SCC OnLine Bom 453*** went to the extent of saying that "even though the arbitrator is not bound by CPC or the Evidence Act, the principles of CPC and the Evidence Act are applicable to even arbitration proceedings."

23.Therefore, the Courts have firmly established that these Sections are not mere technicalities but cardinal rules of substance. Therefore, arbitral Tribunals are bound to respect written contracts and exclude contradictory oral testimony. However, exceptions to the rule apply. The provisions to Section 92 allow oral evidence in specific circumstances. When the disputed terms were meant to be modified later or if there were outside circumstances regarding how the contract was signed, to find out the true nature of the transaction.

24.The learned Arbitral Tribunal held that arbitration was invoked by the ICL under the marketing agreement and that clearly implies that the dispute has arisen under or out of the marketing agreement. The learned Arbitral Tribunal also held that having regard to Section 1 of Evidence Act and Section 19 of the Arbitration Act, the Evidence Act is not made applicable to arbitration proceedings and therefore, the bar created under Sections 91 and 92 of the Evidence Act cannot, by its own force apply to arbitration proceedings. Further, the learned Arbitral Tribunal held that even in arbitration proceedings, basic principles of judicial determination of a dispute, including the principles of natural justice are required to be followed so as to maintain fairness and reasonableness of the procedure.

25. The learned Arbitral Tribunal further rejected the objection raised by the ZCL and held that oral and documentary evidence can be let in by the ICL to disclose the real nature of transactions in respect of marketing agreement executed between the parties. The learned Arbitral Tribunal also held that though share purchase agreement does not refer to the marketing agreement, it is not in dispute that marketing agreement was prepared and deposited in the escrow account along with other documents mentioned in the share purchase agreement and also held that the prior correspondence and the antecedent circumstances can be considered for understanding the nature of true transactions.

26. The Arbitral Tribunal also held that no evidence was let in by the ZCL to show in which way the actual marketing services were to be rendered and what was the deficiency in rendering those services and only attempt made by SVCL was to show that there was a shortfall in the market share by not lifting the required quantity by the ICL. The Arbitral Tribunal, therefore,

held that the absence of such evidence, non-payment of any remuneration to ICL for the services rendered and provision in the agreement that services were to be rendered for 24 months and that the agreement was not to be terminated earlier by any party clearly go against the case of the ZCL that marketing agreement was a completely independent agreement and it has nothing to do with the additional amount that was to be paid to ICL for the sale of its share holding in SVCL. The Arbitral Tribunal also held that the ICL was also not correct in contending that the marketing agreement is a sham agreement not intended to be acted upon and irrespective of the agreement, it was to be paid Rs.74.40 crores as consideration for the shares sold by it. The Arbitral Tribunal also held that even though the marketing agreement was treated as part of the transaction of purchase of SVCL, the same was made payable by a separate agreement and rights and obligations of the parties, therefore, have to be decided in terms of the separate agreement.

27. Thereafter, the learned Arbitral Tribunal proceeded to examine the obligations under the marketing agreement and which party to the agreement defaulted in performance of its obligations. After referring to various clauses and exhibits, the Arbitral Tribunal held that till the end of December 2002, the ICL was not allowed to perform its obligation and it cannot be stated that the

reasons given by it for not lifting the shortfall were not genuine and that it had committed a default in performance of it obligation. It also held that on an overall consideration of the facts and circumstances, as disclosed by oral evidence, correspondence between the parties, conduct of the parties and the manner in which certificates were issued by E&Y, the ICL was willing to fulfil its obligation by lifting the shortfall.

28. The learned Arbitral Tribunal also came to the conclusion that issues raised by ICL in this behalf were not resolved with the result that they were not properly taken into account by E&Y while issuing certificates and therefore, SVCL and ZCL did not settle them as that would have helped them in avoiding its liability to pay the agreed amount of Rs.74.40 crores. It also found that ICL did not lift the shortfall as mentioned in certificates as there was a genuine grievance regarding the correctness of the certificates because of SVCL and ZCL not supplying the necessary information to E&Y and accordingly, E&Y did not verify the relevant records. It came to the conclusion that but for the non-cooperation and impediment created by the ZCL, ICL could have performed its obligation qua the specified market share and failed to prove that ICL was under the obligation to increase the sales of SVCL by using its marketing network in the territory. They have not proved

any deficiency in rendering assistance except the fact ICL did not lift the shortfall. The ZCL failed to prove that they performed their obligations promptly and as required by the agreement and they were always willing to do so and held that taking into consideration the facts and circumstances, ICL deserved to be granted 50% of the amount that was payable under the agreement i.e., Rs.52.80 crores and accordingly, passed an award of Rs.26.40 crores directing SVCL to pay the same.

29. The learned Arbitrator held that there is no violation of Section 77 of the Companies Act and held that marketing agreement is a separate agreement and it was executed by the Companies after completion of the process of acquisition of ICL Group's shareholding in SVCL by ICL and what was to be paid under the agreement was an additional amount over and above the consideration amount fixed under the share purchase agreement and therefore, there is no question of violation of Section 77 of the Companies Act.

