Medeor Hospital Limited Formerly ... vs Ernst And Young Llp on 1 May, 2023

Author: V. Kameswar Rao

Bench: V. Kameswar Rao

2023

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: May 01, 20

\+ O.M.P. (COMM) 116/2022 & I.As. 3576/2022, 3579/2022

MEDEOR HOSPITAL LIMITED FORMERLY ROCKLAND HOSPITALS LIMITED ..... Petitioner

Through: Mr. Rajshekhar Rao, Sr. Adv. with Ms. Aanchal Basur, Adv.

versus

ERNST AND YOUNG LLP ..... Res

Through: Mr. Jayant Mehta, Sr. Adv Mr. Prateek Khanna, Ms. R Kaur Malik and Ms. Kaveri Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

JUDGMENT

V. KAMESWAR RAO, J

1. At the outset, I may briefly narrate the facts leading up to this petition. The petitioner is a company registered under the name M/s Medeor Hospitals Ltd., formerly known as M/s Rockland Hospitals Ltd. („RHL , for short) and was operated under the brand name Rockland Hospitals (hereinafter referred to as „Medeor and „RHL interchangeably). The petitioner was operating three multi-specialty hospitals at Qutub Institutional Area, Dwarka and Manesar in Delhi with a combined capacity of over 800 beds, and also had plans to establish a hospital at Greater NOIDA, for which 5 acres of land had already been acquired, and a bank loan of approximately 430 crore 2023:DHC:2926 was taken.

2. In view of the debt that had accrued, Medeor wanted a financial restructuring of the company to reduce the quantum of its loans, and thus decided to consider induction of strategic partners for two of its hospitals located at Qutub Institutional Area and Dwarka. For this purpose, Medeor

approached Ernst & Young LLP („EY , hereinafter) to assist it in identifying and approaching potential partners and advise on the execution of its financial restructuring. In lieu of this understanding, the parties executed a Letter of Engagement („LOE , for short) dated August 11, 2015. The statement of work therein set out the basis for EY s engagement under the section „Statement of Work-Our Understanding of Your Requirements , as follows:

> "We understand that the company is considering induction of strategic partner (s) for two of its hospitals located at Qutub Institution Area and at Dwarka in Delhi (together, referred to as the "Hospitals") and its is in this Connection RHL is seeking EY s assistance in identifying an approaching potential partner and in advising on the execution of any resultant transaction. The Company would undertake requisite restructuring in accordance with legal and regulatory requirements to ensure that the proposed transaction is possible."

3. The key elements of services that were to be rendered by EY was recorded in the „Scope of Services of the LOE, which included preparing a confidential Information Memorandum based on the information that was to be provided by RHL, assisting RHL in preparation of a Detailed Financial Plan for the two hospitals, 2023:DHC:2926 approaching potential partners on a „no-names basis along with a teaser in order to establish the degree of interest from such potential partners / buyers and in case of interest shown by the potential partners / buyers, obtaining a confidentiality letter from such partners / buyers and thereafter sending them the Information Memorandum disclosing the name of the company and thereby providing information for the negotiation of the proposed transaction.

4. The LOE provided a definitive time-period within which the transaction envisaged had to be completed; as reproduced below:

> "Our endeavour is to achieve signing of the definitive transaction documents within 6 (six) months of the Start Date..... However, we agree that we shall not reach out to any new potential partner after December 31, 2015 apart from continuing discussions with those parties who we have marketed the transaction before December 31, 2015"

5. As per the above terms, EY had six months from August 11, 2015 to perform these services. EY was barred from reaching out to any new potential partners after December 31, 2015 and was allowed to continue discussions with only such potential buyers who they had approached prior to December 31, 2015 and to those whom the potential transaction has been marketed before December 31, 2015.

6. As EY was unsuccessful in locating a potential partner / buyer for the two hospitals, RHL vide e-mail dated March 26, 2016 informed EY of an ongoing development involving the Company, i.e., its Strategic Debt Restructuring („SDR , for short), which was invoked by the bankers of RHL in terms of the norms set out by the Reserve Bank 2023:DHC:2926 of India. Relevant portion of the e-mail is reproduced as under:

> "I refer to the discussions we had with you in relation to invoking of SDR by our Bankers which would include conversion of debt into shares and change in management to be initiated by the Bankers. This has to be done within the timelines prescribed by the RBI circulars. In view of the same and also as per our understanding with you, please keep all your actions in abeyance".

The reference / invocation of SDR w.e.f. February 22, 2016 is also evident from the minutes of the meeting of the bankers of RHL dated February 22, 2016. Pending approval of SDR from the competent authority, the bankers of RHL vide the said minutes, put the accounts of RHL in a „standstill , as the accounts were in a critical position as per the guidelines.

7. In lieu of invocation of the SDR, RHL was legally incapacitated and had no choice but to ask EY to keep its services in abeyance, since between February and June, 2016, Medeor was legally restrained from undertaking any transaction in respect of its assets as the management of RHL had to be taken over by the nominee directors of the bankers in terms of the RBI circulars. It is stated that the failure of EY to bring in any strategic partner, compounded with the invocation of SDR rendered the process of financial or asset restructuring under the LOE untenable.

8. Subsequently, the shareholders of RHL which included 24 companies, a Trust, an International Financial Corporation and six individuals, executed a Share-Purchase Agreement in favour of a third party, i.e., M/s VPS Healthcare Pvt. Ltd. (hereinafter referred to 2023:DHC:2926 as „VPS) to sell their respective shareholding.

9. It is stated that while RHL was a party to the said Share- Purchase Agreement, it was neither a seller nor a purchaser and received no consideration in the transaction of sale of shares. It is also stated that the two hospitals of RHL for which EY was to find strategic partners continued to remain property of RHL. They were never sold by RHL and no strategic partners were inducted.

10. On June 28, 2016, after the expiry of the LOE, EY wrote to RHL seeking payment of the full outstanding amount of 10 lakh in lieu of the services rendered. The LOE set out a fixed fee of 15 lakh to be paid to EY in the event it was unable to find a strategic partner. Since 5 lakh has already been paid, EY sought the final amount owed to it towards clearance of its dues. However, in complete contradiction to this demand, on August 3, 2016, EY wrote to RHL seeking an additional fee citing the LOE and share-purchase involving VPS. RHL on August 26, 2016 denied owing any pending amount towards the LOE. On September 7, 2016, RHL received a legal notice from EY, to which the new management of RHL appropriately replied, intimating EY that since the deal that took place was not of a nature envisaged by the LOE, and considering the fact the VPS was not a strategic partner / buyer introduced by EY, it was not entitled to any additional fee.

11. Subsequently, EY filed its Statement of Claims before the Indian Council of Arbitration („ICA , for short) alleging that since the transfer of shareholding in RHL was covered under the scope of LOE, EY was entitled to success fee as a percentage of the transfer 2023:DHC:2926 consideration. The dispute was referred to an Arbitral Tribunal constituted under the ICA s Rules of Domestic Commercial Arbitration and Conciliation (hereinafter referred to as „ICA Rules) on April 5, 2017.

Pursuant to the completion of pleadings, the Arbitral Tribunal framed the following issues:

> "1. Whether the transaction as contemplated in Engagement Letter / Agreement dated 11th August 2015 is fundamentally different from the transaction dated 30th June, 2016 entered between the Rockland Hospitals Ltd. and VPS Healthcare Private Ltd. (henceforth referred to as VPS)?
>
> 2. Whether the objections raised in the Statement of Defence are legal and valid, and if so, their effect on the claims?
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> 3. Whether the Claimant is entitled to the Award for a sum of Rs. 10 crore, or any part thereof?
>
> 4. Whether the Claimant is entitled to any interest on the amount of the Award and if so, at what rate and for which period?
>
> 5. Order as to cost, if any."

12. Subsequently, EY who was a claimant in the proceedings sought to examine Mr. Prabhat Kumar Srivastava, the erstwhile Managing Director of RHL as its witness and sought permission of the Tribunal under Section 27 of the Arbitration and Conciliation Act, 1996 („Act of 1996 , hereinafter) to approach this Court seeking assistance in summoning the witness. Once Mr. Srivastava appeared as the claimant s witness before the Tribunal, he requested to file a witness statement setting out his narration of facts and circumstances surrounding the execution of the LOE, which was objected to by the claimant. Subsequently on October 31, 2018, EY expressed that it was no longer interested in examining Mr. Srivastava as a witness 2023:DHC:2926 and therefore he was removed from the list of witnesses. Since, Mr. Srivastava subsequently approached RHL / Medeor with certain key facts in relation to the execution and performance of the LOE, RHL / Medeor, filed an application before the Tribunal on February 26, 2019 to produce him as its witness. The Arbitral Tribunal vide order dated May 11, 2019 allowed the request and placed the affidavit filed by Mr. Srivastava on record as his examination-in-chief and directed that he may be cross-examined by the claimant.

