Gwl Properties Ltd vs James Mackintosh & Company on 16 March, 2012

Author: Anoop V. Mohta

Bench: Anoop V. Mohta

1 arbp272.10.sxw ssm

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 272 OF 2010

GWL Properties Ltd.
(Formerly known as Gordon

Woodroffe Ltd.), a public limited
duly incorporated under the
Companies Act, 1956, having
its Registered Office at 36, Rajaji Salai,

Madras-600 001. .....Petitioner

Vs.

James Mackintosh & Company
Private Limited, a private limited
company duly incorporated and
registered under the Companies Act,

1956, having its Registered Office at
Commissariat Building, 5th Floor,

231, Dr. Dadabhoy Naoroji Road,
Mumbai-400 001. .....Respondent

Mr. E. P. Bharucha, Senior Advocate with Mr. Cyrus Bharucha with Mr. M.G. Salian with Ms. V. Shete, Mr. J. Khan i/by M/s. Gagrats for the Petitioner.

Mr. Haresh Jagtiani, Senior Advocate with Ms. Vandana Mehta with

Mr. Abhijeet Shinde, Ms. Kathleen Lobo i/by Mr. Anil D'souza and Mr. Yashpal Jain for the Respondent.

CORAM: ANOOP V. MOHTA, J.

JUDGMENT RESERVED ON : 22 FEBRUARY 2012
JUDGMENT PRONOUNCED ON: 16 March 2012

ssm

JUDGMENT:

The Petitioner has challenged majority Award dated 31 August 2009 of the Arbitral Tribunal consists of three members, whereby the claims of the Respondent have been partly allowed along with interest and the costs.

2 The basic facts as noted by the learned Arbitral Tribunal are as under:

"The claimant is a shipping agency doing business for a long time. In the year 2004,

it entered into negotiations with the Respondent to acquire its wholly owned subsidiary by name "Gordon Woodroffe Logistics Limited" (GWLL). Sometime in July 2004, the claimant took the help of the Bombay Consultancy Group (BCG) for carrying out Due Diligence exercise as a preliminary to acquisition of GWLL. BCG made a report dated 05.11.2004. After the Due Diligence Report, further negotiations were held sometime in 2004 between the Claimant and the Respondent and finally a Share Purchase Agreement (SPA) was arrived at between the parties on 24.11.2004.

According to the claimant, GWLL is a logistic company and its principal assets comprised the large amount of receivables as shown in 3 arbp272.10.sxw ssm the Balance Sheet dated 31.03.2004, which was the principal reason for arriving at the total purchase consideration of `750 lakhs. In the Annual Report for the year 2003-2004 as at 31.03.2004, the Balance Sheet of GWLL showed Sundry Debtors at a total amount of `66, 317 lakhs out of which only `1,008 lakhs were shown as debts considered doubtful for which a provision was made in the Balance Sheet. After provision for doubtful debts, the Balance Sheet showed Sundry Debtors to the extent of `65,309 lakhs as on 31.03.2004. The Balance Sheet also showed that even as on 31.03.2003, an amount of `66,691 lakhs was shown as debts considered good without there being any provision for doubtful debts. According to the claimant, based on these representations made by the Respondent, it agreed to acquire GWLL at the price of `750 lakhs as mentioned in the SPA.

In the Written Statement filed, the Respondent denies that any sum is due and payable to the claimant. It contends that since a detailed due diligence exercise was held by the group of consultants hired by the claimant and the Due Diligence report was available to the claimant before the signing of the SPA, it is not open to the claimant to allege that any documents or material facts have been suppressed. The Respondent also contends that after the Due Diligence report and taking into consideration the comments made 4 arbp272.10.sxw ssm therein with regard to sticky and doubtful receivables, the claimant had taken the decision to offer the consideration of `750 lakhs; that the SPA contains very limited Representations and Warranties on the part of the Respondent; and no situation for enforcement of any such Warranty exists. According to the Respondent, in any event, none of the claims of the claimant arises out of any Representations and Warranties of the SPA as all of them fall beyond the purview of the SPA. The Respondent's stand is that the Due Diligence report shows the valuation of GWLL was made after "an appropriate consideration for doubtful outstanding debts", which shows that the claimant's officer of `750 lakhs for purchase of the shares of GWLL had been made after full consideration of all doubtful receivables. The Respondent finally contends that there was no Warranty given in the SPA that all the debts would become realizable or recoverable."

3 The Respondent withdrawn the counter claim so filed as no evidence was led to prove the same. The claimant/Respondent examined three witnesses and the Petitioner examined one witness.

