Development Corporation Of Konkan ... vs Saidhara - Dck Agro Product And ... on 25 February, 2015

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

Kvm

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 74 OF 2011

Development Corporation of Konkan Limited,)
a Government Company within the meaning of)
Section 617 of Companies Act, 1956, having its)

registered office at Warden House, 5th Floor,)
Phiroz Shah Mehta Road, Fort,)
Mumbai 400 001) ..... Petitioner

Versus

1. Saidhara - DCK Agro Product &
Plantation Limited, a Company registered
)
)
under the Companies Act, 1956, having its)

registered office at 115/7, Maksood Industrial)
Estate Chimat Pada, Marol Naka,)
Mumbai 400 059)

2. Arun Kumar Sinha,)

Adult Indian Inhabitant, having his office at)

115/7, Maksood Industrial Estate, Chimat Pada)
Marol Naka, Mumbai 400 059) ..... Respondents

Ms.Lata Desai, a/w. Mr.Y.V.Divekar, Ms.Pallavi Divekar, Mr.U.M.Mahajan, i/b.

M/s.Divekar & Co. for the Petitioner.

Mr.Umesh Shetty, a/w. Mr.V.N.Ajitkumar, i/b. Consulta Juris for the Respondents.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 28th JANUARY, 2015
PRONOUNCED ON : 25th FEBRUARY, 2015

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, (for short the said Arbitration Act), the petitioner has impugned the Kvm ARBP74.11 arbtiral award dated 2nd March, 2010 thereby allowing some of the claims made by the respondent no.1 and rejecting the counter claims made by the petitioner. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner was the original respondent to the claim made by the respondents and was claimant to the counter claim made by the petitioner. The respondents were the original claimants to the statement of claim and were respondents to the counter claim before the learned arbitrator.

3. The petitioner was nominated as the implementing agency for the Oil Palm Demonstration project of the Government of India. The petitioner had taken on lease

several pieces of agricultural land from farmers in District Sindhudurg aggregating to about 1035 hectares of land for the purpose of planting nursery, growing oil palm trees and producing palm fruits. It is the case of the petitioner that the petitioner had completed the formalities of registration of lease deeds in respect of about 672 hectares, while lease formalities of the remaining 363 hectares were in progress.

4. On 31st March, 1996, the petitioner caused an advertisement of tender notice in the newspaper for participation in large commercial plantation of oil palm trees and edible oil. Pursuant to the said advertisement, respondent no.2 submitted tender. There were various meetings and consultation between the petitioner and the respondent no.2. It is the case of the respondents that in compliance of one of the condition of the tender offer, firm M/s.Saidhara was duly converted into a private limited company under the provisions of Companies Act, 1956 and was named as M/s.Saidhara-DCK Agro Products and Plantation Private Limited.

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5. On 17th December, 1997, the petitioner and the respondent no.2 entered into a joint venture agreement. Under the said joint venture agreement, it was recited that under diverse deeds of lease, the petitioner had taken on lease several pieces of agricultural land at village described in Schedule 1 to the said agreement in District Sindhudurg aggregating admeasuring approximately 1035 hectares for the purpose of planting, nursery and growing oil palm trees and producing palm fruits. It was recited that several lease deeds were entered into with the petitioner in respect of the said land owners for a period of 35 years commencing from the date of actual possession taken by the petitioner under the deed of lease executed by and between the petitioner and respective land owners. The petitioner had commenced palm tree plantation on the said lands. The petitioner had proposed to promote the company for setting up a factory for processing of palm fruits for producing oil and other chemical etc. The petitioner agreed to take Saidhara the then a proprietory concern of the respondent no.2 as co-promoter in the said projects. The petitioner agreed to entrust the management of the plantation to the proposed joint venture company under the said agreement without creating any interest in the said lands.

It was agreed that the joint venture company would sell the oil produced from the trees and in the best interest of the joint venture company.

6. Under clause 1.1 of the said agreement, it was recorded that the petitioner had contributed about Rs.1102.79 lacs in the said project upto 31 st December, 1996 as and by way of investment. It was expressly agreed by and between the petitioner and the respondent no.2 that the cost of investment incurred on the project till 31st December, 1996 shall be taken to be at Rs.400 lacs and no further investment in Rupee terms whether by way of equity or loan shall be demanded/expected nor the same shall be made by the petitioner.

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7. Under clause 1.2 of the said agreement, it was provided that if the cost of investment amounting to Rs.400 lacs as reduced by commercial outstanding. If the same was incurred by joint venture company, it shall be treated as loan from the petitioner to the joint venture company as on 1 st March, 1997 and shall carry interest at the rate of 10% per annum until whole of the said amount was repaid to the petitioner or adjusted against the capital.

8. Under clause 1.3 of the said agreement, respondent no.2 agreed that it would pay to the petitioner the said amount of Rs.400 lacs. Respondent no.2 agreed to pay Rs.100 lacs by way of down payment at the time of execution of the said agreement. Upto 30th November, 1997, the respondent no.2 had already paid Rs.51,14,900/-. It was agreed by the respondent no.2 that the balance amount of Rs.48,85,100/- shall be paid within one year from the date of the said agreement. The first installment would start after completion of six months from the date of the said agreement. The rate of interest agreed under the said deferred down payment would be at 12% per annum.

9. Under clause 1.4 of the said agreement, the petitioner granted licence and authority to the joint venture company simultaneously to enter upon the said lands for the purpose of management and administration of the said lands by the petitioner without creating any interest in favour of joint venture company either as lessee or sub-lessee or partner in cultivation or otherwise.

10. Under clause 2.1 of the said agreement, it was recorded that it was informed by the petitioner and expressly understood by respondent no.2 that the said lands were lease-hold lands taken by the petitioner from various land holders and upon termination of leases or completion of lease periods, or upon termination of lease, Kvm ARBP74.11 such leases should cease to form part of the agreement without prejudicially affecting petitioner's investment of Rs.400 lacs nor shall it entitle respondents or joint venture company to claim any compensation from the petitioner on that ground.

11. Under clause 3.1 of the said agreement, it was agreed between the parties that joint venture company shall issue its equity share capital out of such issued equity share capital of joint venture company, the petitioner alone or with its nominees shall subscribe and be entitled to the preferential allotment upto 26% and the balance 74% shall be subscribed to and paid by the respondent no.2 along with its associates whose list had been annexed to the said agreement. It was provided in the said clause that the respondent no.2 shall always subscribe and pay 51% of the issued capital of joint venture company under each issue. The said basis of allotment shall continue till entire loan amount due to the petitioner by the joint venture company was fully adjusted by converting the loan into equity shares till repayment of the loan to the petitioner.

12. Clause 3.3 of the said agreement provided that the balance of the loan that might be remaining to be paid by the joint venture company to the petitioner upon conversion of loan into equity shares under clause 3.1 together with interest at the rate of 10% per annum shall be paid by the joint venture company to the petitioner within 13 years. The joint venture company however was given an option to repay the said balance outstanding loan together with all interest thereon any time on or before 13 years whether fully or partially and the petitioner was bound to accept all such payments from joint venture company.

13. Under clause 4.2 of the said agreement, it was agreed that neither the Kvm ARBP74.11 petitioner nor the respondent no.2 shall without the consent of the other first had and obtained in writing, sell, assign, encumber, pledge or otherwise transact with its shares in the joint venture company or any part thereof for the period of 5 years commencing from the dates of allotment such shares in their favour including for the purpose of loans and where the petitioner would not be responsible for repayment of such loans. The said clause however would not prevent associates of the respondent no.2 in subscribing to the equity shares of joint venture company from transferring the equity shares held by them within the period of five years from the date of allotment of such shares without obtaining the consent of the petitioner.

14. Under clause 6 of the said agreement, the respondent no.2 agreed to absorb all 35 employees of the petitioner working as mentioned in Schedule No.II appended thereto and shall offer package beneficial to the employees.

15. Under clause 9 of the said agreement, it was provided that the said agreement was terminable by the parties only in the event of any party committing any breach or default of any of the provisions thereunder contained or upon failure of respondent no.2 to subscribe and pay any part of its contribution towards equity share capital of the joint venture company or failure of joint venture company to pay interest on loan as and when due to the petitioner and failing to remedy or rectifying the same in case where the breach or default could be remedied or rectified, within 90 days of the receipt of the notice in writing from the other party.

16. Clause 14 of the said agreement provided for arbitration.

17. On 17th December, 1997 the petitioner and M/s.Saidhara Agro Products and Kvm ARBP74.11 Plantation Private Limited entered into an agreement i.e. management agreement on the terms and conditions recorded therein.

18. The first recital of the said management agreement which is relevant is extracted as under :-

> DCKL has already taken on lease from various land owners several pieces of agricultural lands admeasuring about 700 hectares and also negotiating with several other land Owners for taking on lease additional pieces of agricultural lands admeasuring about 335 hectares, both aggregating to about 1035 hectares at villages Asalde, Osaram, Darom, Kharepattan, Sangave, Lore, Wagheri, Napane, Sherpe, Hirlok and Sangeli in Talukas Kankavall, Kudal & Sawantwadi in the District of Sindhudurg (hereinafter referred to as the said lands) for plantation nursing and growing oil palm trees on the terms and conditions set out in the Deeds of Leases and which said entire area of about 1035 hectors is in the possession of the DCKL.