13. Subsequently, closing arguments were advanced and written statements were filed before the Tribunal. RHL / Medeor urged the following before the Tribunal:

> a) The transfer of 100% shareholding in RHL or any variation thereof was not contemplated by the terms of the LOE and therefore, EY was not entitled to any success fee.
>
> b) In light of the fact that RHL / Medeor did not receive any consideration from the transfer of the shareholding, it is not be bound to pay the success fee to EY.
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> c) EY had not approached VPS as a potential partner / buyer either by itself or though its associated offices and cannot now seek the success fee based on the transfer of the

shareholding.

d) The terms of the LOE cannot be inferred to include a scenario of transfer of the shareholding.

e) The LOE and the engagement of EY had expired at 2023:DHC:2926 the time of the transfer of the shareholding in Medeor and therefore could not be held to be binding on Medeor.

f) The respondent was aware that it was not entitled to any monies from Medeor and for this reason sought "full outstanding" of 10 lakh. The change in its alleged claim must be adversely inferred against EY.

14. The arbitral proceedings were closed on November 28, 2020 and the Tribunal reserved the proceedings for rendering its award.

15. Subsequent thereto, on August 17, 2021 the two co- Arbitrators rendered an award with a finding that since the LOE required Medeor to inform EY of all the matters it was undertaking in relation to the sale of any of its assets, Medeor should have informed EY of the sale of shares, and upon an expansive interpretation of the terms of the LOE, EY was entitled to its success fee. The respondent was found to be entitled to the following:-

a. An amount of 10 crore against the success fee which shall be paid after adjustment of retainer fee already paid to EY by Medeor;

b. Interest at 9% per annum on the awarded amount from the date of the claim petition till the date of realisation of the awarded amount.

c. A lump sum amount of 5 lakh as costs of the proceedings.

16. On October 04, 2021 the Presiding Arbitrator issued her award in terms of Rule 61 of the ICA Rules, noting the reason for passing 2023:DHC:2926 the minority award as under:-

"In view of the above quotes rule of the ICA [Rule 61] as also the fact that another Award had already been written by one of the Co-Arbitrators even prior to the award by the Presiding Arbitrator with which the other Co-Arbitrator had agreed without assigning any reason, even before receiving the draft of the proposed award from the Presiding Arbitrator, it emerged as a compulsion to refer to the relevant Rule 61 of the ICA quoted above, in order to clarify the confusion. Thus, two awards are on record as of now-one by the Presiding Arbitrator and the other by the Co-Arbitrator which had been concurred by the second Co-Arbitrator without assigning any reason as also without awaiting and perusing the draft award from the Presiding Arbitrator."

17. According to Medeor, the Presiding Arbitrator, through the award issued in the above terms, agreed with its submissions and held that the transfer of shareholding to VPS would not be covered by the terms of the LOE, and that EY was only entitled to professional fee for services rendered by it.

18. Mr. Rajshekhar Rao, learned senior counsel appearing for Medeor submitted that the award dated August 17, 2021 passed by the Tribunal is invalid, illegal and perverse inasmuch as, the award cannot be said to constitute the majority consensus and has been passed without consideration of the material on record, and on a biased understanding of the terms of the LOE in complete disregard to the arguments and submissions of Medeor.

19. The case of Medeor, as contended by Mr. Rao, is that the impugned award cannot be said to be an award passed under the terms of the Act of 1996 as there were no joint deliberations between 2023:DHC:2926 the arbitrators. As is clear from the observations of the Presiding Arbitrator, one of the co-Arbitrators simply consented to the award drafted by the other Arbitrator without assigning any reason and without awaiting the draft award of the Presiding Arbitrator. Such an award cannot be said to be a majority award. In the absence of the vital steps that are to be necessary undertaken by the members of the Tribunal to appreciate all the factors and different opinions within the Tribunal while deciding the dispute to ensure that a rational, fair and just decision is reached, the award is patently illegal and needs to be set aside. In any case, even in the arbitration clause in the LOE, the parties had consented to an arbitral award passed by three arbitrators.

20. He has submitted that the practice of efficient deliberation amongst the members of an Arbitral Tribunal is a fundamental aspect of arbitration and finds credibility internationally through references in various jurisdictions. He has referred to the decision of the Civil Chamber of the Spanish Supreme Court (Tribuno Supremo) in Puma v. Estudio. (2000); SA, Judgment No. 102/2017, where the Court annulled an arbitral award passed by a three-member Tribunal upon reaching a conclusion that the two arbitrators had excluded the third arbitrator from the deliberations prior to writing and delivering the award. Reliance has been placed on the judgment of the Bombay High Court in Maharashtra State Electricity Distribution Company Ltd. & Ors. v. Deltron Electronics 2017 (2) Mh. L.J., wherein it was held as under:-

> "5. ...As held by a number of our High Courts, an award signed by a majority of the Arbitrators is valid, provided all 2023:DHC:2926 Arbitrators were present throughout the proceedings and took part in all deliberations, including the deliberations for preparation of the award."

21. He has also submitted that the impugned award cannot be said to be an "award" within the terms of the Act of 1996 for the reason that the award does not bear the signatures of all the arbitrators. The signature of the Presiding Arbitrator is absent, and no reason for such omission has been stated. The requirement of signatures of all the arbitrators is a mandatory provision of law under Section 31 of the Act that cannot be derogated from by the Tribunal. Since this very fundamental requirement has not been fulfilled, the impugned award must be set aside as being patently illegal and unenforceable. Section 31 sets out the form and content of an arbitral award passed in India- seated arbitrations. Section 31 (1) specifies the mandatory requirement with respect

to an award being signed by all the members of the Tribunal. Furthermore, in arbitral proceedings with more than one arbitrator, Section 31 (2) requires that the arbitral award contain the signatures of the majority of all members of the Arbitral Tribunal, "so long as the reason for any omitted signature is stated". According to Mr. Rao, similar to the principles of effective deliberation, the requirement of signatures as a mandatory part of the form and content of an arbitral award is a principle and practice recognised internationally. In this regard, he has referred to Rule 32 of Singapore International Arbitration Centre Arbitration Rules (6th Edition, 2016) and also Article 26.6 of the Arbitration Rules of the London Court of International Arbitration. A reference is also made 2023:DHC:2926 to the following excerpts from Gary Born s International Commercial Arbitration (3rd Edition), Chapter 23: Form and Contents of International Arbitral Awards.

> "Many national arbitration laws prescribe mandatory form requirements for international arbitral awards. In general, these provisions require a written and (almost always) reasoned instrument, signed by some or all of the arbitrators, which is dated. In some cases, these requirements are mandatory and parties are not capable of altering them by agreement. In general, these requirements are non-controversial and readily complied with, thus giving rise to few issues of interpretation.
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> ... In many national legal systems, all of the arbitrators are required to sign the award.
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> ...Where a signature requirement exists, it may be a matter of mandatory law, which prevails over inconsistent arbitration agreements or institutional rules.
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> xxxx xxxx xxxx As noted above, statutory form requirements for arbitral awards may be mandatory. In some jurisdictions, failure to satisfy particular formal requirements (e.g., to sign or date the award or indicate the place of arbitration) will be potential grounds for invalidating the award in a subsequent annulment proceeding."

22. It is his argument that the requirement of signatures is not a mere administrative or technical requirement, rather a mandatory one, 2023:DHC:2926 any violation thereof goes to the root of the award. Failure to comply with the requirements of Section 31(2) could lead to fatal consequences with respect to the award passed. To buttress this argument, he has placed reliance on the judgment of the Supreme Court in Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd., (2021) 7 SCC 657, wherein it was held as under:

> "26. Section 31 (1) is couched in mandatory terms, and provides that a arbitral award shall be made in writing and signed by all the members of the arbitral tribunal. If the arbitral tribunal comprises of more than one arbitrator, the award is made when the arbitrators acting together finally express their decision in writing, and is authenticated by their signatures. An award takes legal effect only after it is signed by the arbitrators, which gives it authentication. There can be no finality of the award, except after it is signed, since signing of the award gives legal effect and validity to it.

> The making and delivery of the award are different stages of an arbitration proceeding. An award is made when it is authenticated by the person who makes it. The statute makes it obligatory for each of the members of the Tribunal to sign the award, to make it a valid award. The usage of the term "shall" makes it a mandatory requirement. It is not merely a ministerial act, or an empty formality which can be dispensed with."

Further reliance is placed on the judgment of this Court in 2023:DHC:2926 Mahanagar Telephone Nigam Limited v. Siemens Public Communications Network Limited., 2005 (80) DRJ 584, wherein the following was observed:-

> "17. ...Merely because the proposed draft came to be signed by the two Arbitrators, will not alter the nature of the document and convert it into an " Award" within the meaning of the term because it is the intention of the arbitrators which has to be seen rather than going by a mere coincidence of the draft award bearing the signature of the two arbitrators.
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> xxxx xxxx xxxx
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> 20. ...Taking into account the totality of the facts, circumstances and the material brought on record and the manner in which the arbitral proceedings were conducted by the two arbitrators at the stage of making the award, this Court has no hesitation in holding that the document purported to be a majority award cannot be termed as an award within the meaning of the term or the Act and it is violative of Section 31 (2) and Section 31 (4) of the Act and is hit by the provisions of Section 34 (2) (a) (v) of the Act."