4 The operative part of the majority Award is as under :

5 arbp272.10.sxw ssm "(a) the Respondent is ordered and directed to pay to the claimant the sum of Rs.59,70,583/- (Rupees Fifty Nine Lakhs Seventy Thousand Five Hundred Eighty Three only)

together with interest thereon to be calculated at the rate of 12% per annum from the date hereof till payment or realization, whichever is earlier;

(b) the Respondent is ordered and directed to pay to the claimant the costs of this arbitration quantified at Rs. 13,80,000/- (Rupees Thirteen Lacs and Eighty Thousand only)."

5 The operative part of the minority Award is as under :

> "1. The claims made by the Claimant are rejected.
>
> 2. The claimant to pay to the Respondent the cost of arbitration quantified at Rs.13,80,000/- (Rupees thirteen lacs eighty thousand only)."

6 There is no dispute that the Respondent has expressed their interest to purchase the Petitioner's entire share holding in GWLL.

The Respondent appointed the Bombay Consulting Group for conducting the Due Diligence at various branches of GWLL, including its Head Office at Chennai during the period July-November 2004. A Due Diligence Report (for short, "the DDR") dated 5 November 2004 was prepared conveying the Petitioner's outstanding debts, irrecoverable credit management, finance estate and its worth including bad debts of GWLL to the extent of `100 lacs and suggested 6 arbp272.10.sxw ssm a write off of `60 lacs. The DDR valued GWLL at `750 lacs. The parties, thereafter, entered into a Share Purchase Agreement (for short, "SPA") on 24.11.2004. The Respondent, after taking over of GWLL, pointed out difficulties in recovering the receivables of GWLL.

Therefore, arose dispute.

7 The Respondent, therefore, initiated arbitration proceedings against the Petitioner on 1 December 2006 and claimed an amount of `64,61,301/- with interest at 15% per annum. Admittedly, after DDR, the parties executed the SPA and acted upon the terms and conditions, accordingly.

8 Both the learned Senior Counsel have visited and re-visited the pleadings and documents on record apart from the following clauses:-

> "Clause 3.2- Subject to the terms and conditions mentioned herein and the fulfillment of the conditions, referred to in Clause 2 above on the Closing Date, the Seller agrees to sell and transfer to the Acquirer and the Acquirer hereby agrees to purchase the Sale Shares from the Seller for the 7 arbp272.10.sxw ssm Acquisition Price, relying on the Representations and warranties, and the indemnities given by the seller free and clear of all Encumbrances, along with all rights and interest of any nature, now or after the date of this Agreement accruing or attached to the Sale shares.

Clause 6.1- The Seller hereby; represents and warrants to the Acquirer as set out in this Agreement, and acknowledges that the Acquirer has agreed to acquire from the seller the Sale Shares relying upon the Seller's Representations and Warranties.

Clause 6.2- Any Representations and Warranties herein or Representations and/or Warranties contained in any certificate or writing of either Party shall be deemed to be material and to have been relied upon by the other Party, notwithstanding any investigation, due diligence or inspection made by or on behalf of such Party with respect to the other Party's or his/its/their business, and shall not 8 arbp272.10.sxw ssm be affected in any respect by any such investigation, due diligence or inspection.

Clause 6.3- The Parties expressly agree and undertake that the Representations and Warranties are true and correct on the date hereof and will be true and correct on the Closing Date. The Seller/Acquirer shall promptly disclose to the Acquirer / Seller any information contained in its Representations and Warranties that is incomplete or is no longer correct as of all times after the date of this Agreement until the Closing Date; provided, however, that none of such disclosures shall be deemed to modify, amend or supplement the Seller's Representations and Warranties, unless the Acquirer shall have consented thereto in writing.

Clause 6.4- Each Representations and warranty shall be construed independently of the others and is not limited by reference to any other Representations or Warranty.

9 arbp272.10.sxw ssm Clause 7.1- The Seller hereby represents and warrants to the Acquire that :

(a) Organization and Authority :- The Seller is the legal and beneficial owner of the sale shares and has good and valid title to all the sale shares. Further, it is a company duly organized and validly existing under the laws of India and has full corporate power and authority necessary to enter into and perform its obligations under this Agreement and to consummate the transactions contemplated hereby and that there are no litigations or threatened litigations against the Company other than that disclosed in Annexure B.

(d) Financial Statements:- The Financial statements of the company have been prepared in accordance with generally accepted accounting principles in India applied on a basis consistent with that of the preceding period and present fairly in all material 10 arbp272.10.sxw ssm respects, the assets and liabilities and the financial position of the Company as reflected in the audited Financial Statements as on March 31, 2004. Excepting as otherwise disclosed or provided for in this Agreement there has not been any material change in the financial statements of the Company other than changes in the ordinary and usual course of business.