30.The learned arbitrator considered all these aspects and held that Section 92 applies only to dispositive documents and evidence can be let in by ICL to show the real nature of transaction in respect of which the marketing agreement was executed by the parties. The learned Arbitral Tribunal has relied upon the earlier correspondence to appreciate the true nature of the transaction, and rightly held that oral evidence can be let to show that the document is a sham or it was not intended to be acted upon or that it was made for creating evidence for some other purpose or the real nature of transaction is different. In the light of the judgments referred above, and the same will not amount to rewriting the contract by the learned Arbitrator while interpreting it. Therefore, the findings of the learned Single Judge that Sections 91 and 92 of the Evidence Act provides a legal bar from letting any oral evidence, is incorrect.

31.The next question which arise for consideration is that, whether the claim made by ICL under the share purchase agreement is prohibited under Section 77 of the Companies Act, 1956.

32.According to ICL, both the share purchase agreement dated 10.01.2002 and the marketing agreement dated 18.05.2002 are parts of a single transaction of purchase of shares and both were executed on the same day, although the second agreement was me nominee titled as marketing agreement and subsequently dated 18.05.2002. Its further contention is that though the terms of the marketing agreement does not reflect the true nature of transaction between the parties, it is really an evidence of a liquidated sum payable by CF which includes to ICL group and not a bonafide marketing agreement but a device evolved and structured by SVCL and ZCL and their financial and legal advisors, based upon requirements of them for a staggered payment over two years. It is further submitted that the same becomes apparent from the following circumstances.

A. After the sale of shares of SVCL, ICL will have no interest in the said company or the promotion of the said company its brand or its market share, when in facts SVCL will be a competitor to ICL.

B.The marketing agreement itself envisages that the obligation contained therein can be fulfilled by ICL by Simply lifting cement or for that matter clinker from SVCL without the same being branded with SVCL brands. ICL could therefore market the said cement in its own brand name or convert the clinker into cement and sell in ICL's own brand name. No company would make such huge payment of as much as Rs.74.40 crores, for the total quantum to be lifted by ICL would be MT 650719 which will work out to Rs.1143 per metric ton; when the gross sale price as per E&Y certified report for January 2003 is Rs.2288 PMT. This would mean that the consideration offered under the Marketing agreement was 50% of the gross sales value. The net price realization of SVCL as per E&Y certified report for January 2003 is Rs.1339.62 PMT. This would mean that the consideration offered under the Marketing agreement was 85.32% of the net plant realization. Thus, the so called Marketing agreement is sham and nominal and was never intended to be a bonafide marketing agreement intended to utilize the marketing expertise or experience of ICL but was only a camouflage for disguising the true nature of the transaction namely that the said amount which was quantified and liquidated was a part of the consideration for the sale of shares.

C. CF and Italcementi Group of which Zuari is also a part are well established world leaders in cement production and marketing and did not need any help for marketing the products of the company that they were acquiring. Moreover Zuari cement which was part of Birla group was well entrenched in cement manufacturing and marketing in India. The so called marketing experience and expertise of ICL was totally unnecessary and irrelevant for the acquires of SVCL. ICL also relied upon the correspondence which led to the two agreements, oral evidence, certain clauses of the marketing agreement, subsequent correspondence and certain facts as disclosed by the documents on record. Therefore, the definite case of ICL was that the amount claimed by them was payable under share purchase agreement and marketing agreement was only a mechanism, and that there is no violation of Section 77 of the Companies Act. Further it is submitted that violation of Section 77 is a compoundable one under Section 621 A of the Companies Act and for violation of Section 77, a nominal fine of Rs.10,000/- can be imposed as per Section 77(4) of the Companies Act. Therefore, there is no total ban or prohibition on purchase of its own share by a company under Section 77 and Section 77 also contemplate certain suggestions and conditions under which such purchases can be made and therefore, it cannot be contended that the claim of Rs.74.40 Crores as per the share purchase agreement is violative of Section 77 of the Companies Act.

33.Further, it is to be noted that, Section 77 of the Companies Act is introduced to prevent manipulation of trading and purchase of shares by the Company itself with a view to deceive the public. It is nobody's case that the object of the transaction viz., entering into marketing agreement was to deceive the public and according to ICL, it was only a mechanism provided for the payment of Rs.74.40 Crores as payable under the share purchase agreement. Therefore, the claim of Rs.74.40 Crores as part of consideration payable under the share purchase agreement is not in violative of Section 77 of the Companies Act. Even otherwise, for violation of Section 77 of the Act, has rightly pointed out by the learned Senior Counsel for ICL only fine can be imposed as per Section 77 (4) of the Companies Act. Therefore, there is no total ban or prohibition on purchase of its own share by a company under Section 77 of the Act.

34.The learned Arbitrator on an overall assessment of the materials on record has rightly held that, the claim made by ICL was an additional amount over and above the consideration amount fixed in the share purchase agreement and therefore, there is no question of violation of Section 77 of the Companies Act.