23. To substantiate his argument regarding the mandatory nature of Section 31, he has also relied upon Maharashtra State Electricity Distribution Company Ltd. (supra) and the judgment of the High Court of Andhra Pradesh in Transmission Corporation of Andhra Pradesh Ltd. (A.P. Transco) Hyd. & Anr. v. Galada Power and Telecommunication Ltd., Hyderabad & Ors, 2006 SCC OnLine AP 2023:DHC:2926

24. That apart, Mr. Rao has sought to draw a distinction between Section 31 and Section 29 of the Act of 1996. Section 29 which deals with decision-making by a panel of arbitrators requires that any decision of the Tribunal "shall" be made by a majority of all its members. However, Section 31 which deals with the form and content of an arbitral award specifically requires either signatures of all the arbitrators or specific reasons to be explicitly stated in the award as to the omission of any signature(s), wherein the majority of the Tribunal has signed the award. According to him, the legislature, in its wisdom decided to set a higher standard for issuance of awards and specifically set out a different requirement than other decisions by the Arbitral Tribunal. As such, branding that requirement as a mere technicality would run against the intention of the legislature.

25. He stated that the impugned award has been rendered in contravention to Rule 67 of the ICA Rules which sets out the mandatory requirement of signing the award in the following words:-

> "The arbitrators constituting the arbitral tribunal or the Presiding Arbitrator where Rule 61 is applicable, shall sign the award and the Registrar shall give notice in writing to the Parties of the making and signing thereof and of the amount of fees & charges payable in respect of the arbitration and the award. The arbitrators fee shall be payable by the Council on receipt of the award and requisite deposit made by the parties"

26. Mr. Rao has submitted that the defect outlined above 2023:DHC:2926 undermines the very validity of the impugned award and is an incurable defect that goes to the very root and accordingly is liable to be set aside.

27. Further, he stated that the impugned award is also illegal as it enlarges the scope of the LOE beyond the contours of applicable law. The Tribunal committed patent illegality in interpreting the LOE to hold that the transaction contemplated or any variation thereof, can be enlarged to the extent that the transfer of shares undertaken by a non-party to the LOE, i.e., the shareholders, can be said to be a transaction provided for by the LOE, which was essentially for finding strategic partners for the two hospitals. A finding based on this interpretation seeks to penalise a separate legal entity for the gains received by other entities, which is against the public policy of India.

28. Furthermore, EY before the Arbitral Tribunal had claimed fee from Medeor in terms of the clause relating to „success fee in the LOE. However, as the transaction contemplated under the LOE and / or any variation thereof, entitling EY to success fee had to be the transactions qua the assets and / or equity owned by Medeor, and not the shares owned by the shareholders. The fact that the transactions contemplated under the LOE could vary does not mean that such variations could change the parties to the LOE or the parties contemplated in the proposed transactions, i.e., EY and RHL. Such an interpretation would lead to rewriting the LOE which is impermissible in law. In fact, the LOE executed between EY and Medeor was to the attention of Mr. Prabhat Kumar Srivastava, i.e., 2023:DHC:2926 the then Managing Director of Medeor, wherein his signatures under the caption read "Agreed: For & on behalf of Rockland Hospitals Limited", and not on behalf of the shareholders.

29. Mr. Rao further contended that given the clear and unambiguous language of the LOE, no interpretive adjudication was required and the transactions contemplated under the LOE or any variation thereof, could not have been enlarged or stretched to the extent that the actual transaction undertaken by a non-party to the LOE, i.e., shareholders could be said to be a transaction provided for by the LOE.

30. In response to the claim of EY that the shareholders of Medeor were a party to the LOE, Mr. Rao has submitted that even assuming so, the success fee being claimed by EY, could not have been claimed from Medeor, but only from the shareholders who are separate legal entities, and as such Medeor should not have been made a party to the arbitral proceedings as it never received any

monetary benefit from the transaction. While the shareholders had authorised Medeor to execute the LOE and enter into a transaction with EY in respect of the assets / equity owned by Medeor, it did not give any authority to it to deal with the shares of the shareholders in any manner. The transactions which took place under the Share Purchase Agreement was that of sale of shares by the shareholders which does not fall within the meaning of proposed transactions or any variation thereof, provided in the success fee clause. Therefore, no success fee in terms of the LOE was payable by Medeor to EY inasmuch as;

A. Medeor did not exercise any control whatsoever over the 2023:DHC:2926 shares owned by the shareholders, as the shares are their exclusive property and not that of Medeor.

B. The respondent could not claim that the sale of shares owned by the shareholders formed part of the transaction contemplated under the LOE or any variation thereof inasmuch as even to include the third Hospital at Manesar within the purview of the LOE which was only for two Hospitals, EY had requested Medeor to execute a separate letter sent vide e-mail dated March 9, 2015. However, admittedly the same was never agreed to by Medeor. The impugned award does not consider the effect of this letter which formed part of the record and was stressed upon throughout Medeor s submissions.

C. It cannot be said that the parties to the LOE contemplated payment of success fee on sale of shares owned by the shareholders without there being a separate written agreement to that effect.

D. No adequate reason has been put forth by EY as to why Medeor should pay the alleged success fee to EY when it never received any monetary gain from the transaction. E. In terms of the preamble of the Share-Purchase Agreement, "sellers" have been defined to include "the shareholders of the Company, set forth at Schedule-1 attached hereto (each a "seller" and collectively the "sellers")" and listed out all the 31 shareholders that are party to the Share-Purchase Agreement and had agreed to sell off their respective shares to VPS. The shareholders included 21 Private Limited Companies, 2023:DHC:2926 two Limited Companies, one Trust and the International Financial Corporation (IFC) which is a unit of the World Bank. Clearly EY could not be allowed to seek success fee from these parties, who are separate legal entities.

F. The LOE provided for a specific two-part fee structure as consideration for services that were to be rendered by EY. Firstly, Medeor was to pay a retainer fee amounting to 15 lakh for the work done by EY, which did not even bring any potential partner. The retainer fee of 15 lakh was payable to EY in three installments; the first on signing the LOE, the second after one month of execution of the LOE and the third on receipt of first non-binding offer. By virtue of news articles of May, 2016, EY was aware that the shareholders of Medeor had sold their shares to VPS. However, vide letter dated June 28, 2016, EY asked for the transfer of "full outstanding" amount of 10 lakh. This demonstrates that the institution of the claim before the Arbitral Tribunal was an afterthought to extract money from Medeor. G. It was not stated in the LOE that Medeor was liable to pay success fee for any transaction undertaken by the shareholders in respect of the sale of shares. It was only liable to pay the success fee for the transaction in its favour and gain.

31. Mr. Rao contended that EY was not entitled to the success fee of 2% of the gross value for which 100% shares of Medeor were sold by the shareholders, since it is not only untenable and illogical, but also against commercial principles of contract interpretation. Given that EY was to find buyers / partners for the two hospitals of Medeor 2023:DHC:2926 it could not have been awarded success fee in respect of entirety of its shares.

32. It is his submission that the Arbitral Tribunal failed to consider EY s own admission of its full and final outstanding amount as only its retainer fees. The LOE provided for a specific two-part fee structure as consideration for the services that were to be rendered by EY. Firstly, a retainer fee for the work done by EY for the preparation of teaser and Information Memorandum which admittedly did not bring in any strategic partners, and secondly the success fee in the event that EY actually performed its scope of work and brought in investment into Medeor.

33. That apart, the Tribunal failed to consider the impact of the inconsistent position taken by EY in its claim for entitlement of success fee. The respondent vide e-mail dated June 28, 2016 had asked Medeor for transfer of "full outstanding" of 10 lakh despite being aware that the shareholders of Medeor had sold their shares to VPS. Subsequently, in the legal notice dated September 7, 2016 and the statement of claim filed by EY before the Tribunal it restricted its claim to 2% of the enterprise value of the two hospitals only, i.e., 10 crore which is 2% of the half of the total value of the deal claimed by EY at 1000 crore. In this regard, it was also submitted that the value of 100% shares being 1000 crore has remained unproven till date and Medeor had vehemently denied before the Tribunal. However the learned counsel for EY during the closing arguments before the Tribunal submitted that EY restricted its claim to only 2% of the value of the two hospitals. However as regards what enterprise value 2023:DHC:2926 is to be fixed for the said two hospitals neither was any evidence led nor was the same proved. This was on account of the fact that EY was aware of the sale of the shares of Medeor, therefore the enterprise value of the individual assets of the company cannot be calculated. Further, confusion and contradiction were resorted to by EY who after completion of the final hearing in its closing submission claimed an entitlement of 13,30,00,000/- i.e., 2% of the total transaction value which was claimed to be 1000 crore and is now claimed to be 655 crore. This contradictory stand has been taken by EY as an afterthought without leading any evidence as to the actual claim sought. The payment to EY could not have been awarded by the Arbitral Tribunal in ignorance of such consideration.