Clause 11.1- From and after the Closing Date, the seller shall be liable to compensate and indemnify, defend and hold harmless the Acquirer, its directors, officers and employees (collectively, "Acquirer and Associates"), from and against any and all losses, liabilities, damages, demands, claims actions, judgments or causes of action, assessments, interest, penalties and other costs or expenses including, without limitation, reasonable attorneys' fees and expenses ("loss" or "losses", as the case may be) directly based upon or, arising out of, or in relation to or in connection with any inaccuracy in or any breach of any Representations and/or Warranties or any covenant or 11 arbp272.10.sxw ssm agreement or Representations of the Seller contained in this Agreement or any Annexure hereto, or any document or other papers delivered by the Seller to acquire in connection with or pursuant to this Agreement.

Clause 11.2- From and after the Closing Date, the Acquirer shall be liable to compensate and indemnify, defend and hold harmless the Seller, its directors, officers and employees (collectively, "Seller and Associates"), from and against any and all losses, liabilities, damages, demands, claims actions, judgments or causes of action, assessments, interest, penalties and other costs or expenses including without limitation, reasonable attorneys' fees and expenses ("loss" or "losses", as the case may be) directly based upon or, arising out of, or in relation to or in connection with any inaccuracy in or any breach of any Representations and/or Warranties or any covenant or agreement or Representations of the Acquirer contained in this Agreement or any Annexure hereto, or any document or other papers delivered by the Acquirer to the Seller in 12 arbp272.10.sxw ssm connection with or pursuant to this Agreement."

9 The DDR is a procedure to collect information, date and relevant material in advance, before entering into any transactions by the parties. Now, therefore, it is necessary to consider the final effect of DDR so far as the Respondent is concerned. The Petitioner may and may not be bound by the DDR. The Respondent also may or may not take note of DDR before executing any agreement between the parties. There is nothing pointed out and/or referred and/or relied the evidentiary value of the DDR.

10 Therefore, the DDR, in a way, is a background material where parties before entering into any final contract collect the information and the material for taking decisions to purchase and/or deal with not to party or the company. It is also for the satisfaction and for verification of the information of the seller, or vice-versa, to avoid further delay and/or the complications, apart from valuation of the company/property. The Petitioner, therefore, in no way claim that this DDR is final and binding between the parties for all the purposes to come, though they entered into SPA. Both the parties knowing fully the background material/information, signed and entered into the SPA 13 arbp272.10.sxw ssm which, in my view, is a final and binding document between the parties for purposes of adjudicating the claims so raised by invoking arbitration clause. To clauses of the SPA, which are not vague and/or unclear. The background material like DDR is relevant to consider in case of any doubt and/or any vagueness, in the terms and conditions and not otherwise.

I have in Reliance Natural Resources Ltd. Vs. Reliance Industries Limited 1 , considered the importance of commercial document between the parties in the following words:-

> "95. The same author has further elaborated the principles of construing the documents as a whole as under:-
>
> 6.02.In order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document.
>
> 6.03.In construing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus.

The construction of a document as a whole necessarily involves giving effect to each part of 1 2007(Supp.) Bom.C.R. 925 14 arbp272.10.sxw ssm it in relation to all other parts of it.

Accordingly, as a corollary of the principle that a document must be construed as a whole, effect must be given to each part of the document. This in turn means that in general each part of the document is taken to have been deliberately inserted, having regard to all the other parts of the documents, with the result that there is a presumption against redundant words (usually called "surplusage")."

12 I have already observed in Jigar Vikamsey Vs. Bombay Stock Exchange Limited, 2 by noting the Supreme Court judgments, the Court's role, while dealing with such situation which are as under :-

> "11 The Petition is under Section 34 of the Act. The Apex Court recently in G. Ramchandra Reddy & Company v.
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> Union of India & anr., (2009) 6 SCC 414 and in Madhya Pradesh Housing Board v. Progressive Writers and Publishers, (2009) 5 SCC 678, while dealing with both the Arbitration Acts and considering the principles to challenge the Arbitral Award has re-iterated the following points :
>
> (a) The re-appraisal of the evidence by the Court is not permissible (Ispat Engineer Foundary Works vs. Steel Authority of India, (2001) 6 SCC 347). An Award of an Arbitrator need to be read as a whole to find out the implication and meaning thereof of the reasons. The Court, however, does not sit in Appeal over the Award.
>
> (b) The interference, where reasons are given would still be less, unless there exists a total perversity and/or the 2 2010(1) Bom. C.R. 908 15 arbp272.10.sxw ssm Award is based on a wrong proposition of law.

c) Even if two views are possible on an interpretation of central clause, that would not be justification in interfering with the Award specially when the view so taken is possible/plausible one (Sudarshan Trading v. Allied Construction (2003) 7 SCC 396). [G. Ramchandran (Supra)] But the interpretation of the clause which is wholly contrary to law should not be upheld by the Court. [Numaligarh Refinery Ltd v. Daehim Industrial Co. Ltd., 2007(10) SCALE 577/(2007) 8 SCC 466]

(d) The jurisdiction of the Court to interfere with an Award made by an Arbitrator is limited, unless there is an error apparent on the face of the Award and/or jurisdictional error and/or legal mis-conduct. [Numaligarh Refinery Ltd (supra).