19. Under clause 1.1 of the said management agreement the petitioner granted licence/permission and authority to the joint venture company to enter upon the said lands particulars set out in the schedule appended thereto for the purpose of management and administration of the plantation and irrigation system on the said lands thereon by the joint venture company without creating any

interest in favour of the joint venture company either as lessees or sub-lessee or tenants of the said lands.

20. Clause 2 of the said agreement provides for expenses of management. It was agreed that those expenses shall be the liability of the petitioner but the same shall be in the first instance borne by joint venture company and joint venture company shall always save harmless and keep indemnified the petitioner of from and against Kvm ARBP74.11 the sum or any demand or action on account thereof. The petitioner shall however reimburse to the joint venture company the expenses so incurred by the joint venture company by adjusting it against the sale price of palm fruit.

21. Under clause 3 of the said agreement it was agreed that all the palm fruits grown on the said lands belong to and be the property of the petitioner and all the amounts received from sale of palm fruits shall belong to and the property of petitioner.

22. Clause 4.1 read with 4.2 of the said agreement provided that if the quantify of palm fruits grown on the said lands was not sufficient i.e. less than the consumption capacity of the joint venture company then and in that case, the petitioner would not be liable or responsible for procuring any palm fruits to the joint venture company for full utilization of the capacity of plaint of the joint venture company or the petitioner would not be liable or responsible to pay any damages or any other amount for under utilization of the capacity of the plant of the joint venture company if the joint venture company fails to procure any required quantity of palm fruits. It was also agreed that the petitioner would not be liable or responsible to reimburse joint venture company and expenses incurred by the joint venture company under or in pursuance of this agreement.

23. Clause 8 of the said management agreement provided for termination.

Clauses 8.1 and 8.2 of the said agreement is extracted as under :-

> 8.1 In the event of JVC committing breach of any of the terms and conditions of these presents, or Joint Sector Agreement, DCKL shall be entitled to give notice to JVC requiring JVC to remedy the breaches within a period of two months and upon JVC's failure to remedy the breaches as aforesaid, DCKL shall be entitled to terminate these presents Kvm ARBP74.11 by giving 15 days notice in writing.
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> 8.2 It is agreed that in case of termination of this agreement, DCKL shall pay to the JVC the cost of improvement carried out by JVC on the said lands including the improvements mentioned in para 1.2(b) above. JVC shall be entitled to remove all its moveable, plant, equipments etc. on the said lands. Such cost shall be paid at the book value of each Item or such other lower value as may be certified by.

24. Clause 10 of the said agreement provided for arbitration.

25. In the said management agreement, the list of associates of respondent no.2 was mentioned. In schedule 1 annexed to the said agreement details of survey numbers/ Gat numbers with area in

hectares having possession of ODPM project of various villages in Sindhudurg district with the petitioner were mentioned. The total of such lands granted was mentioned as 1035.49 hectares. The area of each plot and Gat number was mentioned in the schedule appended to the said agreement.

26. The parties had also annexed a list of employees working as palm project which list was forming part of the said agreement. It is the case of the petitioner that immediately on execution of the said two agreements, the respondent no.1 company was put in possession of 1035 hectares land described in Schedule appended to the management agreement.

27. By letter dated 30th November, 2000 to the respondent no.2 who was managing director of respondent no.1 the petitioner recorded that under the said joint venture agreement, the joint venture company had to pay in advance the lease rent to the petitioner for onward disbursement to land owners. For the years 1997- Kvm ARBP74.11 98, 98-99, and 1999-2000 upto 30th September, 2000 lease rent amounting to Rs.14.49 lacs had to be paid by joint venture company to the petitioner. The petitioner also recorded that the petitioner had handed over the entire land of 1035 hectares to joint venture company and joint venture company shall make payments of 1035.44 hectares land as the lease documentation of remaining land was in progress. The petitioner pointed out that the lease documentation was complete in respect of 739.20 hectares and was balance in respect of 295.80 hectares. The petitioner placed on record the lapses in payment of lease rent on the part of the respondents and that the Joint venture company might create unnecessary unrest amongst the land owners which might lead to further legal complications. The petitioner called upon the respondents to send their representative to see the lease documents and lease disbursement records in the office of the petitioner.

28. By letter dated 17th October, 2002 to the said M/s.Saidhara Agro Products and Plantation Private Limited the petitioner placed on record that though under the agreement, respondent no.2 had agreed to pay a sum of Rs.100 lacs on or before execution of the agreement dated 17th December, 1997, respondent no.2 was not in a position to pay the said amount of Rs.100 lacs by way of down payment at the time of execution of the agreement and had paid a sum of Rs.51,14,900/- upto 30th November, 1997. The balance amount of Rs.48,85,100/- was to be paid within one year from the date of the said agreement with interest. The respondent no.2 had thereafter paid a further sum of Rs.15 lacs thereby making total payment of Rs.65,14,900/- and failed to pay balance amount and of deferred down payment of Rs.100 lacs.

29. The petitioner had also placed on record that balance of Rs.300 lacs were treated as loan and were to be repaid with interest at the rate of 10% per annum or Kvm ARBP74.11 by converting them into equity in case of fresh issue. Till the date of writing the said letter, only Rs.67,64,800/- worth of equity share holdings had been converted and the balance amount of Rs.2,32,35,200/- was still not been repaid to the petitioner. The petitioner placed on record that as against the sum of Rs.1 crore which was to be paid by way of down payment the respondent had paid only a sum of Rs.65,14,900/- and as against balance consideration of Rs.3 crores, after conversion into equity shares, the respondents had not paid the sum of Rs.2,32,35,200/- with interest and therefore had committed breach of the terms and conditions of the agreement. The petitioner alleged that the sum of Rs.59,11,012/- was still outstanding out of the down payment of Rs.100 lacs and the sum of

Rs.3,71,99,651/- was outstanding due and payable by the respondents to the petitioner towards the amount of loan of Rs.300 lacs till 30th September, 2002.

30. The petitioner also placed on record that the joint venture company had issued shares of joint venture company to seven persons other than three associates mentioned in Annexure III to the agreement which was in breach of the agreement and the respondents were bound to remedy the said breach as per terms and conditions of the said agreement. The petitioner also placed on record that the joint venture company was liable to pay the salaries of the employees amounting to Rs.18,89,412.70 as was outstanding as on 31st July, 2000 excluding interest. The density of the plantation had drastically reduced attributable to the respondents. By the said notice, the petitioners called upon the respondents to remedy the breaches mentioned therein of the two agreements both dated 17 th December, 1997 within a period of 90 days from the date of the said notice making it clear that in case of failure, the petitioner would be compelled to take further legal steps.

31. By its advocates' letter dated 20th December, 2002, the respondent no.1 Kvm ARBP74.11 alleged that the shares upto 51% were being held by respondent no.2. The associates and others were holding not more than 23% shares, petitioner was allotted shares worth 26% of the then share capital. It was alleged that number of trees found were not more than 50,000 as against 79,000 mentioned in the tender. It was alleged that though 1200 KVA power supply was stated to be there at various plantation sites, after taking over, it was observed that power supply was disconnected as early as in 1996 at almost all sites due to non-payment of bills to MSEB which adversely affected all further development activities at plantation sites. It was also alleged that it was declared in the tender document that 1037 hectares of land at various sites was under lease agreements with various farmers.

On inspection, it was found that the lease documentation was incomplete in case of land admeasuring over 300 hectares.

32. It was alleged that though the petitioner had clarified that the lease rent was being paid in the case of those land, the unfinished documentation formalities would be completed shortly but not completed. The farmers in some of those areas were agitated and at times were obstructing the plantation activities which was affecting regular production. It is alleged that the petitioner had not disclosed various arrears of payments not made by them towards power and water for irrigation. The employees transferred to joint venture company were refusing to work with the joint venture company from the beginning. It was alleged that in so far as down payment was concerned, no amount was due and payable by the respondents to the petitioner. The respondent no.1 also denied that a sum of Rs.2,32,35,200/- was payable by the respondent no.1 to the petitioner. The respondent no.1 contended that the respondents had never requested the petitioner to adjust the amount of Rs.40.75 lacs paid by ARC Surface Tunnel Systems Pvt. Ltd. By the said letter, the respondents denied all the alleged breaches of the Kvm ARBP74.11 agreement referred in the notice dated 17th October, 2002 and conveyed that if the petitioner chooses to take any action as threatened, it would be entirely at their risk as to the costs and consequences.

33. The respondents by their advocate's letter dated 10th January, 2003 to the petitioner's advocate alleged that joint venture company had faced considerable difficulties to run the unit at the initial stage due to various reasons attributable on the part of the petitioner . The bank was not willing to make further disbursement of much needed working capital without board resolution for documentation.

34. The petitioner by its advocates' letter dated 12 th May, 2003 denied various allegations made in the letter of 20th December, 2002 and letter dated 10th January, 2003 and terminated the Joint Venture Agreement as well as Management Agreement both dated 17th December, 1997 and made it clear that the petitioner was entitled to claim damages/compensation for the loss suffered by the petitioner due to various breaches committed by the respondents of the agreement dated 17 th December, 1997.