34. It is also submitted that the impugned award perversely ignores documentary evidence that EY during the entire term of its engagement have had no contact or interaction with VPS. Although EY claimed that VPS came into picture through the Dubai office of EY, the same is merely a casual statement as VPS had not even expressed any interest in the proposal of EY Dubai at that stage. That apart even with respect to the communication between EY and VPS, only an e-mail dated November 29, 2015 was relied upon by EY. A perusal of the said e-mail along with the trailing e-mails before and after the said e-mail clearly shows that there was no such approach by EY. The e-mail pertained to the subject "Project GOH Discussion, Document and Snapshots" which referred to some project in Bahrain and sent to one Dr. Ibtesam Al Bastaki of VPS. Subsequently EY Dubai responded to the said e-mail intimating Dr. Ibtesam of the 2023:DHC:2926 position regarding the project GOH at Bahrain and incidentally mentioned "also our team in India wants to check up if Dr. Shamsheer has

any apetite to look at a cluster of Hospitals in South Delhi of a reasonable size. Any preliminary thought on that would be highly appreciated". It is the contention of Mr. Rao that in these communications neither any details about the company nor the five salient features of the proposed transaction were stated. In response to this e-mail Dr. Ibtesam responded vide e-mail dated November 29, 2015 wherein he enquired about the exact amount of investment in realistic numbers qua the project at Bahrain. Regarding the Delhi investment, the e-mail stated "I will get back to you regarding New Delhi, let us focus at Bahrain and close the deal". Besides these e- mails admittedly there are no exchange of correspondence between EY Dubai and VPS. That apart he stated that there was no contract between EY Dubai and Medeor.

35. As per the terms of LOE it was mandatory for EY to be in close discussion with Medeor and keep it informed of EY s work. Further under the time-table of the LOE, EY agreed that they will not reach out to any potential partner after December 31,2015 apart from those who they had already marketed the transaction. It is an admitted case that at no point of time did EY inform Medeor of any of its alleged communication with VPS in any manner whatsoever, much less market the transaction to them. It is the case of Medeor that EY had absolutely no role in VPS getting any information about the value of its two hospitals and Dwarka and Qutub Institutional Area or about the assets of Medeor and its value of shareholding.

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36. According to him, the Arbitral Tribunal committed a patent illegality in holding that even though EY had no role in either tracking VPS or introducing it to the shareholders, the contractual clause can be stretched to interpret that Medeor was obliged to report it to EY so as to facilitate EY to claim its success fee for a transaction wherein admittedly it had neither any role nor any scope. The Arbitral Tribunal awarded the success fee as payment contingent on the occurrence of an event, despite the position admittedly being that EY has actually not rendered any services in lieu of such contingent payment. His contention is that such payments are untenable and unenforceable in law and cannot be legally upheld.

37. Additionally he stated that the impugned award does not consider that the timeline of the LOE does not cover any transaction with VPS and as such cannot be basis of the award of success fee. The transaction of transfer of shares happened after the expiry of the exclusivity period of nine months and as such cannot be said to be covered within the terms of the LOE. As per the time-table clause of the LOE, EY had six months from August 11, 2015, i.e., the date of execution of the LOE, to perform it services. Thereafter EY was barred from reaching out to any potential new partners after December 31, 2015 and was only allowed to continue discussion with only such potential partners / buyers who were approached by them prior to December 31, 2015 and to those whom the potential transaction has been marketed before December 31, 2015. As per the list shared by EY vide e-mails dated December 19, 2015 and March 29, 2016 of potential partners / buyers no mention of VPS 2023:DHC:2926 could be found. Therefore after December 31, 2015, EY, in any case was not in a position to approach VPS for the proposed transaction.

38. That apart, the impugned award fails to consider the exclusivity clause of the LOE. Before the Tribunal, EY claimed that as per the said clause even if it did not approach VPS, Medeor was liable to pay the success fee as if VPS had been approached by EY. The said exclusivity clause reads as under:

> "In order to maximise the chance of achieving this objection, the Company and EY will co-ordinate all contacts with the potential partners. Should any new potential partner approached the Company directly or alternatively, if the Company identifies a potential partner, the Company will advice EY of such fact and EY will assist the Company in subsequent negotiations with such partner. In any event, irrespective of the source of such partner, EY will be paid the success fee, as if the partner were contacted directly by EY."

39. In response to this submission, Medeor submitted that a plain reading of the said exclusivity clause made it clear that Medeor was to inform, seek advice from EY and pay success fee in case it was approached by any potential buyer / partner with respect to the transaction envisaged under the LOE and / or any variation thereof in respect of the assets and equity owned by it. However, since no one had come forward for the same, there was no occasion for Medeor to inform and / or seek advice of EY.

40. That apart, he stated that the only requirement for making Medeor party to the Share-Purchase Agreement was that the shareholders have to inform the company of any sale of shares so that 2023:DHC:2926 Medeor could record the same and amend its members register. The respondent despite being aware of the sale of shares never impleaded the shareholders in the arbitral proceedings. Further, though EY had claimed that a Term-Sheet for a transaction was signed between Medeor and VPS on March 30, 2016, the same was not placed on record. No question was asked to any witness in respect of the said Term-Sheet. The Term-Sheet mentioned in the Share-Purchase Agreement is for Facility Arrangement executed between one of the shareholders of Medeor, i.e., M/s. LIPI Finstock with VPS.

41. He stated that the award at paragraph 24 incorrectly records that Medeor did not examine any witness on its behalf except cross- examining the three witnesses, completely ignoring the record that Mr. Sameer Sharma, Chief Financial Officer of Medeor was produced and examined as witness by Medeor in the proceedings. According to him, this instance is an example of the lackadaisical approach adopted by the Tribunal in perusing and appreciating the evidence on record.

42. That apart, the Tribunal did not consider crucial evidence of Mr. Prabhat Kumar Srivastava that was sought to be brought on record, whose written statement contained key elements relating to the nature of the engagement with EY and the surrounding circumstances of the developments that followed.

43. He has sought the prayers as made in the petition. FINDINGS

44. I have heard the learned counsel for the parties and perused the record. Accordingly, I proceed to decide the challenge to the award 2023:DHC:2926 on the basis of the records filed in the petition. At the outset, I may state that despite directions of this Court on October 27, 2022, EY has not filed any submission in this petition. The submissions have been filed in OMP (ENF) (COMM) 81/2022. The same is to the effect that the Tribunal has awarded a sum of 10 crore towards success fee to EY with interest @ 9% per annum and has sought the enforcement of the award.

45. The issue which arises for consideration in this petition is whether the award dated August 17, 2021 of the majority arbitrators needs to be set aside under Section 34 of the Act of 1996. The submission of Mr. Rao with regard to the impugned order is that the same is not an award within the ambit of the Act. According to him, the requirement of the signatures of the arbitrators under Section 31 of the Act is a mandatory provision of law and cannot be derogated from by the Tribunal or even by a party agreement which has not been fulfilled in the case in hand. His submission was also that the impugned award has not been passed in accordance with the procedure agreed to by the parties. That apart, the impugned award cannot be said to be passed by the majority of two of the three arbitrators, as the two co-arbitrators have not considered the view of the Presiding Arbitrator.

46. I am not impressed by the submissions made by Mr. Rao. To understand the position under the Act of 1996, it is necessary to re- produce Sections 29 and 31 of the Act of 1996 as under:

> "29.Decision making by panel of arbitrators.--(1) Unless otherwise agreed by the parties, in arbitral proceedings with 2023:DHC:2926 more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members. (2) Notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator."
>
> "31. Form and contents of arbitral award.--(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.
>
> (2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated. (3) The arbitral award shall state the reasons upon which it is based, unless--
>
> (a) the parties have agreed that no reasons are to be given, or
>
> (b) the award is an arbitral award on agreed terms under section 30.
>
> (4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place. (5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award. (7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent 2023:DHC:2926 on the date of award, from the date of award to the date of payment.

Explanation.--The expression "current rate of interest"

shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).] [(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.] Explanation.--For the purpose of clause (a), "costs"

means reasonable costs relating to--

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award."

47. In the case in hand, the two co-arbitrators have rendered the award on August 17, 2021. The Presiding Arbitrator has given her decision on October 4, 2021, i.e., after a period of almost two months. It is true that Section 31(1) contemplates that the arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal. Section 31(2) contemplates that where the arbitral proceedings were held with more than one arbitrator, the signatures of majority of all the members of the Arbitral Tribunal shall be sufficient, so long as the reason for any omitted signature is stated.

48. As is noted from the above, the Presiding Arbitrator has neither put her signature in the majority award nor has stated any reason for such omitted signature. The reason for the same is clear, 2023:DHC:2926 inasmuch as she has given a separate opinion dated October 4, 2021, which is duly signed.

49. In view of Section 29, it is clear that any decision of the Arbitral Tribunal with more than one arbitrator shall be made by the majority of its members. In that sense, as the two co-arbitrators have signed the award dated August 17, 2021, the same shall be construed as an award of the Arbitral Tribunal. Hence the plea of Mr. Rao that the impugned award dated August 17, 2021 cannot be said to be an award only by relying upon Section 31 is clearly untenable.