(e) The wrong point of law and apparent, improper and incorrect findings of facts which are demonstratable on the face of the material on record, may be treated as grave error and/or legal misconduct.

(g) "From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii)the provisions of the Arbitration and Conciliation Act, 1996; or or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties; is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to :

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(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

[Delhi Development Authority vs. R.S.Sharma & Co.- (2008) 13 SCC 80].

In view of above settled principles of law, the judgments cited by the parties in support of their respective submission on law need no further discussion. The facts are totally distinct and

distinguishable."

13 To make the position update, recent observations made by the Apex Court are as under:-

> (i) J.G. Engineers Private Limited Vs. Union of India & Anr. 3 "25. It is now well settled that if an award deals with the decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent."

3 (2011) 5 S.C.C. 758 17 arbp272.10.sxw ssm

(ii) P.R. Shah, Shares and Stock Brokers Private Limited Vs. B.H.H. Securities Private Limited & Ors. 4 "21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence."

14 Both the learned counsel have also relied upon the various judgments revolving around the above principles. As there cannot be much debate on the above principles. I am not dealing with cases cited. The law and the principles are clear to all. I am dealing with the matter on above foundation, independently.

15 It is also important to note that while dealing with the interpretation and/or disputed clause of any commercial agreement, the Court needs to consider whole document and not isolated clause and/or clauses, to understand its object, purpose and its intention.

Once the parties signed and acted upon the same, in my view, the earlier correspondences and/or documents and/or information so collected, like in the present case the DDR, cannot prevail over the written and clear terms of the final documents, when the clauses so 4 (2012) 1 S.C.C. 594 18 arbp272.10.sxw ssm argued are clear and not vague. Therefore, the first and foremost point is whether the Arbitral Tribunal has wrongly interpreted the SPA while awarding the claims in favour of Respondent, based upon the evidence and material placed by both the parties. The majority Arbitrators have considered and dealt with in detail and gave the findings on all the points of law as well as facts 16 The majority Arbitrators found that; a large amount of debts which were shown as good in the balance-sheet as on 31 March 2004 were irrecoverable and agreed to be written off; receivable by GWLL on 31 March 2004 were not correctly stated in the audited account and did not disclose subsequent changes also; the representation and the warranties in SPA were inaccurate; the Petitioner, therefore, in view of Clause 11.1 of the SPA, the Respondents, entitled to be indemnified. The Arbitrators have also noted that despite having agreed to write off at the higher executive level and communicated the same to the concerned debtors, still the representation was made that the same would be good and recoverable as on the date of the SPA. The submission that the Respondent had appointed BCG as its agent to carry out due diligence qua GWLL and as all changes in the receivables between 31 March 2004 and 24 November 2004 were 19 arbp272.10.sxw ssm disclosed, therefore fall within Clause 7.1(d) of the SPA and the words "otherwise disclosed" has rightly been discarded. The learned Arbitrators found that the Petitioner, who was under obligation, to disclose

these facts specifically by a representative and failed to disclose the details and in fact provided incorrect information, the Arbitrators right in holding that there was misrepresentation. The Petitioner cannot get premium of its own wrong by relying the DDR which is a document of the Petitioner. As the Arbitrators found that as the loss is caused to the Respondents because of inaccuracy, breach of representations and the warranties and, therefore, the Petitioner is bound by the indemnities contained in clause 11.1 of SPA, cannot be stated to be wrong, perverse and/or contrary to the clauses in question.

17 The learned Arbitrators have awarded the amount to the tune of `59,88,503/- with 12% interest from the date of Award till realization and the costs so awarded. Both the learned Arbitrators have considered all the claims independently as follows :

> "(a) A total amount of Rs.20,77,812/- was disputed by different parties on the ground that the bills of GWLL 20 arbp272.10.sxw ssm were in excess of the amounts payable under the contract with GWLL;
>
> (b) Pursuant to the disputes with different parties, the Senior Executives of the Respondent had agreed and represented to those parties to settle the amounts receivable by reducing it to the tune of Rs.
>
> 37,27,890/-;
>
> (c) Debts totaling to Rs.1,64,881/- were not recoverable because the parties from whom they were due were not traceable."