35. The petitioner by their letter dated 11th June, 2003 alleged that the licence/permission and authority given to the joint venture company to enter upon lands of oil palm plantation stood cancelled. Various assets transferred to the joint venture company which were lying at various plantation sites were either disposed off or shifted to factory building. The Managing Director of the joint venture company had admitted that certain assets were shifted to factory building. The petitioner called upon respondent no.2 to furnish details of the assets sold by him and list of assets shifted to factory building or otherwise and site-wise list of assets for verification. The petitioner requested the respondents to depute their authorised Kvm ARBP74.11 representative at various sites mentioned therein.

36. The respondents by their advocates' letter dated 18 th June, 2003 addressed to the petitioner alleged that though in the tender floated, the petitioner had taken on lease from the local farmers 1047 hectares of land for plantation, when in fact only 700 hectares land had been acquired on lease by the petitioner. The respondents also alleged various breaches on the part of the petitioner. The respondents alleged that based upon the representation of the petitioner, the respondents had invested Rs.9 crores and the same were reflected in the balance-sheet. By the said notice, the respondents invoked arbitration clause 14 of the joint venture agreement and clause 10 of the management agreement and called upon the petitioner to appoint arbitrator on its behalf. The respondent no.1 thereafter filed arbitration application (222 of 2004) in this court. By an order dated 31 st March, 2006, the parties agreed to refer the dispute and differences between the parties under the said two agreements to the sole arbitration of a retired judge of this court.

37. Pursuant to the directions issued by the learned arbitrator, the respondents jointly filed the statement of claim against the petitioner herein inter-alia praying for an award of Rs.25 crores as and by way of damages with costs. The petitioner filed a written statement and counter claim inter-alia praying for a sum of Rs.2,10,20,30,236/- with interest towards various heads.

38. Both parties led oral as well as documentary evidence before the learned arbitrator. The learned arbitrator framed 10 issues. By the impugned award dated 2nd March, 2010, the learned arbitrator allowed some of the claims made by the respondents thereby directing the petitioner to pay various amounts with interest and dismissing the counter claim made by the petitioner. The petitioner has

impugned the said award in this petition filed under section 34 of the Arbitration Kvm ARBP74.11 Act.

SUBMISSIONS OF THE PETITIONER

39. The learned counsel appearing for the petitioner submits that though the petitioner had produced sufficient evidence on record that the petitioner had already handed over possession of the land admeasuring about 1035 hectares and had granted licence to the respondents to enter upon such lands under the agreements entered into between the parties which possession was not disputed by the respondents before the learned arbitrator, the learned arbitrator has rendered erroneous findings contrary to such admitted documents on record that the petitioner had not handed over possession of 1035 hectares land to the respondents and had committed breaches of the agreements entered into between the parties. It is submitted that there was no evidence led by the respondents to show that the possession of only those lands in respect of which lease agreements had been entered into between the petitioner and the land owner was handed over to the respondents by the petitioner. The learned counsel submits that it was not the case of the respondents that the possession of land admeasuring 1035 hectares was not given by the petitioner to the respondents. The learned arbitrator has however totally misconstrued the submission made by either party before him and has decided beyond what was submitted to him by the parties.

40. Learned counsel submits that the respondents themselves had admitted before the learned arbitrator and such admission was in conformity with the statement of rent paid by the petitioner to the land owner and which was reimbursed by the respondents for more than two years which indicated that the petitioner had paid rent for the land admeasuring 1034 hectares to the land owners and the same was reimbursed by the respondents to the petitioner. The learned Kvm ARBP74.11 arbitrator has however contrary to these admitted facts has overlooked the evidence produced by the petitioner which was not disputed by the respondents and rendered a finding which is patently illegal on the face of the award.

41. It is submitted by the learned counsel that the respondent no.2 had visited the land and had taken physical possession of the land admeasuring about 1034 hectares from the petitioner and had signed and acknowledged the possession of 1034 hectares of land. The petitioner had repeatedly informed the respondents in various documents that the lease agreement however in respect of some of the lands were being executed. The project of the joint venture company was thus not affected merely because lease documents in respect of some of the plots were being executed. The petitioner had already granted lincence to enter upon the entire land admeasuring 1034 hectares.

42. In support of the submission that the petitioner had handed over the possession of the land admeasuring 1034 hectares to the respondents, the learned counsel invited my attention to the oral evidence of the witness examined by the respondents and also by the petitioner and would submit that even in the oral evidence, the petitioner had proved that the respondents were handed over possession of the land admeasuring 1034 hectares. The learned arbitrator has overlooked the material and crucial piece of evidence on record before the learned arbitrator. It is submitted that the evidence of the witness examined by the petitioner on this issue has been totally misconstrued

by the learned arbitrator.

43. It is submitted by the learned counsel that the learned arbitrator could not have been reduced the consideration amount payable by the respondent no.2 to the petitioner on the ground that the petitioner had not handed over possession of the Kvm ARBP74.11 1034 hectares of land. If according to the respondents the petitioner had not complied with that part of the obligation under the terms and conditions of the agreement, the respondents could have terminated the agreement. On the contrary, the respondents after having paid the rent for land admeasuring 1034 hectares for more than two years refused to pay such rent to the petitioner. Since the respondents failed to pay the rent to the petitioner inspite of repeated demand and also committed other breaches of the agreement, the petitioner was justified in terminating the agreements.

44. It is submitted by the learned counsel that by reducing the consideration amount and consequently holding that the respondents were not in breach of the agreement by not paying the down payment of Rs.1 crore to the petitioner and holding that the termination of the agreement was illegal has re-written the entire contract between the parties which is not permissible in law. The award shows patent illegality on the face of the award. The award is in breach of the terms of the agreements and accordingly in conflict with public policy.

45. It is submitted by the learned counsel that the learned arbitrator did not frame issue on the basis of the pleadings filed by the parties and has decided the issues which were not referred to the learned arbitrator. The learned arbitrator has allowed the claims made by the respondents on the premise that the claims made by the respondents were in the nature of liquidated damages. It is submitted that this finding of the learned arbitrator is totally perverse and shows non application of mind on the part of the arbitrator. None of the claims made by the respondents which have been allowed by the learned arbitrator could be termed as claims in the nature of liquidated damages falling under section 74 of the Indian Contract Act, 1872. The award of claims proceedings on the premise that the same were in the Kvm ARBP74.11 nature of the liquidated damages is contrary to section 74 of the Indian Contract Act, 1872 and also contrary to the agreements entered into between the parties. The award is thus in conflict with public policy and deserves to be set aside.

46. It is submitted by the learned counsel that even in the tender document issued by the petitioner, the petitioner had categorically disclosed about the land admeasuring 1034 hectares. In the management agreement entered into between the parties, the petitioner had in clear terms disclosed that the lease agreements in respect of the land admeasuring 672 hectares were already entered into and in respect of the balance area of land it was being negotiated. The respondents were thus fully aware that the respondents were granted licence to enter upon the entire land of 1034 hectares which did not hamper the activities of the joint venture company. The respondents submitted their tender and signed the agreement with open eyes. The learned counsel submits that due to various other difficulties faced by the respondents which were totally attributable to the respondents, the joint venture company could not make any profit. It is submitted that the respondents could not blame the petitioner for such a situation which was warranted due to the reasons attributable on the part of the respondents. In support of this submission, learned counsel invited my attention to various correspondence entered into between the parties and also the oral evidence led by the

respondents.

47. Learned counsel submits that the learned arbitrator was under an impression that the amount of Rs.4 crores mentioned in joint venture agreement was by way of consideration though the agreement specifically recorded that the same was by way of loan given to the respondents by the petitioner for extraction of oil. The finding of the learned arbitrator is thus perverse and contrary to the agreements.

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48. In so far as the claims awarded by the learned arbitrator in favour of the respondents is concerned, it is submitted by the learned counsel that none of the claims made by the respondents before the learned arbitrator would fall under clause 8.2. In case of termination of the agreement, the petitioner was liable to pay only to the extent of cost of capital improvement on the land. None of the claims made by the respondents would fall under clause 8.2. It is submitted that admittedly all the claims made by the respondents were under clause 8.2 of the joint venture agreement which is also clear from the award itself. Each and every claim is contrary to the terms of the agreement and is vitiated on that ground itself.

49. It is submitted by the learned counsel that though there was no pleadings of the respondents on record for reducing amount payable by the respondents to the petitioner towards down payment, in absence of any such pleadings. The learned arbitrator however as scaled down the amount of down payment which part of the award is ex-facie perverse and contrary to the terms of the contract.

50. It is submitted by the learned counsel that the learned arbitrator has awarded a sum of Rs.6,43,74,193/- as capital expenditure which was never claimed by the respondents. In so far as findings of the learned arbitrator on issue no.2 is concerned, it is submitted that there was no such claim made by the respondents against the petitioner before the learned arbitrator. The learned arbitrator however has considered that claim contrary to what was submitted by the parties to the learned arbitrator. The award deserves to be set aside on these grounds also.

51. In so far as claim awarded by the learned arbitrator in favour of the respondents towards share capital contribution paid by the respondent no.2 is concerned, it is submitted that though admittedly the joint venture company still Kvm ARBP74.11 exist, the learned arbitrator has not only directed the petitioner to pay the share capital amount paid by the respondent no.2 to the respondent no.1 but has not issued any consequential direction to the respondent no.2 to return his shareholding in respondent no.1 company to the petitioner. Similarly the learned arbitrator has allowed various claims of the respondents towards various loan taken from the banks and other alleged unsecured loans.