50. The aforesaid position of law can be seen from the judgment of a coordinate Bench of this Court in the case of Government of India, BSNL v. Acome and Ors., 2007 SCC Online Del 226 decided on February 14, 2007, wherein the Court in paragraphs 32 to 36 has stated as under:

> "32. In a case where the minority of arbitrators choose not to give their opinion unless agreed to by the parties, in my view should not prevent the making of a majority award by the Tribunal. By preferring not to sign the majority award, or by failing or refusing to give its opinion altogether, the minority of arbitrators cannot defeat or frustrate an arbitral proceeding. This appears to be the reason why the law states that it "shall be sufficient" for the majority of the Arbitral Tribunal to sign the award, so long as they disclose the reasons for the omission of signatures of the minority of arbitrators.
>
> 33. Once the award is signed and communicated by the majority of arbitrators, (since the decision of the panel of arbitrators is to be governed by majority under Section 29, unless otherwise agreed) the parties are put to notice, and are aware of the determination made by the Arbitral Tribunal. Each party knows his rights and obligations as crystalised in 2023:DHC:2926 the award of the majority and the consequences flowing therefrom. If a party is aggrieved by the majority award, he can and must challenge the same within the time provided for the purpose. His grounds of challenge have to be gathered from the majority award and the arbitral proceedings. They are not dependent upon the giving of the minority opinion by the minority of arbitrators. If and when it is given, such a minority opinion(s) may be used by a party challenging the award to bolster his challenge. However, the aggrieved party cannot await the giving of the minority opinion to challenge the majority award, which binds him and affects his rights.
>
> 34. Consequently, it is immaterial whether the opinion of the minority of arbitrators, if any, is made available to the parties at the same time as the award of the majority or not. From the decisions cited above, it is evident that it has always been the law that an award which is signed by the majority of arbitrators is a valid and enforceable award. The contention of the petitioner that an award, of necessity, has to be signed by all the arbitrators, or that even if there are two or more opinions, they should all be expressed in writing and communicated by the arbitrators before a valid and binding arbitration award comes into being, therefore, does not appear to be correct and is rejected. This submission is also not in consonance with Section 31(2) of the Act, which provides that the signature of the majority of all arbitrators of the Arbitral Tribunal shall be "sufficient". The language used by the legislature in Section 31 of

> the Act is clear, and on a plain reading of the section no other reasonable conclusion can be reached. It may be noted that in spite of the language used by the Parliament in Section 10 read with Section 14 of the Arbitration Act, 1940, the Madras High Court in R. Dashratha Rao (supra) took the view that an award might be pronounced by a majority of arbitrators, and the failure of the minority to sign the Award does not affect the validity of the Award. Under the 1996 Act, the Parliament has made it explicit and clear that it shall be "sufficient" if the award is signed by the majority of arbitrators and the reasons for the omission of the minority to sign are stated in the award.
>
> 2023:DHC:2926
>
> 35. In my view the limitation for filing of objections would begin to run from the date the parties are put to notice of the majority award. That to my mind is also the purposive interpretation of the provisions of the Act. The party succeeding before the Arbitral Tribunal, in whose favour the award has been rendered, would be left high and dry if it is taken that the majority award cannot be challenged or executed unless all the arbitrators give their respective opinions. Such an interpretation would have the potential to frustrate the scheme of the Act whenever there is a multi- member Arbitration Tribunal constituted. The object of the Act is to provide speedy and alternative resolution of disputes. This would be defeated if one or more arbitrators in minority choose to either delay the publication of their opinion, or choose not to give it at all.
>
> 36. The contention of learned counsel for the petitioner that the word "sufficient" used in Section 31(2) of the Act means that the reasons for omission of signature of the minority of arbitrators must to be those found within the provisions of the Act itself, and particularly in Section 14 thereof is also incorrect. Sub section (2) of Section 31 does not deal with the reasons for which the minority of the arbitrators may omit to sign the award. The reason of dissent with the majority is a reason good enough and is also contemplated by the Act, since Section 29 talks of the decision being made by majority of all arbitrators. This obviously contemplates the possibility of dissent by a minority of arbitrators. ....."

(emphasis supplied)

51. The aforesaid decision of the coordinate Bench has been upheld by the Division Bench in FAO (OS) 248/2007 decided on July 25, 2008, wherein in paragraph 9, the Court has held as under:

> "9. Section 31 of the 1996 Act which is material for our purpose requires that an arbitral award must be in writing and signed by all the arbitrators whether the award is unanimous or not. An oral award is unknown to the 1996 Act. Sub-section (2) of the Section 31 deals with arbitral proceedings with more 2023:DHC:2926 than one arbitrator. As per sub-section (2) bearing signatures of majority of all the members of

> the arbitral tribunal shall be sufficient so long as valid reasons for the omitted signature is made clear. Section 31 contemplates a single award and there is no plurality of award and signatures of majority of the members of the arbitral tribunal are sufficient so long as reasons for omission of the signatures of the minority arbitrator are contained in the majority award itself. Thus it is enough if the award is signed by the majority arbitrators and refusal of the minority arbitrator to sign will not affect its validity. Learned counsel for the respondent has referred to the following passage from Russel on Arbitration at page 271 of the 21st Edition (1997). In para 6-059 Russel states as follows:
>
> "If however there is no chairman, then decisions, orders and awards must be made by all or a majority of the tribunal. Any member of the tribunal who does not assent to an award need not sign it and may set out his own views of the case in a "dissenting opinion". This is for the parties information only and does not form part of the award, but it may be useful in terms of adding weight to the arguments of a party wishing to appeal against the award."

The aforesaid commentary makes a reference to the specific provisions of the Arbitration Act, 1996 as in force in England. The scheme of the two Acts is similar and same principles of law would apply in the context of Indian Act."

52. I find that the view of the Division Bench of this Court in FAO (OS) 248/2007 has been followed by the Madras High Court in R. Ramasubbu v. AVM Productions and Ors., O.P. No. 102/2010 decided on August 3, 2018, wherein in paragraph 46, it is held as under:

> "This Court is in agreement with the Division Bench Judgment of the Delhi Hgih Court in the case of Govt. of India Bharat Sanchar Nigam Limited vs. Acom and Ors. reported in 2006 2023:DHC:2926 AIR 2011 102 cited by the learned Counsel for the first respondent that if the Award signed by the majority Arbitrators and refusal of minor Arbitrator to sign will not affect its validity."

53. The plea of Mr. Rao that impugned award cannot be said to have been passed as a majority award by two of the three arbitrators as the co-arbitrators have not considered the view of the Presiding Arbitrator, effectively restricting the deliberations and decision making process to themselves, is without merit. This I say so as the two co-arbitrators having signed the award dated August 17, 2021, the same has to be construed as a unanimous view of the two co- arbitrators. It also implies, they did not feel the requirement of perusing a view different from theirs in their award. As held by this Court, the majority view is not dependent upon giving the minority opinion by the minority Arbitrator(s). Even the plea of Mr. Rao that the learned co-arbitrators have rendered their award without awaiting and perusing the draft decision of the Presiding Arbitrator, is also without merit, more so, when they have rendered the award much in advance on August 17, 2021 that too unanimously on consideration of the record as available before them. It is nobody s case that the Presiding Arbitrator had rendered her opinion prior to August 17, 2021 and sent it to the two co-arbitrators for their consideration. Further, I find that there is no remark by the learned

Presiding Arbitrator anywhere in the award that she did not have benefit of deliberations with the two co-arbitrators.

54. In view of the above, it must be held that the two learned co- arbitrators having signed and rendered the award, which is in 2023:DHC:2926 majority, shall be construed as a valid award and the opinion rendered by the Presiding Arbitrator is of no consequence. Hence the plea of Mr. Rao is liable to be rejected.

55. Another submission of Mr. Rao was on Issue Nos. 1 and 2 which reads as under:

> "Issue No.1:
>
> Whether the transaction as contemplated in Engagement Letter / Agreement dated 11th August, 2015 is fundamentally different from the transaction dated 30th June, 2016 entered between the RockLand Hospitals Ltd. and VPS Healthcare Private Ltd.?
>
> Issue No.2:
>
> Whether the objections raised in the Statement of Defence are legal and valid, and if so, their effect on the claims."

56. According to him, the nature of transaction envisaged under the LOE and the final transaction that was undertaken by Medeor, i.e., transfer and sale of its entire shares, including all its assets was very different and according to him, the finding in the impugned award holding that the final transaction is merely a variation of the originally envisaged transaction and that the respondent was entitled to a success fee, is perverse. To consider this submission of Mr. Rao, it is important to reproduce the relevant clauses of the LOE as under:

> "Statement of Work xxx xxx xxx We understand that the Company is considering induction of strategic partner(s) for two of its hospitals located at Qutab Institutional Area and at Dwarka in Delhi (together, referred to as the "Hospitals") and it is in this connection RHL is seeking EY's assistance in identifying and approaching potential partners and in advising on the execution of any resultant transaction. The Company 2023:DHC:2926 would undertake requisite restructuring in accordance with legal and regulatory requirements to ensure that the proposed transaction is possible."
>
> "Scope of our services As your financial advisor, our role is to use best endeavours to source potential partners for the Transaction and provide advice and strategic Insight with regard to key commercial and financial aspects of the Transaction. In our role, you will be able to draw upon the full extent of our transactional experience, Industry knowledge, relationship with potential partners, and resources to deliver an outcome aligned to thestakeholders' interests.