18 The learned Arbitrators have interpreted basic clauses in the following words:

> "Clause 3.2 of the SPA records the agreement between the claimant and the Respondent to the effect that the Claimant as an Acquirer had agreed to acquire GWLL for the acquisition price relying on the Representations and Warranties and the Indemnities given by the Respondent 21 arbp272.10.sxw ssm (Emphasis supplied). Clause 6.1 of the SPA records the agreement arrived between the Claimant and the Respondent to the effect that the claimant had agreed to acquire from the Respondent the Sale Shares relying upon the Respondent's Representations and Warranties (Emphasis supplied).
>
> Clause 6.2 of the SPA records further agreement arrived between the claimant and the Respondent making it clear that any Representations and Warranties contained in any certificate or writing of either party would be deemed to be material and to have been relied upon by the other party notwithstanding any investigation, due diligence or inspection made by or on behalf of such party with respect to the other party's business and would not be affected in any respect by such investigation, due diligence or inspection (emphasis supplied). Clause 6.3 of the SPA records affirmation by the Claimant and the Respondent to the effect that their

Representations and Warranties were true and correct on the date of the SPA and would be true and correct on the Closing Date mentioned in the SPA. It further records affirmation by the Claimant and the Respondent to the effect 22 arbp272.10.sxw ssm that the Respondent would promptly disclose to the Claimant any information contained in its Representations and Warranties (emphasis supplied) that was incomplete or was no longer correct as of all times after the date of the SPA. It also records the agreement between the Claimant and the Respondent to the effect that no such disclosures would be deemed to modify, amend or supplement the Respondent's Representations and Warranties given and/or provided for in the SPA unless the Claimant would have consented thereto in writing. (Emphasis supplied).

17 ..... Clause 11.1 of the SPA is an indemnity clause which provides that on and after the Closing Date mentioned in the SPA, the Respondent would be liable to compensate and indemnify the Claimant against any and all losses, liabilities, damages, directly based upon, or arising out of, or in relation to or in connection with any inaccuracy in or any breach of any Representations and/or Warranties or any covenant or agreement or Representations of the Respondent contained in the SPA or any Annexure thereto, or any document or other papers delivered by the Respondent to 23 arbp272.10.sxw ssm the Claimant in connection with or pursuant to the SPA (Emphasis supplied). Even assuming that the decision taken by the Board of Directors of GWLL to make provision for only Rs.1,008/- lakhs as doubtful debts was commercially correct, the fact remains that the representations that the rest of the debts were "good" was certainly inaccurate and wrong to the knowledge of those in charge of GWLL and consequently by the Respondent. The Claimant is thus justified in placing reliance on indemnity Clause 11.1 of the SPA and the Respondent, being under contractual obligation, is bound and liable to indemnify the Claimant for loss sustained due to wrong and misleading representations in the Balance Sheet of GWLL as of 31.03.2004.

18 ..... There is no doubt that the judgment as to whether a debt is recoverable or of doubtful nature is a commercial judgment. However, the person making a judgment on that and making representations to the public at large or to another party as in the present case, must exercise commercial prudence and arrive at his judgment only after being informed of the state of affairs by his 24 arbp272.10.sxw ssm assistants and executives and on that basis. It is for this reason that the SPA vide Clause 6.2 specifically provides that there would be breach of the Warranties due to inaccuracies, even if there had been due diligence.

19 Mr. Suresh Kumar Kothari, the witness of the Respondent, has even admitted (see answers to questions 62, 63 and 72) that bad and doubtful debts of Rs. 60 lakhs and sticky debts of Rs. 90 lakhs had not been considered in ascertaining the value of GWLL acquired by the Claimant. If this was the situation, even according to him, the valuation report of BCG was based on the free-net worth of Rs.540 lakhs mentioned in the audited Balance Sheet of GWLL as at 31.03.2004 plus the goodwill

valued at Rs.210 lakhs, thus making the total amount of Rs.750 lakhs. Mr. Suresh Kumar Kothari further admits (in reply to question 73) that bad or doubtful debts of Rs.60 lakhs and sticky debts of Rs.

90 lakhs were not taken into account while arriving at the free-net worth of Rs.540 lakhs of GWLL. This establishes that the valuation was made straightaway on the basis of the figures in the Balance Sheet of GWLL as of 31.03.2004 25 arbp272.10.sxw ssm showing a net worth of Rs.540 lakhs and goodwill evaluated at Rs.210 lakhs."

19 The learned Arbitrators, considering the material and evidence on record, found that the sum of `6,14,040/- was not recoverable as it was billed twice for the same transaction. GWLL, in fact filed the Suit against the Sudarshan Overseas Limited in the Court of District Judge, New Delhi. Therefore, there was misrepresentation that the amount so due from Sudarshan Overseas Limited as mentioned in the balance sheet as on 31 March 2004. A sum of `3,14,235/- was also disputed by the debtors but it was reflected as recoverable debts.