35. Moreover, it is settled law that even otherwise the award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion. The Hon'ble Apex Court in the case of ***Ssangyong Engineering & Construction Vs. National Highways Authority of India*** reported in ***AIR 2019 SC 5041*** observed that the Courts could not substitute its view over that

of the arbitrators and that it is not permissible for a Court to examine the correctness of the findings of the Arbitral Tribunal, as if it were sitting in appeal over the findings. It was further held that each Arbitrator is legitimately entitled to take the view which he holds correct.

36. Section 34 of the Act was deliberately engrafted and couched in a particular manner bearing in mind the fact that there should be limited intervention of Courts in Arbitral proceedings especially after the proceedings have been concluded and the award has been pronounced by the Arbitral Tribunal.

37. Notably, the yardsticks and the parameters under which intervention by the courts of law in the proceedings against the award stands bracketed in Section 34 of the Act which obviously starts with caveat that the Arbitral award may only be set aside by the Court if the party making the application establishes on the basis of the record of the Arbitral Tribunal:

> *(i) was under some incapacity;*
> *(ii)the Arbitral agreement is not valid under the law for the time being in force;*
> *(iii) a party making the application was not given proper notice of appointment of arbitrator or he was unable to present his case;*

(iv) the Arbitral award deals with a dispute not contemplated or not falling within the terms of the submission of the arbitrator;

(v) the composition of the Arbitral Tribunal or the Arbitral procedure was not in accordance with the agreement of the parties unless such agreement was in conflict with the provisions;

(vi) the subject matter of dispute is not capable of settlement by arbitration under law for the time being in force;

(vii) the Arbitral award is in conflict with the public policy of India..

45.Nonetheless, while assailing the order passed under Section 34 of the Act either setting aside the award or upholding the award an appeal is provided under Section 37 of the Act, however, the contours of the proceedings under Section 37 also is limited to the scope and the ambit of challenge under Section 34 of the Act.''

38. The aforesaid proposition of law stands culled out in umpteen number of decisions of the Hon'ble Apex Court, also in the case of ***Associate Builders (supra), Ssangyong Engineering & Construction Co. Ltd. (supra), Sal Udyog Private Limited (supra), PSA Sical Terminals Pvt. Ltd. (supra),***

Batliboi Environmental Engineers Vs. Hindustan Petroleum Corporation Limited & Another AIR (2024) SCC 375. The Apex Court in the case of ***Ssangyong Engineering & Construction Co. Ltd. supra*** has held that the additional ground made available for setting aside a domestic arbitral award under Sub-section (2A), added by the Amendment Act, 2015, to Section 34, refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. For the sake of clarity, the Court has held that the contravention of a statute not linked to public policy or public interest, which is not subsumed within the fundamental policy of Indian law cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality. It is clear from the amendment of 2015 that re-appreciation of evidence, which is what an Appellate Court is permitted to do, is not permitted under the ground of patent illegality appearing on the face of the award.

39.In the present case, a judicial appreciation of the Arbitral award goes to show that the learned Arbitrator has properly appreciated the facts of the case and has done a due analysis of the evidence led by the parties and has rendered his findings after due consideration, application of mind and on the touchstone of the law.

40.The learned Arbitrator has drawn inferences and conclusions after the factual appreciation in the light of the legal principles. The views of the learned Sole Arbitrator cannot be found fault with only for the reason that some other views can emerge by appreciating the same set of facts and evidence, until and unless it is shown that such a view is totally obnoxious and unsupported by the sound legal principles.

41.The Section 34 Court cannot substitute its own views or the views of the parties in place of the view taken by the learned Arbitral Tribunal, if the view taken by the learned Arbitrator is not in conflict with the settled legal position. There is nothing to suggest that the findings and conclusions rendered by the learned Arbitrator are *per se* perverse, illegal or non-sustainable. There is no ground to state that the award suffers "patent illegality" and the award is against the public policy of Indian Law.

42.By the amendment of 2015, Explanation as appearing in clause (b) in sub-section (2) of Section 34 of the said Act has been substituted by the new Explanations and Sub-Section 2-A has been inserted in Section 34 of the said

Act. Amended clause (b) (ii) of Section 34 (2) reads as follow:

"(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.-For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

Newly inserted sub-Section 2A read as follow;

"(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by *reappreciating evidence."*

43.Viewing the case from four corners of law, we are of the firm opinion that the respondent herein has miserably failed to show any patent illegality in the Arbitral award warranting interference by the learned Single Judge under Section 34 application. More so, the scope of interference under Section 34 is limited and within the contours of the ground specified under Section 34 of the Act. To put it otherwise, the award is not required to be set aside on the ground of mere erroneous application of law or by re-appreciation of the evidence until and unless it suffers from patent illegality. We find the award is based on pleadings and available documents on record and that the award is a reasoned one and it is clearly a plausible view taking into account each and every aspect of the matter. Hence, the impugned order passed by the learned Single Judge is set aside.

44. In the result, this Original Side Appeal is allowed. No costs.

(P.V.J.,) (K.G.T.J.,)

05.06.2026

vsn
Index: Yes/No

Internet: Yes/No
Speaking/Non-Speaking order

P.VELMURUGAN,J.

and
K.GOVINDARAJAN THILAKAVADI,J.
vsn

Pre-delivery judgment made in
O.S.A. No.98 of 2016

05.06.2026