Scope of our services to be provided under this engagement will include to the extent required:

1. Based on information provided by you, we will prepare a confidential information Memorandum, including information on the a. history of the Company/Hospitals;

b. business (including services offered, key doctors, patient mix etc.);

c. management and personnel details;

d. historical profit and loss accounts;

e net assets;

f. future prospects; and g. other material information

2. Assist the Company in preparation of a detailed financial plan for the Hospitals based on management's estimates and based on our understanding of the Company, the business and the industry;

3. Approach on a "no-names" basis the potential partners in order to establish the degree of interest from such companies / suitors. If the potential partners are interested then we will obtain a confidentiality letter from them;

4. Co-ordinate distribution of the information Memorandum and timetable of events to those potential 2023:DHC:2926 partners who have provided us with a signed confidentiality letter:

Timetable We will mobilize our engagement team to commence work on the date of execution of this Engagement Agreement (the 'Start Date'). Throughout the course of the assignment, we shall be in close discussions with you and keep you informed of the progress of our work. Documentation that may be required from time-to-time will be prepared and delivered according to schedules agreed upon at the time such document preparation work is undertaken.

At this point in time, it is difficult to precisely estimate the time required for achieving the Transaction Closing Date i.e. finalization of Sale Agreements/shareholder Agreements etc. This could vary depending on the complexity of the transaction and the keenness of the partner(s), etc. Our endeavor is to achieve signing of the definitive transaction documents within 6 (six) months of the Start Date. The Company acknowledges that achieving Transaction Closing Date is a function of numerous factors, many of which are out of the control of the Company and EY. However, we agree that we shall not reach out to any new potential partner after December 31, 2015 apart from continuing discussions with those parties who we had marketed the Transaction before December 31, 2015.

xxx xxx

Retainer Fee

We will charge you a retainer fee of INR 15 lakhs (Rupees Fifteen lakhs) payable in 3 equal tranches, as per the following schedule:

INR 5 lakhs (Rupees Five lakhs) payable on signing of this Agreement;

INR 5 lakhs (Rupees Five lakhs) payable at the end of 1 month of signing of this Agreement; and 2023:DHC:2926 INR 5 lakhs (Rupees Five lakhs) payable upon receipt of first acceptable Non-Binding Offer;

Retainer fee mentioned above would be fully creditable against the success fee (as defined below) paid under this Engagement Agreement, but shall not be refundable. Success Fee In the event that the proposed transaction is completed, you agree to pay a success fee of 2% of the "Enterprise Value" of the Hospitals, subject to a minimum fee of INR 5 crore (Rupees Five crare only). Enterprise Value for the purpose of computing success fee payable shall include the value of all underlying equity transferred (upfront or in tranches as agreed in the transaction Agreements with the incoming partner) and all debt associated with / transferred to the Hospitals at transaction closing. The success fee would be due on the signing of definitive transaction documents but payable in cash on completion of the transaction.

For the purposes of calculating our success fee based on the Enterprise Value, Enterprise Value shall also be deemed to include the value of any deferred, contingent or non-cash consideration, the value of any liability assumed by the acquirer and the value of any compensation, consultancy fee, non-complete fee, pre-transaction dividend (or other distribution) or other payment or transfer of value to the acquired company or its shareholders, proprietors, directors or Related Parties as well as the cash value of the consideration paid. Whilst the structure and nature of the project may change as discussions with potential partners progress, you acknowledge that this is the basis on which the project has been undertaken. For the avoidance of doubt, the above success fee will not be prejudiced in the event that the final transaction, once completed, has evolved away from that originally envisaged in this Agreement and we will still be 2023:DHC:2926 entitled to our success fee based on any consideration received by the shareholders in relation to any transaction on which we advise pursuant to this engagement or any variation of this engagement (e.g. disposal of all or part of the company,(solely or with other assets) or any fundraising).

Furthermore, if the structure or nature of the project begins to alter from the mandate originally envisaged by us as outlined in this Agreement, we reserve the right to withdraw from this engagement or renegotiate the engagement Agreement.

Related Party as used in the paragraphs under the heading "Fees" In the Agreement includes the following: a. substantial shareholders of the company or its parent or subsidiary undertaking (substantial shareholders means anyone who has 10% of the voting rights) b. directors of the company or its parent or subsidiary undertakings c. any associates of the Related parties in a) and b) above Associates means in relation to an individual that person's spouse or child, his trusts and certain companies in which the Individual has an interest. Associates means in relation to a company any parent or subsidiary undertaking of that company as well as certain other entities.

xxx xxx xxx.

Continuance of fee arrangement You confirm that in the event that the Transaction does not occur during the period of our engagement but that it occurs within six (6) months of termination of our appointment (howsoever terminated), from a party with whom we had been in discussions or from a party who received information during our appointment, we will be entitled to the fees calculated on the basis set out in paragraphs under the heading "Fees" above.

2023:DHC:2926 Exclusivity For the purpose of this Transaction, EY is appointed as the exclusive advisor for the scope of services hereunder for an initial period of nine (9) months beginning on the date of execution of this Agreement (the "Primary Period"). You have terminated any existing arrangements with any other persons to undertake any of the functions set out in this Agreement and you will not (without our prior written consent) engage or assist (directly or indirectly) any other persons to perform these functions during the period of this Agreement.

In order to maximize the chance of achieving this adjective, the Company and EY will co-ordinate all contacts with the potential partners. Should any new potential partner approach the Company directly or alternatively, if the Company identifies a potential partner, the Company will advise EY of such fact and EY will assist the Company in subsequent negotiations with such partner. In any event, irrespective of the source of such partner, EY will be paid the success fee, as if the partner were contacted directly by EY.

Unless the Transaction is successfully completed before the end of 9 months from the date of signing of this Agreement, the Primary Period would automatically be extended by six (6) additional months, unless you or EY terminate this Agreement by way of a written notice to the other party."

57. After much discussion on both the issues, the Tribunal has in paragraph 47 held as under:

"47.....The transaction as contemplated in the Letter of Engagement is not fundamentally different from the transaction between Rockland and VPS Healthcare

> but has evolved out of the original agreement and in the light of the discussions and findings recorded hereinbefore, Issue No.1 is 2023:DHC:2926 held against the Respondent. So far as Issue No.2 is concerned, it is held that the objections raised by the Respondent in the Statement of Defence are considered as baseless and without merit in the light of the discussions and findings recorded hereinbefore."
>
> 58. The submission of Mr. Rao is that the Tribunal erred in interpreting the scope of LOE to hold that the transaction contemplated under the LOE or any variation thereof could be enlarged to the extent that transfer of shares undertaken by non-

parties to the LOE, i.e., the shareholders, who are separate juristic persons is contrary to the noting in the LOE and as such a perverse conclusion.

59. Before dealing with the issue, it is necessary to understand the scope of interference of Courts in an arbitral award while exercising jurisdiction under Section 34 of the Act of 1996. For a party to successfully assail an arbitral award, it must show that the award suffers from perversity or an error of law, or that the arbitrator has mis-conducted himself. The ground for assailing an award cannot include what the Court thinks is unjust on the facts of a case. In other words, the Court cannot substitute its view for the arbitrator s view on facts. The Supreme Court in Associate Builders v. Delhi Development Authority, Civil Appeal No. 10531/2014 decided on November 25, 2014, while setting aside the Judgment of a Division Bench of this Court, opined as under:

> "22. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the Arbitrator for having applied a formula of 20 2023:DHC:2926 months instead of 25 months. Though this would inure in favour of the appellant, it is clear that the appellant did not file any cross objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with claims 12 and 13. The formula then applied by the Division Bench was that it would itself do "rough and ready justice". We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the Arbitrator s view and does what it considers to be "justice". With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact."

60. The Supreme Court has in a veritable plethora of judgments, the latest being Indian Oil Corporation Limited v. Shree Ganesh Petroleum Rajgurunagar, (2022) 4 SCC 463, held that the interpretation of provisions of a contract is the domain of an Arbitral Tribunal and any

interpretation thereof cannot be set aside in a challenge under Section 34 of the Act of 1996 unless such interpretation is shown to be manifestly perverse.

61. It is also a law well settled that the arbitrator is the master of facts and evidences placed before him, and the Court while exercising its jurisdiction under Section 34 shall neither re-visit nor re-

2023:DHC:2926 appreciate the same. In this regard, I may refer to the decision of the Apex Court in Madnani Construction Corporation Pvt. Ltd. v. Union of India & Ors., (2010) 1 SCC 549 and Aroson Enterprises Limited v. Union of India & Anr., (1999) 9 SCC 449.