52. The petitioner could not be made liable to pay all these liability of the joint venture company firstly on the ground that the petitioner could not be directed to discharge the liability of the company and secondly on the ground that none of these alleged liabilities were actually discharged by the joint venture company. In support of this submission, the learned counsel placed reliance on

the oral evidence led by the witness examined by the respondents including chartered accountant who admitted that the accounts maintained by the respondent no.1 were on accrual basis. It is submitted by the learned counsel that though the respondents had not challenged any of such orders passed by the debt recovery tribunal, the learned arbitrator has foisted the entire liability upon the petitioner as if the petitioner had borrowed such amount from the bank as well as from other parties and the petitioner was liable to repay such amount.

53. It is submitted that on one hand the petitioner has been directed to discharge all the alleged liability of the respondent no.1 and on the other hand has permitted the respondent no.2 to continue to be the shareholder and part of the management of the joint venture company. It is submitted that in any event the amount borrowed by the respondent no.1 company were invested in various assets. The learned arbitrator did not give any direction in respect of such assets which were purchased out of the amount borrowed by the respondent no.1 company. The Kvm ARBP74.11 entire award shows total non application of mind on the part of the arbitration on this aspect.

54. It is submitted that even the alleged unsecured loan directed to be paid by the petitioner in the impugned award is also ex-facie illegal. The respondent no.1 had in the books of accounts reflected various entries showing loan alleged to have been taken from the family members and friends of the respondent no.2. The petitioner had disputed all these entries in the accounts. Though the respondents did not prove the correctness of each and every of such entry in the balance-sheet and books of account, the learned arbitrator has allowed the entire claim based on the audit certificate issued by the chartered accountant. The chartered accountant herself in her evidence had admitted that whether any amounts were received or paid by the company as reflected in the books of accounts or not were not verified by the chartered accountant. The entire award allowing various claims for damages is based on no evidence.

55. It is submitted by the learned counsel that on one hand, the learned arbitrator has accepted the case of the respondents that various expenses were rightly capitalized and on the other hand also directed the petitioner to reimburse such capitalized expenses to the respondents which was totally contrary to the accounting principles. The learned arbitrator has treated the capital expenditure at par with revenue expenditure in the impugned award. Though the witness examined by the respondent had admitted in evidence that upto 31 st March 2002 there was no commercial activities started, the learned arbitrator overlooked this part of the evidence and has allowed all sorts of claims made by the respondents towards the expenses alleged to have been incurred.

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56. It is submitted that though the learned arbitrator had decided to give ruling on the disputed documents relied upon by the respondents which were objected by the petitioner, in the impugned award, no such ruling has been given by the learned arbitrator but has considered such disputed documents directly in the award in violation of principles of natural justice.

57. Learned counsel for the petitioner invited my attention to the cross examination of Mr.Shivnath who was examined by the respondents who had admitted in the cross examination that the project

of the joint venture company had failed because the bank could not advance the loan to the respondents. All vouchers were not signed. The respondents had used part of the loan amount for factory premises. The witness admitted that some of the vouchers were not signed and not paid. The respondents however claimed the entire amount based on the vouchers which were not even signed.

58. Learned counsel submits that in so far as loan granted by the Central Bank of India is concerned, though the decree passed by the Debt Recovery Tribunal clearly indicated that the loan was taken by the respondent no.1 company only for the purpose of factory, the learned arbitrator has directed the petitioner to pay the entire alleged liability of the respondents to the bank though the petitioner was not concerned with the loan taken for factory.

59. It is submitted that various claims for damages are allowed by the learned arbitrator which were not permitted in view of clause 8.2 of the agreement and under other provisions of the agreements. Even claim for damages in the arbitration proceedings were liable to be proved. The entire claim for damages allowed by the learned arbitrator is based on no evidence and contrary to section Kvm ARBP74.11 73 of the Indian Contract Act, 1872. The claims made by the respondents were also contrary to clause 2.1 of the joint venture agreement which prohibited any claims for compensation. The claims for compensation were also prohibited under clauses 4.1 and 4.2 of the management agreement. The learned arbitrator has allowed the prohibited claims and has exceeded his jurisdiction. The learned arbitrator has decided contrary to the terms of the agreements and the award is in conflict with the public policy.

60. It is submitted by the learned counsel that the learned arbitrator has rejected the counter claims made by the petitioner without any reasons.

ig The learned arbitrator framed issues which find no place in the pleadings whatsoever. The counter claims made by the petitioner were arising out of the breaches of the joint venture agreement viz. the respondent had failed to pay the entire down payment of Rs.1 crore, failed to pay the balance amount of Rs. 3 crores, failed to pay the outstanding lease rent, failed to pay the salaries of certain employees as per agreement, the respondents had allotted equity share of joint venture company to persons other than its associate mentioned in the joint venture agreement. None of these issues raised by the petitioner have been considered by the learned arbitrator at all in the impugned award and the counter claim came to be rejected in a casual manner.

SUBMISSIONS OF THE RESPONDENTS

61. Mr.Shetty, the learned counsel appearing for the respondents on the other hand submits that the petitioner had made a positive representation to the respondents that the petitioner had obtained a lease of 1042 hectares of land before execution of the joint venture agreement. The joint venture company was required to set up a factory under the said joint venture agreement. Respondent No.2 had agreed to pay down payment of Rs.1.00 crore out of the payment of Rs.4.00 crores Kvm ARBP74.11 as loan to the joint venture company under the said agreement in the mode and manner prescribed under the joint venture agreement. Out of said amount of Rs.1.00 crore admittedly respondent no.2 had already made payment of Rs.51,14,900/- on the date of the execution of the

said agreement. Respondent No.2 paid further sum of Rs.15.00 lakhs to the petitioner subsequently.

62. It is submitted that it was the case of the petitioner itself that the petitioner had received a sum of Rs.40,75,000/- from the sister concern of respondent no.1 and the said amount was adjusted towards the down payment of Rs.1.00 crore payable by respondent no.2 to the petitioner. The petitioner however, subsequently, changed its stand and alleged that the respondents had committed default in making complete payment of Rs.1.00 crore payable as and by way of down payment. The petitioner itself had informed the respondents that the balance amount was adjusted against the payment already made by the sister concern of respondent no.1. The petitioner had never treated the loan payment of Rs.48,85,100/- as in breach on the part of the respondents.

63. The learned counsel submits that since no lease document in respect of the plot of land over and above the land admeasuring 672 hectares was obtained by the petitioner, which was agreed under the joint venture agreement as well as the management agreement and which lease was required to be valid for the period of 35 years, the respondents could not have entered into possession of those lands without any lease agreement having been executed between the petitioner and those land owners. The petitioner though did not hand over possession of 1034 hectares of land with duly executed lease, recovered the lease rent from the respondents for the entire plot of land for more than 2 years. It is submitted that since there was no lease in respect of large portion of the land, the farmers started Kvm ARBP74.11 agitating. One of the farmer had terminated the lease. The petitioner ultimately returned all the lands to the farmers. The learned counsel submits that since the respondents had already invested large amount in the joint venture company, though the petitioner had committed breach of its obligation under the joint venture agreement as well as the management agreement, the respondents did not terminate the said agreement and continue to ask the petitioner to perform its part of obligation.

64. It is submitted that since the petitioner did not comply with its obligation by handing over the leasehold plots admeasuring 1034 hectares, and did not comply with its reciprocal obligation, the respondents were not required to pay the balance amount of down payment. There was thus, no breach on the part of the respondents in making down payment. The learned arbitrator has thus rightly scaled down the amount payable by the respondents to the petitioner as and by way of down payment in view of the petitioner not having submitted the lease documents in respect of the entire 1034 hectares of land. The learned arbitrator has proportionately reduced the down payment and has rightly rendered a finding that there was no breach on the part of the respondents to make balance down payment and that the termination of the agreements by the petitioner was accordingly illegal and unlawful. The learned counsel submits that this finding of fact rendered by the learned arbitrator cannot be interfered with by this court under section 34 of the Arbitration & Conciliation Act, 1996.

65. Insofar as the balance payment of Rs.3.00 crores under the said joint venture agreement is concerned, it is submitted by the learned counsel that the said amount was payable by the respondents to the petitioner within 13 years and could be adjusted against allotment of further shares in the joint venture company. The Kvm ARBP74.11 learned counsel submits that the joint venture company had already issued shares in the proportion agreed under the said joint venture

agreement to the petitioner and had proposed to issue further shares to the petitioner. There was thus, no breach on the part of the respondents even in respect of the balance payment of Rs.3.00 crores. It is submitted that in any event, since the petitioner had committed breach on its part and had wrongfully terminated the agreements which resulted in huge loss to the respondents, the respondents were not liable to comply with their part of reciprocal obligation.

66. Though employees of the petitioner were to be absorbed by the joint venture company and their salary and wages were agreed to be paid by the joint venture company, since some of those workers refused to work for the joint venture company, the respondents were forced to pay the salary to such employees without carrying any work, the respondents were entitled to recover such amounts from the petitioner. The learned arbitrator has rightly allowed such claim made by the respondents against the petitioner.

67. The learned counsel invited my attention to a letter dated 11 th October, 2000 which was addressed by the petitioner to the respondents admitting that there was excess payment made by the respondents to the petitioner. It is submitted that in view of such letter addressed by the petitioner, there was no question of any breach on the part of the respondents in making any down payment to the petitioner.