20 The amount to the tune of `11,67,457 billed to the different parties under the heads of transport, detention charges, miscellaneous handling charges without supporting documents. This was also treated as misrepresentation by the Arbitrators.

21 The witness of Respondent admitted that a sum of `37,27,890/-

was to be written off as on 31 June 2004. He also admitted that `18,70,464/- which was included in the amount was also agreed to be written off. He could not answer whether this was given effect to in 26 arbp272.10.sxw ssm the Books of Account. He in his cross-examination admitted that the provision of doubtful debts in the Balance Sheet did not include the amount which was agreed to be written off. The majority Arbitrators therefore, referring to e-mail dated 23 August 2004 found that the evidence on record established that though the said amount of `33,71,773/- was sanctioned by GWLL for write off in the month of June 2004 was in fact not written off. The same was the position with regard to the amount due from Wajilam Exports and Marco Finance Private Limited to the tune of `2,40,303/- and were shown as receivable in the Balance Sheet as on 31 March 2004.

22 The learned Arbitrators right in observing further that though amount was not due and recoverable for long i.e. `1,64,881/-, still in the balance sheet it was misrepresented to be receivable by GWLL.

23 Therefore, taking overall view of the matter and as the Hon'ble Arbitrators have gone through the documentary evidence on record laid down by the parties found a misrepresentation with regard to the financial position and further noted that in all material aspects the assets and liabilities and the financial position as of 31 March 2004 was false and incorrect.

27 arbp272.10.sxw ssm 24 The submission that the majority arbitrators erroneously interpreted clause 7.1(d) of the SPA, by referring to phrase "Excepting as otherwise disclosed or provided for in this agreement", need to be tested taking into consideration all the clauses in question. One cannot

overlook the earlier part of clause 7.1(d) of the SPA whether the positive statement was made that the financial statements of the company have been prepared in accordance with generally accepted accounting principles in India, consistent with that of a preceding period and present in all material respects, the assets and liabilities and the financial position of the company as reflected in the audited financial statements as on 31 March 2004. The finding so arrived at by the majority arbitrators itself shows that there was no proper disclosure and in fact there was misrepresentation. In spite of above finding, the said submission was made that all challenges in the receivables between 31 March 2004 and the date of the SPA 24 November 2004 were disclosed to the BCG and, therefore it would follow within the ambit of "otherwise disclosed", is unacceptable. The importance of specific clauses and the representations so made in the agreement noway can be diluted at the instance of the Petitioner on the basis of BCG report which was prepared at the instance of the 28 arbp272.10.sxw ssm Petitioner. The positive statements and the representations so made by the Petitioner, and as recorded in the clauses, prevail for all the purposes, as those clauses were clear and there was no vagueness of any kind. The Petitioner needs to stand on his own legs instead of blaming the Respondents BCG report which was admittedly a step prior to signing of the agreement between the parties. The interpretative reasons, given by the majority Arbitrators in para 24 in any way cannot be stated to be perverse and/or illegal. The view so expressed by interpreting the clauses which in my view, also are plausible and acceptable interpretation. Therefore, there is no reason to interfere with the same.

25 The finding that, the statements and representations made by the Petitioner as referred above, as on 31 March 2004 was found to be incorrect that also goes to the root of the matter. Therefore, the view taken by the learned Arbitrators based upon the material, as well as, the interpretations so given in any way cannot be stated to be against the public policy and/or perverse. The learned majority Arbitrators referring to the phrase "changes in the ordinary course of business" as referred in clause 7.1(d), the evidence and material on record, as discussed in paragraph 22 observed that under the SPA, "claim could 29 arbp272.10.sxw ssm be made by the claimant against the Respondent only for a breach of the Respondent's representations and warranties contained therein and in the light of due diligence conducted by BCG on behalf of the claimant, the SPA contains very limited representations and warranties on the part of the Respondent is devoid of any merits. It is rightly observed that the Respondent claimant had agreed to purchase the interest in GWLL from the consideration mentioned and relying on the representations and warranties and indemnities stating it to be free and clear from all encumbrances. It is specifically mentioned in Clause 6.1 read with 6.2 that notwithstanding the due diligence report made by BCG with respect to GWLL as the representations and warranties given by the Respondents as mentioned in the SPA have not been effected by due diligence report of BCG". It is also clear in view of clause 6.3 of SPA, that the representation and the warranties given as stated to be true and correct, as on the date of SPA, as also on the closing date, could not get modified or amended or supplemented unless the claimant consented thereto in writing. There is no material on record to show that there was such consent given or provided in writing. The learned Arbitrators therefore, by referring to the depicted position of balance sheet as on 31 March 2004 comes to the conclusion that the contention that Clauses 6 and 7 of SPA provides 30 arbp272.10.sxw ssm limited representations and warranties is devoid of merits by observing that the material aspect is the incorrect and inaccurate financial affair as shown in the balance sheet and not the failure to recover the amounts so represented. The learned majority

Arbitrators rightly observed that the true scope of the said clause is to be determined on a fair reading of the word used in their part of ordinary and natural meaning. The interpretation so given by the Senior counsel for the Petitioner was rightly rejected by detailed elaboration on law, as well as, on the facts.