62. Even otherwise, I find that the Tribunal while coming into such a conclusion has inter alia relied upon the following stipulation in LOE under the heading "Success Fee":

> "Whilst the structure and nature of the project could change as discussions with potential partners progress, you acknowledge that this is the basis on which the project has been undertaken. For avoidance of doubt, the above success fee will not be prejudiced in the event that the final transaction, once completed, has evolved away from, that originally envisaged in this agreement and we will still be entitled to our success fee based on any consideration received by the shareholders in relation to any transaction on which we advise pursuant to this engagement or any variation of this engagement, i.e., disposal of all or part of the company (solely or with other assets) or any fundraising."

(emphasis supplied)

63. One of the submissions of Mr. Rao was also that the Tribunal has failed to consider EY s own admission of „full and final outstanding as only 10 lakh, thereby settling the matter and ending its engagement and as such the claim of EY before the Tribunal was an afterthought. I note this submission of Mr. Rao was not taken by the petitioner before the Tribunal in the Statement of Defence. It was taken for the first time in the written submissions filed before the Tribunal and as such there was no occasion for the respondent to respond to the same. It appears, it is for this reason that no issue in 2023:DHC:2926 that regard was framed by the Tribunal. Be that as it may, it appears that the claim of 10 lakh was the balance of retainer fee as the petitioner had already paid an amount of 5 lakh against the total amount of 15 lakh payable under the contract.

64. This is clear from the email dated June 20, 2016 wherein the respondent had requested the petitioner / Hospital wherein it is stated "would request if you can arrange to have the full outstanding (Rs 10 L + service tax) released to us at the earliest."

65. In any case, the claim of 10 lakh could not be under the heading Success Fee as the formula governing Success Fee was 2% of the enterprise value of the Hospitals, subject to a minimum fee of 5 crore.

66. Yet another submission of Mr. Rao was that the Tribunal failed to consider the impact of the inconsistent position taken by EY regarding the amount of the Success Fee. According to him, initially EY sought 10 crore as 2% of the 50% of the enterprise value of 1000 crore and subsequently increased the claim to 13.2 crore as 2% of the alleged transaction value of 665 crore. There is no denial to the fact that the claim petition was filed by the respondent for a claim of 10 crore as 2% of the enterprise value. However, the Tribunal has quantified the Success Fee in the following manner in paragraphs 43 and 48:-

> "43. In view of the aforesaid position, it is established that whilst the structure and nature of the project would change as discussions with potential partners progress, the claimant would still be entitled to receive its success fee based on the enterprise value. It is the intent of the engagement letter that 2023:DHC:2926 such success fee would not be prejudiced even in the event that the final transaction once completed has evolved awar from the original envisaged in the agreement. The enterprise value of the Respondent Company was an amount of Rs.650 crore which is indicated in the Share Purchase Agreement dated 29.06.2016. This is also confirmed by the statements made in the notice dated 12.04.2017 particularly in paragraphs 3, 12 and 14 which document is placed on record by the Respondent itself along with the Statement of Defence as Annexure-III thereof, it is of course stated in paragraph 14 thereof that the gross amount of Rs.650 crores was invested by VPL Healthcare towards initial purchase amount which also included the dues payable to the banks since this purchase amount of entire shareholding is not disputed and rather admitted, we may therefore proceed to consider the same as purchase money for deciding the claim of the claimant. The concept of success money means the enterprise value consisting also of all debts associated with the hospital and the value of any compensation as mentioned under the heading Success Fee. However, it is noted that the erstwhile shareholders have already been paid out of the total consideration of Rs.650 Crores which is an admitted position and admitted by none else than the Director of the Shareholder Company, Mr. Prabhat Srivastava in his reply to question No. 17 of his cross-examination when he stated that the total consideration was Rs.650 Crores which is relevant for us. Besides, the agreement in the nature of share purchase itself stipulates the gross amount of purchase is of Rs.650 Crores.
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> 48. Consequent upon the aforesaid findings and conclusions recorded hereinabove, it is held that the Claimant would be entitled to claim an amount equivalent to 2% of the enterprise value which in this case would be around Rs.13.30 Crore. However, since the Claimant has claimed in the Claim Petition only for payment of an amount of Rs.10.0 Crore towards success fee, being 2% of the enterprise value, it is held that the Claimant is entield to an award for payment of such an amount of Rs.10.0 Crore against the success fee which shall be paid by 2023:DHC:2926 the Respondent to the Claimant after adjustment of the retainer fee already paid under the Engagement

> Agreement to the Claimant, if any, as provided under the title "Retainer Fee" at page 6 of 14 of the Engagement Letter dated 11.08.2015, wherein it has been stipulated that the Retainer Fee mentioned therein would be fully creditable against the success fee paid under the Engagement Agreement...". We are conscious of the fact that we are bound by the terms of the contract and we cannot order payment of any amount which is not envisaged in the contract, which if done, would amount to rewriting the contract which is not permissible for us. Consequently, we have ordered for payment of the amount stipulated under the heading "Success Fee" minus the retainer fee which is actually paid by the Respondent to the Claimant in terms of the provisions of the contract / agreement. Issue No. 3 is accordingly answered in favour of the Claimant and against the respondent.

67. Suffice to state that earlier the claim of the respondent was 2% of the 50% of the total enterprise value which was quantified as 1000 crore by EY, but the fact remains as is seen from paragraph 43 of the award which I have reproduced above, that the Tribunal comes to conclusion that the gross amount of the share purchase is 650 crore and on that basis it quantified the 2% to be around 13.02 crore, However, since EY had made a claim for only 10 crore, the Tribunal has awarded the said amount. There is sufficient justification for the Tribunal to grant the amount in favour of EY. Hence, this plea of Mr. Rao is also rejected.

68. Another submission was that the impugned award perversely ignores documentary evidence that EY during the entire term of its engagement had no contact or interaction with VPS and that the stand that of EY that VPS came into the picture as a result of the 2023:DHC:2926 communications from the Dubai Office of EY, is merely a casual statement as VPS had not even expressed any interest in the proposal of EY Dubai at that stage. Even the reliance placed on the email dated November 25, 2015 along with the trailing email before and after the said email clearly shows that there is no such approach by EY.

69. According to Mr. Rao, the email demonstrates that VPS was concerned only on focusing on the Bahrain project and closing the deal. Further he stated that there is no contract between EY India and the petitioner herein.

70. In this regard, I may refer to paragraphs 37 to 40 of the award wherein the Tribunal has stated as under:-

> "37. Here is a case where the Respondent was directly negotiating the deal with VPS Healthcare. But according to the terms of the Agreement, the Respondent was required to inform the Claimant about such approach and negotiation with a party who had contacted the Respondent directly and therefore, the Respondent has knowingly and wilfully violated a material part of the Agreement by not bringing on the Claimant on board. The specific stipulation in the contract under the heading "Exclusivity" to the effect "Should any new potential partner approach the Company directly or alternatively, if the Company identifies a potential partner, the Company will advise EY of such fact and EY will assist the Company in subsequent negotiations

with such partner".

The facts stated clearly establish that the Respondent has wilfully and knowingly violated this clause which was binding on the parties. This wilful violation on the part of the Respondent is not only unethical but also improper and illegal and so, the Respondent is obliged to comply with the contractual condition and mandate and pay the 2023:DHC:2926 amount of success fee as stipulated in the contract to the exclusive advisor or appointed mutually for the Scope of Services as stated under the Exclusivity Clause. It is a well settled legal position that the terms of the contract are binding on the parties thereto as was held by the Hon'ble Supreme Court in the case of Bharathi Knitting Co. v. DHL Worldwide Express Courier Division of Airfrieght Ltd reported in (1996) 4 SCC 704.

38. It is thus crystal clear that should any new potential partner approaches the Respondent directly or alternatively and if the Respondent identified a potential partner, the Respondent was required to advise the Claimant of such fact and thus the Claimant was required to assist the Company in subsequent negotiations with such partner and therefore, Irrespective of the source of such partner, the Claimant would be paid the success fee on the basis of specific stipulation under the sub-heading 'Exclusivity, as if the partner was contacted directly by the Claimant. The present deal was struck on 30.03.2016 as pointed out hereinbefore when the term sheet was signed between the Respondent and VPS Healthcare well within the first 9 months of the Letter of Engagement which ended on 10.05.2016 and the extended period of Letter of Engagement which ended on 10.11.2016. It is also Indicated from the records that the Share Purchase Agreement for the sale and transfer of the entire shares of the company by the shareholders and for transfer of the Respondent Company is dated 29.06.2016 which is well within the extended period of Letter of Engagement. It is also established from the record that the Claimant has completed its responsibility as vested in the Letter of Engagement and the terms and conditions envisaged therein by preparation of a teaser, Information Memorandum and Financial Model The Claimant during the course of its negotiations and correspondence with various proposed healthcare organizations like those mentioned in preceding paragraphs also approached VPS Healthcare, as indicated in the admitted document, 2023:DHC:2926 through the office of the Claimant in Dubai although a different entity but so stipulated, permitted and envisaged in the Letter of Engagement under the heading 'our relationship with you in Appendix B. To be more specific, on 29.11.2015, Mr. Tarun Koduri, EY Team memberfrom Dubai office wrote an E-mail to VPS Healthcare based in Middle East to check for their interest, which fact has been confirmed by the Claimant by sending an E-mail on 10.07.2016. Both the aforesaid documents are parts of the documents shown in this proceeding. The aforesaid dealing of the Dubai office of the Claimant was authorised action on the part of the Claimant and is so permitted and authorised under the terms of the contract as stipulated in Appendix B under the Reading "Our relationship with you". This is an undisputed fact and contractual position between the parties. This would become more clear when the three E-mails exchanged on 26.04.2016 are read. All these E-mails which are also discussed in the preceding paragraphs prove the fact of it being in touch with VPS Healthcare for making it a strategic partner. The VPS Healthcare as reflected from the three E-mails referred to above took a plea for avoiding the request of the Claimant on the ground that the exclusivity clause of the contract between the Claimant and the Respondent had expired which however was an incorrect stand, as is clearly reflected from the E-