68. The learned counsel submits that by a letter dated 1 st March, 2000, the respondents had placed on record various breaches committed by the petitioner of their obligations under the joint venture agreement and the management agreement and also pointed out various difficulties faced by the joint venture Kvm ARBP74.11 company due to such breaches committed by the petitioner. The learned counsel submits that it was not the case of the petitioner that the petitioner had offered leasehold lands to the joint venture company on 'as is where is basis' and thus were not responsible in respect of the land for which no lease deeds could be executed. There was a positive and categorical representation made by the petitioner that the petitioner had already with it the leasehold land of 1034 hectares.

69. Insofar as the submission of the learned counsel for the petitioner that no claim for compensation could have been made by the respondents under clause 8.2 of the joint venture agreement is concerned, the learned counsel for the respondents placed reliance on clause 8.2 and also 4.2 and would submit that there was no bar under those provisions against the respondents from making any claim for compensation in the case of illegal termination of the agreement. It is submitted by the learned counsel that all the claims were made by the respondents in the arbitration proceedings under section 73 of the Indian Contract Act, 1872. The learned arbitrator has rightly rendered a finding of fact that there were breaches on the part of the petitioner and hence wrongful termination and accordingly allowed the claims for compensation rightly. It was not the case of the petitioner that there was any waiver on the part of the respondents.

70. The learned counsel placed reliance on the judgment of the Supreme Court in the case of Dwarka Das vs. State of Madhya Pradesh, AIR 1999 SC 1031, and would submit that even if the respondents did not have any proof of any damages as canvassed by the petitioner, the learned arbitrator has ample power to allow the reasonable compensation.

71. Insofar as claim no.1 awarded by the learned arbitrator is concerned, the Kvm ARBP74.11 learned counsel submits that in view of the representation made by the petitioner that the petitioner had leasehold plots of 1034 hectares, respondent no.2 agreed to invest large amount in the joint venture project and acquired 74% shareholding of the joint venture company. Since the petitioner committed breaches, the joint venture company suffered huge losses and thus the claim of the respondents for the loss suffered by the respondents towards the share capital contribution was justified and the learned arbitrator having rendered a finding that the agreements were wrongfully terminated by the petitioners, has rightly allowed the said claim in favour of respondent no.1. The learned counsel submits that in the event if this court comes to the conclusion that the learned arbitrator could not have directed the petitioner to reimburse the share capital contribution made by the respondents, this court may modify that part of the award.

72. Insofar as the claims arising out of the loans taken by the joint venture company from the banks and other unsecured loans are concerned, it is submitted by the learned counsel that both these claims were allowed by the learned arbitrator on the basis of admitted liability reflected in the balance sheet which were audited by a chartered accountant. He submits that in view of the breach committed by the petitioner, the amounts borrowed by the joint venture company from the banks and from others could not be repaid. He submits that the Debts Recovery Tribunal (DRT) has already passed decrees against the joint venture company as well as the petitioner and respondent no.2 in respect of the said loan transactions with the banks. The liability of respondent no.1 company to the decree holders is thus crystallized. Though the decretal amounts are actually not paid by the joint venture company, the respondents were entitled to seek such payment from the petitioner who was solely responsible for the said decrees being passed against the joint venture company and respondent no.2.

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73. He submits that the chartered accountant who had audited its books of account was examined as one of the witness by the respondent, who proved that all such liabilities were reflected in the balance sheet of the joint venture company.

Such balance sheets and other audited accounts were also signed by the nominee directors of the petitioner, thus the petitioner could not have disputed such documents.

74. Insofar as the issue raised by the petitioner that the learned arbitrator could not have accepted the plea of the respondents for capitalization of expenditure is concerned, it is submitted that the board of directors of respondent no.1 had passed a resolution to capitalize the expenditure and only pursuant to such resolution, respondent no.1 company had capitalized some of the expenditure. The learned arbitrator has rightly allowed those claims also.

75. Insofar as claim no.4 allowed by the learned arbitrator towards the value of the building and machinery directed to be paid by the learned arbitrator against the petitioner is concerned, the learned counsel submits that if this court comes to the conclusion that the learned arbitrator could not have directed the petitioner to make payment of the value of the building and machinery, this

court may modify that part of the award.

76. He submits that similarly in respect of the labour payment under claim no.5 directed to be paid by the petitioner is concerned, since the said amount was accounted for by the respondents in the accounts of the joint venture company whether such liability was actually cleared or not is not relevant for the purpose of allowing any reimbursement of such expenditure in favour of the respondents.

77. Mr.Shetty, learned counsel for the respondents placed reliance on the following judgments :-

1. P.R.Shah vs. B.H.H.Securities Pvt. Ltd., (2012) 3 Mh.L.J. 737 (paragraph 15)

2. Dwarka Das vs. State of Madhya Pradesh, AIR 1999 SC 1031 (paragraph 9)

3. Vasu P.Shetty vs. Hotel Vandana Palace & Ors., (2014) 5 SCC 660 (paragraphs 41 and 42)

4. D.N.Pandey (dead by LR's) vs. Suresh Chandra Bhattasai (dead by LR's), AIR 1986 SC 1509 (Paragraphs 6)

5. Satnam Overseas Ltd. vs. m.v. OOCL Ability & Ors., 2009(4) ALL M.R.102 (paragraph 34)

6. R.S.Jiwani vs. Ircon International Ltd., 2010(1) Bom.C.R.529 (Paragraphs 36 and 38)

78. Mrs.Desai, learned counsel for the petitioner in rejoinder invited my attention to the tender conditions in support of her submission that even in tender document, it was made clear that all the assets of the petitioner mentioned therein were on 'as is where is basis'. The learned counsel also invited my attention to a letter addressed by the respondents themselves admitting that the leasehold plots referred in the agreements were on 'as is where is basis'. She submits that the investment amount of the petitioner in the joint venture company was mentioned at Rs.10.93 crores and the project estimated cost of the joint venture company was mentioned at Rs.42.00 crores. The licence was already given by the petitioner to the respondents for entering upon the land admeasuring 1034 hectares. The respondents had admitted the area of the land and possession thereof. The learned counsel invited my attention to a letter dated 18th June, 2003 addressed by the Kvm ARBP74.11 respondents through their advocates to the petitioner admitting that the petitioner had taken on lease about 700 hectares of land and was negotiating for 335 hectares of land. The petitioner had already given complete details of the lands admeasuring 1034 hectares. The respondents were fully aware of those details and the correctness thereof. There was no misrepresentation made by the petitioner to the respondents of any nature whatsoever.

79. Learned counsel submits that the respondents never addressed any letter to the petitioner alleging that the petitioner had made any misrepresentation or had not given possession of land admeasuring 1034 hectares of land and also did not produce any evidence that the petitioner had handed over possession of the land of only 672 hectares. She invited my attention to a letter dated 30 th November, 2000 regarding handing over of 1034 hectares of land to the respondents which was never controverted by the respondents. Along with the said letter, the petitioner had also annexed a chart showing the details of the land. The said document was produced in evidence by the respondents themselves before the learned arbitrator.

In the said chart annexed to the said letter, it was categorically mentioned that the petitioner had handed over possession of 1035.44 hectares of land to the respondents. Even in the letter dated 20th December, 2002 addressed by the respondents to the petitioner, the respondents had admitted possession of 1037 hectares of land from the petitioner.

80. Learned counsel invited my attention to the cross-examination of Mr.Kulkarni, who was examined as a witness by the petitioner in the cross- examination who deposed that possession of 1034 hectares of land was given to the respondents by the petitioner. It is submitted that the finding of fact rendered by the learned arbitrator is totally in ignorance of the evidence, oral as well as Kvm ARBP74.11 documentary led by the petitioner and also by the respondents on this aspect. The learned arbitrator could not have scaled down the amount payable by the respondents.

81. Insofar as the submission of the learned counsel for the respondents that the claims made by the respondents were under section 73 of the Indian Contract Act and not under clause 8.2 of the joint venture agreement is concerned, the learned counsel submits that in the entire award the learned arbitrator has allowed all such claims for compensation based on clause 8.2 which was relied upon by the respondents. It is submitted that even if such claims were under section 73 of the Indian Contract Act, the respondents failed to prove breaches alleged to have been committed by the petitioner and also proof of loss suffered if any, by the respondents and thus no such claim for compensation could have been awarded by the learned arbitrator. The learned arbitrator did not reject the submission of the petitioner that the claims were not permissible under clause 8.2 of the agreement but has considered the submission of the respondents that it was permissible under clause 8.2 and awarded the said claim. Under clause 8.2 of the agreement, the petitioner was liable to pay only for the improvement, if any, on the land and no other compensation. The learned arbitrator has awarded the claims contrary to clause 8.2 of the agreement.

82. It is submitted that insofar as the decrees passed by the DRT is concerned, the respondents have not satisfied the decrees so far and thus even if the petitioner was held responsible for the wrongful termination of the agreements, no order for payment in view of such decree could have been awarded by the learned arbitrator. The loans obtained by the joint venture company in any event was for investment in the factory and thus the learned arbitrator could not have passed order for Kvm ARBP74.11 payment of loan amount. The respondents never issued any notice to the petitioner for rectification of the alleged breaches. The respondents accepted the alleged breach on the part of the petitioner without reserving any liberty or putting the petitioner to notice of its claim for compensation that would be made by the respondents in future. It is submitted that the entire

award is in conflict with the public policy and is patently illegal and thus deserves to be set-aside.