26 Both the learned Arbitrators, based upon the agreement between the parties, gave the findings on the aspect of misrepresentation in detail. Therefore, the submission referring to Clause 11.1 and/or 7.1(d) that the DDR was complete proof of the fact that all the changes relating to the same were disclosed to the agents and the representatives of the Respondent and therefore, the warranties contained therein had been fully complied with, is unacceptable and also the submission that the changes in the receivables over a period of time would necessarily would change in the ordinary course of business.

31 arbp272.10.sxw ssm 27 The submission referring to Section 18 and 19 of the Contract Act, revolving around the definition "Misrepresentation" as made by the learned Senior Counsel appearing for the Petitioner is also of no assistance. The reasoning of the Arbitrators are based upon the binding clauses between the parties and the agreements which are definitely signed in spite of DDR of Respondent but in view of the positive representations made by the Petitioner in every aspects so referred above, based upon which both the parties proceeded. There was no question of keeping those points vague and/or uncleared and now to submit that there was a clear disclosure and/or representation made before signing of the binding agreements. The evidence so arrived at by the learned majority Arbitrators shows that there were inaccurate and incorrect statements made and recorded even in the balance sheet and therefore, there was misrepresentation. Therefore, to say that the Respondents were fully aware that exact quantum of bad debts and therefore, there was no reason to reflect and/or mention in the final agreement, itself shows that the agreement is nothing but contradictory stands and it is in fact admission to say that they have made representations deliberately of the events/ debts / assets / receivables as of 31 March 2004, knowing fully that the position was not correct and or incorrect, but on an alleged 32 arbp272.10.sxw ssm foundation that it was duly informed to the Respondent and/or its aid.

28 The submission that there was no evidence laid down by the Respondent about the misrepresentation is also of no assistance. The evidence even if any, with regard to and/or surrounding circumstances referring to DDR i.e. prior to the signing of these documents, in view of above findings, in no way sufficient to disturb the reasoned award so passed by the majority Arbitrators. There is no question of accepting the submission that the Arbitrators failed to take into account admission and/or evidence of the Defendants cross-

examination. Merely because DDR report was prepared by all the Respondent jointly based upon the information and documents provided by the Petitioner, that itself is not sufficient to overlook the important obligations of the Petitioner to disclose and point out specifically the position on their balance sheet at the relevant date.

The doubtful recovery even if mentioned, as contended, in that case the representations should have been positive but as noted, at the time of final agreement, the Petitioner maintained the position of

debts recoverable which induced the Respondents to acquire GWLL for a sum of `750 lacs. There is nothing pointed out and/or shown by the learned counsel appearing for the Petitioner that such DDR and/or the 33 arbp272.10.sxw ssm finding given therein, prevail over the binding agreement between the parties and it has statutory evidentiary value basically when the same was informed at the instance of the Petitioner.

29 It is declined to accept that the Petitioners were not aware the litigation and/or threaten litigation. The litigation normally proceeded over the exchange of notices referring to the claims or the counter claims. Those litigations even if any, arise and/or based upon the cause of action prior to the execution of the agreement. Therefore, merely because the Suits were filed subsequently as alleged, that cannot be the reason not to disclose the situation in the agreements.

30 The Arbitrator has rightly considered and granted the rate of interest @ 12% p.a. from the date of the award till realization and so also the costs based upon the material available on record on cost amount all the Arbitrators are unanimous. Both these aspects also need no interference.

31 The learned Senior Counsel appearing for the Petitioner has made an issue even out of the following paragraphs-

34 arbp272.10.sxw ssm "34. Alongwith the letter dated 10th August, 2009, the Presiding Arbitrator forwarded draft of this then proposed award to Co-Arbitrators for their perusal and suggestions and informed that a meeting, if desired, may be arranged for discussion. One of us, that is, Justice B.N. Srikrishna (Retd.) agreed with the draft of this award and informed the Presiding Arbitrator accordingly. However, Justice (Dr.) B.P. Saraf (Retd.) by his letter dated 20th August, 2009 informed the Presiding Arbitrator and Justice B.N. Srikrishna (Retd.) that he is not in agreement with the reasoning and conclusions in the drafts of the proposed award, one earlier forwarded by Justice B.N. Srikrishna (Retd.) and the other forwarded by the Presiding Arbitrator. Alongwith his letter dated 20th August, 2009, Justice (Dr.) B.P. Saraf (Retd.) has forwarded a draft of award prepared by him and informed that if there is any possibility of consensus, a meeting may be arranged for discussion otherwise, both Justice B.N. Srikrishna (Retd.) and the Presiding Arbitrator may discuss and if arrive at a consensus, a majority award may be prepared by them, a copy whereof may be forwarded to him to enable him to finalize his dissenting award. Since there has been no possibility of any consensus in respect of draft award prepared by Justice (Dr.) B.P. Saraf (Retd.), this majority award is made which is not signed by Justice (Dr.) B.P. Saraf (Retd.) as he is dissenting from the reasoning and conclusions contained therein."