mail dated 26.04.2016 sent at 4.07 PM and referred to above. From these clear facts, it could be also legally and factually assumed that the Respondent was aware of the fact that the Claimant was in touch with VPS Healthcare and tried to avoid the legal and valid contract on an incorrect and wrong plea that the valid contract between the Claimant and the Respondent had expired. This fact was made clear by the Respondent in its aforesaid E-mail dated 26.04.2016 Informing that the mandate of the Claimant was still very active on that date. Besides, the Claimant approached many other suitable investors other than VPS Healthcare in order to find out a strategic 2023:DHC:2926 partner including entering into non-disclosure agreements with them.

39. These facts clearly indicate that the Claimant performed its obligations very faithfully and diligently and using its professional and business acumen and expertise in preparing the Financial Model and Information Memorandum, the teaser regarding the project using their expertise to take the proposal forward to various prospective partners. Reference may be made to the letter of the Claimant to Narayana Hrudayalaya Limited dated 08.12.2015 wherein the Claimant has extensively given and outlined the various processes, analysis and steps to be undertaken for acquisition of majority stake in the two hospitals. The letter confirms the sincerity and the workmanship of the Claimant and their expertise involvement in the responsibility entrusted to them. Similar processes and steps were taken by the Claimant in respect of other potential buyers also. The Respondent and its shareholders, however, entered into an agreement for sale and transfer of the entire shares of three hospitals located at Dwarka, Qutab Institutional Area and Manesar and also sale of the land at NOIDA to VPS Healthcare on 30.03.2016 together with transfer of the Company to the buyer.

40. Therefore, in the light of the aforesaid factual position and documentary evidence, it is established that the transaction which was entered into between the Respondent and VPS healthcare got evolved from the concept as envisaged in the Letter of Engagement and, therefore, the Share Purchase Agreement by way of sale and transfer of the entire shares and also for transfer of the entire company to VPS Healthcare is merely an extension of the same transaction in as much as the contractual provision categorically states that the Claimant would still be entitled to success fee based on any consideration received by the shareholders in relation to any transaction which the Claimant advised pursuant to the engagement or any variation of the said 2023:DHC:2926 engagement like disposal of all or part of the company (solely or with other assets) or any fundraising. In the present case also consideration was received by the shareholders from VPS Healthcare in relation to the transaction which is in the nature of a variation of the engagement on which the Claimant was advising pursuant to the said agreement. It is also established from the facts that the transaction has under the agreement between the Claimant and Respondent envisaged even an 'evolving transaction as it is stated in the said agreement that the Claimant was advising on the execution of any resultant transaction also. The Agreement, therefore, contemplates the sale or strategic Investment in Rockland Hospitals either in its entirety as a Company with all its assets or part thereof i.e. merely two hospitals."

(emphasis supplied)

71. From the above, it is noted that the Tribunal has come to a conclusion that the respondent during the course of its negotiations and correspondence with various proposed healthcare

organizations also approached VPS through its office in Dubai. The Tribunal has referred to the emails dated November 29, 2015, July 10, 2016 and April 26, 2016. The plea of the petitioner that EY Dubai being a different entity could not have initiated negotiations on behalf of EY India, is answered by the Tribunal by stating that the same was permitted and envisaged in the LOE under the heading Our Relationship with You in Appendix-B.

72. The Tribunal after considering the above emails, was of the view that the same prove the fact that the respondent did approach VPS for making it a strategic partner.

73. The Tribunal was of the view that the three emails dated April 2023:DHC:2926 26, 2016, demonstrate that VPS had taken a plea for avoiding the request of EY on the ground that the exclusivity clause of the contract between the EY and Medeor had expired, which in itself is a incorrect stand as would be manifest from the email sent at 4.07 PM. The Tribunal held that from the facts, it could be legally and factually assumed that Medeor was aware of the fact that EY was in touch with VPS and tried to avoid the contract on an incorrect stand that the contract had expired.

74. Even otherwise, assuming EY had not contacted VPS, the provisions of the LOE still establish that the transactions which took place between Medeor and VPS evolved from the transactions as envisaged in the LOE. As such, EY was still entitled to success fee based on any consideration received by the shareholders in relation to any transaction which EY advised pursuant to the engagement. In this regard, I reproduce paragraph 34 of the impugned award:

> "34. It is, therefore, clear and established that the agreement specifically states that irrespective of the source of the deal, whether it may be through the Claimant or through the resources of the Respondent, the Claimant would still be entitled to a success fee if the deal is conceptualized within the currency of initial 9 months of the Agreement or six months thereafter. It is also the intent of the Agreement that even if the Respondent finds a buyer through its own resources during this period, the Letter of Engagement makes it crystal clear that all negotiations must include the Claimant and in that event the Claimant would still be entitled to success fee. This is clearly established from the wordings of the terms and conditions of the Agreement at page 8 of the Letter of Engagement (page 35 of the Claim Petition). The said provision deals with 2023:DHC:2926 'continuance of fee arrangement', which is extracted hereinbefore. The said clause when read with the clause under 'other matters' laying down that unless the transaction is successfully completed before the end of 9 months from the date of the signing of the Agreement in that event the primary period would be extended by six additional months unless either party terminates the Agreement by a written notice to the other party makes it clear that in the present case primary period of 9 months expiring on 10.05.2016 got extended by another 6 months i.e. till 10.11.2016."

75. The above conclusion of the Tribunal is based on the wordings of the terms and conditions at page 8 of the LOE which I reproduce as under:

> "Continuance of fee arrangement You confirm that in the event that the Transaction does not occur during the period of our engagement but that it occurs within six (6) months of termination of our appointment (howsoever terminated), from a party with whom we had been in discussions or from a party who received Information during our appointment, we will be entitled to the fees calculated on the basis set out in paragraphs under the heading "Fees" above."

76. As stated above, the aforesaid interpretation is a provision of LOE by the Tribunal. Even the plea of Mr. Rao that the Share Purchase Agreement executed between VPS and the shareholders of Medeor was beyond the stipulated time of the LOE, i.e., nine months. In this regard, I may state that the Tribunal has come to a conclusion that though the initial period of the LOE was nine months, it was deemed to have been automatically extended by a further period of six months till November 10, 2016, as neither party had terminated 2023:DHC:2926 the LOE. I find that the Share Purchase Agreement was executed on June 29, 2016, which is within the extended period of six months. In this regard, I also reproduce the conclusion of the Tribunal with regard to the LOE deemed to have been extended by a further period of six months as under:

> "34. .....The said clause when read with the clause under 'other matters' laying down that unless the transaction is successfully completed before the end of 9 months from the date of the signing of the Agreement in. that event the primary period would be extended by six additional months unless either party terminates the Agreement by a written notice to, the other party makes it clear that in the present case primary period of 9 months expiring on 10.05.2016 got extended by another 6 months i.e. till 10.11.2016.
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> 35. .....The Share Purchase Agreement was entered into by the shareholders of the Respondent with VPS Healthcare on 29.06.2016, which is well within the time table and time limit prescribed in the Agreement..... .....this makes it clear that the contract between the Claimant the Respondent was subsisting when the Share Purchase Agreement between VPS Healthcare and the Respondent was executed on 29.06.2016 apart from the fact that the term sheet between VPS Healthcare and the respondent was executed on 30.03.2016. Therefore, the Respondent cannot escape from its liability and responsibility of making payment of the success fee to the Claimant."

77. So, it is not a case where the Share Purchase Agreement was executed beyond the time prescribed by the LOE.

78. Hence, it must be held that the award rendered by the majority arbitrators on August 17, 2020 is a valid award and cannot invalidated on the grounds / pleas raised by Mr. Rao.

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79. In view of the above discussion, I am of the view that the challenge of the petitioner to the award dated August 17, 2021 is without merit and as such the petition under Section 34 of the Act of 1996 is dismissed.

I.As. 3576/2022, 3579/2022 In view of the fact that I have rejected the petition under Section 34 of the Act of 1996, these two applications have become infructuous.

V. KAMESWAR RAO, J MAY 01, 2023/ds/aky