REASONS AND CONCLUSIONS :-

83. The learned arbitrator has framed ten points for determination. Insofar as issue no.1 i.e. whether the respondents herein proved that the petitioner had failed to acquire total 1034 hectares of land on lease and failed to hand over plantation over 1034 hectares of land to them but acquired and handed over only 672 hectares of land and plantation thereon is concerned, the learned arbitrator has held that the petitioner has failed to prove the fact of execution of the lease deeds in respect of the lands over and above 672 hectares of land by the petitioner and that the petitioner had also failed to hand over possession of the land over and above 672 hectares to the respondents. It is held that the petitioner had failed to acquire 1034 hectares of land on the date of the execution of the joint venture agreement and accordingly possession of all such lands were not handed over to the respondents by the petitioner.

84. A perusal of the tender document clearly indicates that the petitioner had categorically disclosed about the land admeasuring 1034 hectares. The possession of the lease of such land was on 'as is where is basis'. Even in the management agreement entered into between the parties, the petitioner had clearly disclosed that the lease agreement entered into was in respect of the land admeasuring 672 hectares and in respect of the balance area of the land it was being negotiated.

Kvm ARBP74.11 Along with such management agreement, the petitioner had also furnished a list of all the lands admeasuring 1035 hectares with a bifurcation showing as to how many plots out of the plots admeasuring 1035 hectares were under the lease agreements and in respect of the balance lands negotiations for execution of the lease agreement was pending. It is not in dispute that the petitioner had already granted license to the respondents to enter into the entire land of 1034 hectares and thus it did not hamper the activities of the joint venture company. It is also not in dispute that the respondents were paying the rent in respect of the land admeasuring 1034 hectares to the petitioner as and by way of the reimbursement for more than two years which rent was being paid by the petitioner to the land owners.

85. A perusal of the record clearly indicates that the respondents never made any grievance nor was it case of the respondents that the petitioner had not handed over possession of the land admeasuring 1034 hectares to the respondents. The only grievance of the respondents and that also belatedly made was that the petitioner had not obtained lease agreements in respect of the entire land admeasuring 1034 hectares but could obtain only in respect of 672 hectares. In my view since the petitioner had made the position clear in the tender document itself that the lease of the lands was on as is where is basis and negotiation for execution of the lease over and above 672 hectares of land was going on. The respondents neither pleaded nor produced only proof that the petitioner had handed over possession of only 672 hectares of land to the respondents.

86. The learned arbitrator has totally overlooked the oral evidence led by the parties in which it was proved beyond doubt that the respondents were handed over possession of land admeasuring 1034 hectares as contemplated under the Kvm ARBP74.11 tender document as well as the joint venture

agreement and the management agreement. The respondents never urged that the rent paid by the respondents for the land admeasuring 1034 hectares was excess payment and that the petitioner was liable to refund the said alleged excess amount to the respondents. Even in the letters addressed by the respondents to the petitioner, the respondents had admitted in clear terms that possession of about 1000 hectares was given to the respondents by the petitioner.

87. A perusal of the record also indicates that it was the case of the respondents themselves that the joint venture company could not make any profit and the project could not be made successful due to loss suffered due to various other reasons which could not be attributed to the petitioner. Under the MOU, both parties were entitled to terminate the contract if other party would have failed to rectify the breaches inspite of notice given by one party. A perusal of the record clearly indicates that the respondents never called upon the petitioner to rectify any alleged breaches on the part of the petitioner such as to hand over the leasehold plots admeasuring 1034 hectares with the requisite lease document. On the contrary the record indicates that the respondents had failed to pay the agreed rent to the petitioner in respect of the land admeasuring 1034 hectares and had failed to pay the down payment completely and committed various other breaches. The petitioner had called upon the respondents to rectify those breaches however, the respondents failed to rectify breaches. The petitioner, in my view, thus was justified in terminating the MOU. The petitioner had to surrender the leasehold lands to the actual owners since the respondents had failed to pay the rent in respect of such lands to the petitioner. The learned arbitrator, in my view, thus has taken a perverse view by declaring that the termination of the MOU by the petitioner is illegal.

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88. A perusal of the record also indicates that respondent no.2 had visited the lands and had taken physical possession of the land admeasuring 1034 hectares from the petitioner and had signed and acknowledged possession of the said lands admeasuring 1034 hectares. A perusal of the record also indicates that though the amount of Rs.4.00 crores mentioned in the agreement was by way loan given by the petitioner to the joint venture company which was repayable by the joint venture company to the petitioner, the learned arbitrator has erroneously considered such loan amount as consideration under the said MOU and has reduced the loan amount while rendering a finding that the respondents had not committed any breach in payment of the down payment of Rs.1.00 crores. In my view, even if according to the learned arbitrator, the petitioner had not handed over possession of the leasehold land of 1034 hectares to the respondents and had committed breach of its part of obligation, the learned arbitrator could not have reduced the loan amount by taking into consideration the area of land which were not leasehold land according to the learned arbitrator. In my view the learned arbitrator has re-written the agreement which is not permissible under law. The award shows patent illegality on the face of award and deserves to be set aside on this ground itself.

89. A perusal of the record indicates that it was not even pleaded or urged by the respondents before the learned arbitrator that since the petitioner had not handed over possession of the lease land of 1034 hectares and had in fact handed over possession of 672 hectares of land only, the respondents were not liable to repay the down payment of Rs.1.00 crores but the lesser amount in that proportion. The learned arbitrator on his own has decided to reduce the loan amount

proportionately. In my view the award is not in accordance with what was submitted by the parties before the learned arbitrator. The award shows total non-

Kvm ARBP74.11 application of mind. The learned arbitrator has exceeded his jurisdiction on this issue.

90. A perusal of the record also indicates that the learned arbitrator did not frame the issues on the basis of the pleadings filed by the parties and has decided the issues which were not referred to the learned arbitrator. The learned arbitrator has misunderstood the nature of the claim made by the respondents and have erroneously proceeded on the premise that each of the claim made by the respondents were in the nature of the liquidated damages. A perusal of the claims made by the respondents indicate that each of the claim was for compensation based on the premise that the termination of the MOU by the petitioner was illegal and in view of the petitioner allegedly not complying with its part of obligation.

Even the learned counsel for the respondents also pleaded before this court that each of such claim was under section 73 of the Indian Contract Act, 1872. In my view the entire basis of the award of the learned arbitrator proceeding on the premise that the claims of the respondents were in the nature of liquidated damages and awarding the same is ex-facie perverse and shows patent illegality on the face of award and contrary to under section 74 of the Indian Contract Act, 1872. The award is also contrary to the submissions made by the respondents themselves. It was not even urged by the respondents that the claims were by way of liquidated damages under section 74 of the Indian Contract Act, 1872. In my view, the learned arbitrator has mixed up the claim of damages under section 73 of the Indian Contract Act, 1872 with the claim of liquidated damages under section 74 of the Indian Contract Act, 1872 in the impugned award.

91. Insofar as the claim awarded by the learned arbitrator is concerned, Mrs.Desai, learned counsel for the petitioner submits that the statement of claim Kvm ARBP74.11 filed by the respondents would indicate that each of the claims made by the respondents were under clause 8.2 of the joint venture agreement. It is submitted by the learned counsel that none of those claims will fall under clause 8.2 of the joint venture agreement. The learned counsel for the respondents however, submitted that the claims were not made by the respondents under clause 8.2 of the joint venture agreement but were under section 73 of the Indian Contract Act, 1872. A perusal of the pleadings filed by the respondents clearly indicates that the respondents had placed reliance on clause 8.2 of the joint venture agreement in respect of various claims for compensation made by the respondents before the learned arbitrator. A perusal of the award also indicates that the respondents had placed reliance on clause 8.2 of the joint venture agreement in support of each of such claims. Even the leaned arbitrator while dealing with each of the claims made by the respondents treated such claims under clause 8.2 of the joint venture agreement and awarded the same. A perusal of clause 8.2 of the joint venture agreement clearly indicates that in case of termination of the agreement, the petitioner is made liable only to the extent of cost of improvement on the leasehold land and no other amount. In my view, none of the claims for compensation made by the respondents would fall under clause 8.2 of the joint venture agreement. The learned arbitrator, in my view, has accordingly decided contrary to the terms of the agreement and the impugned award is thus in conflict with the public

policy.

92. I am not inclined to accept the submission of the learned counsel for the respondents that the claims were made under section 73 of the Indian Contract Act, 1872. The respondents had neither pleaded before the learned arbitrator that the claims were made under section 73 of the Indian Contract Act, 1872 nor the learned arbitrator has treated those claims under section 73 of the Indian Contract Kvm ARBP74.11 Act, 1872. In my view this court thus cannot permit the respondents now to urge at this stage that though in the statement of claim as well as before the learned arbitrator it was urged that the respondents had made those claims under clause 8.2 of the joint venture agreement, the same should be treated as claims under section 73 of the Indian Contract Act, 1872.

93. Be that as it may since the finding of the learned arbitrator that the termination of the MOU was illegal itself is perverse and patently illegal, the question of awarding any compensation to the respondents even under section 73 of the Indian Contract Act, 1872 did not arise. In my view for making a claim for compensation under section 73 of the Indian Contract Act, 1872, a party making a claim for compensation has not only to prove the breaches on the part of other party but has also to prove the actual loss suffered in view of such breaches and quantification in respect thereof. In my view the respondents have failed to prove both these aspects required to be proved under section 73 of the Indian Contract Act, 1872.

94. Insofar as claim no.1, i.e. claim towards the share capital contribution is concerned, the learned arbitrator has directed the petitioner to pay a sum of Rs.1,94,50,500/- with interest at 18% .a. from 31 st March, 2000. A perusal of the record indicates that under the joint venture agreement, the petitioner had agreed to subscribe for 26% paid up capital, whereas the respondents had agreed to subscribe for paid up capital to the extent of the balance 74%. The loan amount was liable to be adjusted by converting the loan into equity shares also. The respondents were issued about 19,41,500 equity shares of the said joint venture company having face value of Rs.10/- each, whereas the petitioner was issued 6,81,996 equity shares of Rs.10/-.

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95. The leaned arbitrator has directed the petitioner to pay to respondent no.1 the entire contribution of Rs.1,94,10,500/- made by respondent no.1 and its associates on the premise that the total shares subscribed by the respondents were disclosed in the audited balance sheet of the company and had not been disputed or challenged by the petitioner before any form of law. It is held that the correctness of the balance sheet was also confirmed by the chartered accountant before the learned arbitrator. The learned arbitrator, in my view, has totally failed to appreciate as to how such claim for share capital contribution be allowed in favour of the respondents and under which provisions of law. The learned arbitrator has not directed respondent no.2 to surrender the shares held by respondent no.2 in respondent no.1 company. The joint venture company continues to exists and the board of directors of the said company as nominated by respondent no.2 continued to manage and control such joint venture company. The award shows total perversity and patent illegality on the face of it and deserves to be set aside. In my view the said claim allowed by the learned arbitrator is in the nature of remote damages which is not permissible in law.

96. A perusal of the award indicates that though there was no claim made by the respondents in respect of the alleged capital expenditure in the sum of Rs.6,43,74,193/-, the learned arbitrator has allowed the said claim in the impugned award. Mr. Shetty, learned counsel appearing for the respondents could not dispute that there was no such claim made for capital expenditure by the respondents in the statement of claim filed by the respondents. In my view, since there was no such claim made by the respondents in the statement of claim, the learned arbitrator could not have granted such claim. Learned arbitrator has thus exceeded his jurisdiction by entertaining the claim which was not made before the learned arbitrator by the respondents. That part of the award is liable Kvm ARBP74.11 to be set aside on this ground alone.

97. A perusal of the reasons rendered by the learned arbitrator in respect of the award towards the capital expenditure indicates that the learned arbitrator had referred to the depositions of the Chartered Accountant examined by the respondents stating that the amount of Rs.6,43,74,193/- mentioned in the balance sheet was on accrual basis therefore, it would not be possible for her to say whether other expenses were actually paid or not. Learned arbitrator has directed the petitioner to pay to the respondents a sum of Rs.6,43,74,193/- holding that to disprove the said claim and correctness of the amounts recorded in the balance sheet produced by the respondents, the petitioner had not examined any expert witness before the learned arbitrator. In my view, the award shows total perversity on the face of the award. Firstly the learned arbitrator could not have allowed any such amount in the impugned award since there was no claim made by the respondents towards the capital expenditure. Secondly, the amount alleged to have been reflected in the balance sheet was on accrual basis and not on actual basis. Since the petitioner had disputed the entries in the balance sheet, it was required to be proved no adverse inference could have been drawn by the learned arbitrator against the petitioner for not examining an expert witness to disprove the same. Learned arbitrator has cast the onus on the petitioner to disprove such entries instead of holding that the said entries were not proved by the author of the said documents.

98. In my view, even otherwise the expenditure in the nature of capital expenditure could not have been allowed by the learned arbitrator in the impugned award. Any expenditure which was in the nature of capital expenditure would increase of cost of assets and was not of the nature of the revenue Kvm ARBP74.11 expenditure. Be that as it may, since the termination of the MOU in my view was valid, the question of allowing any such claim by the learned arbitrator did not arise. In any event, the said claim was also in the nature of remote damages and could not have been permitted under the provisions of the Indian Contract Act, 1872 or under any of provision of the agreements.

99. In so far as the claim no.2 i.e. loan taken from the Central Bank of India towards working capital requirements and loan taken from State Bank of India by the joint venture company is concerned, the learned arbitrator has directed the petitioner to pay a sum of Rs.1,27,54,727/- including interest till the date of application filed by the Central Bank of India i.e. 20 th January 2005 and further interest @11% p.a. on the principal amount till the date of the award and also directed to pay a sum of Rs.1,90,92,221.53 including interest till the date of application i.e. 21st May 2004 filed by the State Bank of India and further interest @15% p.a. on the principal amount till the date of the award.

100. A perusal of the award indicates that the learned arbitrator has allowed both these claims based on the order and decree passed by the Debt Recovery Tribunal in the recovery applications filed by the Central Bank of India and State Bank of India against the joint venture company and other parties including the petitioner and respondent no.2. The respondent no.1-company had borrowed various amounts from the Central Bank of India and State Bank of India respectively. It is not in dispute that none of the respondents to the said applications including the petitioner and the respondents herein have impugned the said order and decree passed by the Debt Recovery Tribunal. It is not in dispute that the respondent no.1-company has not so far paid any amount under the the said orders and decree passed by the Debt Recovery Tribunal. There were Kvm ARBP74.11 allegations made by those banks against the respondent no.1-company in those proceedings that the amounts borrowed by respondent no.1-company were not used for the purpose for which it was granted by those banks but was diverted for some other purpose.

101. In my view, the learned arbitrator could not have allowed these two claims in favour of the respondents on the ground that the petitioner was not responsible for the respondent no.1-company in not making repayment of such loan to the banks. None of the respondents have made any payment under the said orders and decree passed by the Debt Recovery Tribunal. None of the respondents have challenged the said orders and decree passed by the Debt Recovery Tribunal. Be that as it may, since the termination of the agreements by the petitioner was valid, the respondents could not have made any such claim against the petitioner for payment in view of the order passed by the Debt Recovery Tribunal in respect of the loans and facilities availed of by the respondent no.1-company. In my view, the said claim was also in the nature of remote damages. The petitioner had not borrowed the said amounts personally. In any event, no order could have been passed against the petitioner arising out of the said liability. The respondent no.1-company continues to exist. The award, in my view, is totally perverse and shows patent illegality on the face of the award. The award is in conflict with the public policy.

102. A perusal of the award indicates that though the petitioner had submitted before the learned arbitrator that the respondents had not been able to show that the amount taken from both the banks had been used at the site, the respondents had taken loan from State Bank of India for construction of a factory building, machinery on the land owned by the respondent no.2 and thus the petitioner Kvm ARBP74.11 could not be liable for the same, the learned arbitrator though referred to that submission in the impugned award, has not at all dealt with that submission. The learned arbitrator, in my view, has proceeded on the premise that whatsoever would be the liability of the respondent no.1-company would have to be borne by the petitioner exclusively whether petitioner is contractually or legally liable or not.

103. A perusal of the award indicates that whatsoever was the amount reflected in the statement of claim in respect of such loan and the decree passed by the Debt Recovery Tribunal has been ig directed to be paid by the petitioner to the respondents. If, according to the respondents, the said decree was not in accordance with law, the respondents ought to have challenged the said order and decree passed by the Debt Recovery Tribunal.

104. In so far as the claim no.3 i.e. unsecured loans of Rs.2.5 crores is concerned, the learned arbitrator has directed the petitioner to pay a sum of Rs.2,01,03,942/- to the respondents. The said claim was also allowed by the learned arbitrator based on the entries in the balance sheet of the respondent no.1-company for the year ended on 31st March 2002. Learned arbitrator has considered that the balance sheet was signed by the Director of the petitioner in confirmation of the unsecured loan. Though the petitioner had disputed the receipt of such loan by the respondents and also disputed the liability of the petitioner to pay to the respondents towards such alleged loan, the learned arbitrator ignored such submission and without any proof about the payability and quantification has awarded a sum of Rs.2,01,03,942/- against the petitioner. Learned arbitrator has decided on the basis of presumption and surmises that the respondents must have taken loan and have reflected the same as liability in the Kvm ARBP74.11 books of accounts since the various amounts were paid to the petitioner. In my view, this part of the award shows total perversity. The award is based on no evidence. Though the petitioner had disputed the entries in the balance sheet, the respondents did not prove such loan alleged to have been taken by respondent no.1. Be that as it may, even if the loan is taken by the respondent no.1, the learned arbitrator could not have directed the petitioner to pay such amount to the respondent no.1-company. The respondent no.1-company admittedly did not repay any such amount towards alleged unsecured loan and thus there was no question of seeking any reimbursement of the loan alleged to have been reflected as unsecured loan in the balance sheet of the respondent no.1. This part of the claim was also in the nature of remote damages. Since the contract was validly terminated by the petitioner, the respondents even otherwise could not have made any such claim against the petitioner. The loan, if any, was taken by the respondent no.1-company which was in existence. The award is in conflict with the public policy.

105. In so far as the claim no.4 i.e. the claim towards the amount of machinery and factory shed is concerned, the learned arbitrator has directed the petitioner to pay a sum of Rs.2,79,47,898/- to the respondents on the ground that the respondents had made investments in the buildings, plant & machinery for specific purpose of oil extraction from the plantations under the Joint Venture Agreement and the said investments were rendered useless with the termination of the Joint Venture Agreement. While directing the petitioner to pay the said claim of Rs.2,79,47,898/-, the learned arbitrator has disallowed the claim of Rs.26,56,532/- towards the value of land claimed by the respondents. A perusal of the award indicates that the petitioner had vehemently opposed this claim on various grounds including the ground that the machinery and factory shed were Kvm ARBP74.11 not on any of the lands which were given to the respondents. The respondents were still owning the said assets and the machineries and factory shed were on different land for which the petitioner was not concerned. The petitioner had disputed the valuation of the property made by Mr. Goriawalla, Surveyor and Valuer. In any event, the said Valuer had given the report of such assets at Rs.7.8 crores. A perusal of the record indicates that the learned arbitrator has not considered any of the submissions in the impugned award at all and has allowed the claim mechanically. I am unable to appreciate as to how the learned arbitrator has allowed this claim towards the amount invested in the buildings, plant & machinery and other assets of the respondent no.1-company though the respondent no.1-company also exists and owns such assets. In my view, the award shows patent illegality on the face of the award.

106. Be that as it may, since the termination of the agreement was validly done by the petitioner, the respondents could not have made any such claim. There was no loss caused to the respondent no.1-company because it has invested the amounts in the assets of the company. On the contrary, the amounts were invested in the assets of the company and thus there was no loss being claimed in respect of such assets. Learned arbitrator has not given any direction as to what should be done in respect of the assets while directing the petitioner to pay the amount alleged to have been invested by the respondents for procuring such assets. The impugned award shows patent illegalities.

107. In so far as the claim no.5 is concerned, the learned arbitrator has directed the petitioner to pay a sum of Rs.12.05 lakhs with interest @10% p.a. towards the amount of labour payment from the years 1996 to 2002. It was the case of the petitioner that the respondents had never produced any record to show that the Kvm ARBP74.11 workers who were to be joined the joint venture company at the site did not work and were paid any salary. The petitioner had produced an order of the Labour Court to show that the workers were present and working at the site and were not paid their wages by the respondent no.1-company. The petitioner had made its counter claim for such salary in respect of the workers which has been rejected by the learned arbitrator without any application of mind. A perusal of the award indicates that though the petitioner had disputed the payability and quantification in respect of the said claim, the learned arbitrator allowed the claim at Rs.12.05 lakhs without any basis and based on no evidence. Be that as it may, no such amount could have been directed to be paid by the petitioner to the respondents. The award shows patent illegality and perversity on the face of the award.

108. In so far as the claim no.9 is concerned, the learned arbitrator has directed the petitioner to pay a sum of Rs.2.18 crores with interest @10% p.a. from 31 st March 2001 till the date of award towards the alleged loss of opportunity at other sites. The entire claim of Rs.2.18 crores as claimed by the respondents has been allowed by the learned arbitrator on the ground that the respondents had carried out the trial production successfully and from the sale of oils derived from the said trial production, the respondents had made profit of Rs.1,05,000/- which was reflected in the balance sheet as on 31 st March 2001 and if the project would not have been terminated by the petitioner and if all the plantations on 1042 hectares of land were available to the project, the respondents would have made profit of Rs.8 crores as projected by the petitioner in its tender documents. In my view, the learned arbitrator totally failed to appreciate the oral evidence led by the parties in which it was proved that there was no commencement of commercial production. Be that as it may, on the basis of profit Kvm ARBP74.11 of Rs.1,05,000/- alleged to have been made by the respondent no.1 as on 31 st March 2001, the learned arbitrator could not have allowed the claim of Rs.2.18 crores towards the loss of opportunity. Neither the payability of the said claim nor quantification was proved by the respondents. In my view, no such claim could have been allowed against the petitioner by the learned arbitrator as the petitioner was also one of the investors in the said project and had given a loan to the company. The claim for loss of opportunity awarded by the learned arbitrator is contrary to Section 73 of the Indian Contract Act, 1872 and is based on no evidence.

109. The reliance placed by the learned counsel for the respondents and by the learned arbitrator in the impugned award on the judgments of the Supreme Court in the cases of M/s. A.T. Brij Paul Singh and Bros. Vs. State of Gujarat, reported in AIR 1984 SC 1703 and Dwarka Das Vs. State of

Madhya Pradesh and Anr., reported in AIR 1999 SC 1031 is totally misplaced. None of the judgments were applicable to the facts of this case. None of the judgment had considered the claim for loss of opportunity. The award is thus in conflict with the public policy and deserves to be set aside on this ground also.

110. In so far as the award of interest @18% p.a. is concerned, in my view, Mrs.Desai, learned counsel appearing for the petitioner is right in her submission that since no amount is due and payable to the respondents, question of awarding any interest by the learned arbitrator did not arise. Be that as it may, the rate of interest @18% p.a. is not the statutory rate provided under Section 31(7)(b) of the said Arbitration Act as erroneously held by the learned arbitrator. The rate of interest @18% p.a. Indicated therein can be read in the arbitral award to be considered as and by way of future interest only if the award is silent about future interest. Learned arbitrator, however, has proceeded on the premise, as if, Kvm ARBP74.11 the rate of interest @18% p.a. is a statutory rate of interest and has to be granted as and by way of future interest to a successful party. In my view, in any event, the rate of interest @18% p.a. awarded by the learned arbitrator is excessive and deserves to be set aside.

111. In so far as the counter claims made by the petitioner are concerned, a perusal of the award indicates that the learned arbitrator has rejected the said counter claims in toto without rendering any reason and merely on the ground that the termination was illegal. Learned arbitrator, in my view, was bound to deal with the counter claims made by the petitioner on merits and ought to have rendered reason for rejecting the counter claims. The award is based on no reason in so far as the counter claims are concerned and deserves to be set aside.

112. In so far as the judgment of the Supreme Court in the case of P.R. Shah Vs. B.H.H. Securities Pvt. Ltd., reported in (2012) 3 Mh.L.J. 737 relied upon by the respondents is concerned, the Supreme Court has held that the Court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re- appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. In my view, this case is not the case of re-assessing or re-appreciating the evidence. The award shows patent illegality on the face of the award and non-application of mind on the part of the learned arbitrator in dealing with the claim made by the respondents and dealing with the submissions and crucial evidence on record before the learned arbitrator. The said judgment of the Supreme Court in the case of P.R.Shah (supra) does not assist the respondents.

113. In so far as the judgment of the Supreme Court in the case of Vasu P. Kvm ARBP74.11 Shetty Vs. Hotel Vandana Palace and Ors., reported in (2014) 5 Supreme Court Cases 660 relied by the respondents is concerned, it is held by the Supreme Court that there can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. In my view, even if the petitioner had not handed over the possession of the leasehold plot of 1034 hectors to the respondents, a perusal of the record indicates that the respondents never raised any such objection and on the contrary, have accepted the possession of land of 1034 hectors given to the respondents by the petitioner and had paid rent in respect of the entire land to the petitioner for quite some time. The respondents never called upon

the petitioner to rectify the alleged breaches on the part of the petitioner. The respondents, while accepting the possession of plot of lesser area with lease documents, did not put the petitioner to the notice that the respondents would claim compensation for such alleged breach, in my view, the respondents were precluded from raising any such claim under Section 73 read with Section 55 of the Indian Contract Act, 1872. The said judgment of the Supreme Court in the case of Vasu P. Shetty (supra) does not assist the respondents and is not applicable to the facts of this case.

114. In so far as the judgment of the Supreme Court in the case of Dudh Nath Pandy (dead by LR's) Vs. Suresh Chandra Bhattasali (dead by LR's), reported in AIR 1986 Supreme Court Cases 1509 relied upon by the respondents is concerned, it is held by the Supreme Court that the admission must be taken as a whole and it is not permissible to rely on the part of the admission ignoring the other. In my view, this judgment is not at all applicable to the facts of this case in any manner whatsoever. Reliance placed by the learned counsel for the respondents on this judgment is totally misplaced.

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115. Similarly, the judgment of this Court in the case of Satnam Overseas Ltd.

Vs. m.v. OOCLABILITY & Ors., reported in 2009 (4) ALL MR 102 relied upon by the respondents is concerned, in my view, even such judgment is not at all applicable to the facts of this case in any manner whatsoever. In so far as the judgment of the Full bench of this Court in the case of R.S. Jiwani Vs. Ircon International Ltd., reported in 2010 (1) Bom.C.R. 529 is concerned, the learned counsel for the respondents has placed reliance on the said judgment in support of his submission that if this Court comes to a conclusion that any part of the award is bad, the same can be separated from the good part of the award and only to that extent, the award can be modified. In my view, since each and every claim made by the learned arbitrator is contrary to law, shows perversity and patent illegality, the entire award deserves to be set aside. The award shocks the judicial conscience of the Court. Judgment of the Full Bench of this Court in the case of R.S. Jiwani (supra) does not assist the respondents.

116. I, therefore, pass the following order :-

a) Arbitration Petition No.74 of 2011 is made absolute in terms of prayer clause (a).

b) The impugned award dated 2nd March 2010 passed by the learned arbitrator is set aside.

c) There shall be no order as to costs.

(R.D. DHANUKA,J.)