32 The fact is the learned dissenting Arbitrator, has passed a separate award. All the Arbitrators have signed but respective awards.

The submission was, in view of above observations, that there was no consensus and deliberation and/or shows non application of collective 35 arbp272.10.sxw ssm mind, as they did not meet physically prior to reaching to the conclusion as set out in the majority award. The submission was also made that the dissenter Arbitrator could have presented the majority Arbitrator to his point of view or vice-versa. Therefore, submitted that the Arbitral Tribunal not sitting together to deliberate

on the award, before passing the award, amounts to total application of mind. He relied on a number of Judgments to support his case. The facts of those cases are totally distinct and distinguishable. In the present case there is no averments or allegations that all the Arbitrators were never present together during the course of recording of evidence and/or final hearing of the matter. Therefore, when all the Arbitrators heard the matter and accordingly closed the matter for judgment/award, the subsequent physical meeting, in my view, is not material to accept the case of the Petitioner to set aside the majority award merely because there is dissenting opinion also on the record. I have already observed in Axios Navigation Co. Ltd. Vs. Indian Oil Corporation Limited "19 The Court even otherwise, is entitled and empowered to express opinion on merits of the matter if case is made out even by setting aside the majority view/opinion. It cannot be stated here that the Court ought not to have looked into the reasons given by 5 2012 Vol. 114 (1) Bom. L.R. 0392 36 arbp272.10.sxw ssm dissenting Arbitrator's opinion. Any opinion given by any of the Arbitrator whether by majority and/or by minority, if based upon the valid foundation of law and the record, just cannot be overlooked by the Court under Section 34 of the Arbitration Act, 1996.

The Court's independent reasonings irrespective of the reasons given by the majority and/or minority Arbitrator should prevail.

20 Admittedly, the appointment of the Arbitrator was by the consent of the parties. The matter was heard by all the Arbitrators as they agreed for the common procedure to be followed. Only because the dissenting Arbitrator has expressed his opinion on same facts and material differently, that cannot be the reason to overlook the well reasoned dissenting opinion. It is permissible to express individual opinion even by the Arbitrator. There is no bar at all for the Arbitrator to express their independent views though for the purposes of award, the majority decision is required.

21 In any judicial decision making process, every Judge is entitled to express his views on the subject. Therefore, in case of conflict of view which is not uncommon and in fact it is useful as it provides another dimension to the same issue based upon the same material which is important for any judicial decision making process. I am of the view, therefore, that the view expressed by the dissenting Arbitrator and if relied upon by the loosing party and/or aggrieved party who wants to support the same reasoning, such right just cannot be denied merely because the scheme of the Act required in case of conflict, the majority view need to be treated as an awardable opinion.

22 Therefore, heard both the parties and as referred and relied upon by the learned counsel appearing for the Petitioners even on the reasoning given by the 37 arbp272.10.sxw ssm dissenting Arbitrator read with the material placed before the Arbitrators, I am inclined to consider the rival contentions of both the parties, based upon the majority views, as well as, dissenting views. Because at this stage of the hearing, there was no question of forming any opinion of either of the views.

Therefore, ends of justice and to give equal opportunity to both the parties and to treat parties fairly and equally and considering the principle of natural justice, I am inclined to consider both the reasonings given by the Arbitrators i.e. majority view, as well as, the dissenting view."

33 There is nothing contemplated and/or provided under the Arbitration Act that the award should be pronounced by all the Arbitrators by sitting together. There is also no provision under the Arbitration Act that the Arbitrators jointly and/or independently cannot express their minds. This is a case were all the Arbitrators have applied their minds to the facts and circumstances and even exchange the opinion and based upon the same, the learned dissenter Arbitrator has passed his award. The concept of majority award which is final and binding is well recognized more in any judicial decision making procedure. There is no bar. Any Arbitrator can express his views based upon the material and evidence available on record. They physically never met and/or tele-conference or video conference before reaching the conclusions set out in the majority 38 arbp272.10.sxw ssm award, is not material to set aside the reasoned majority award. I am also convinced and as recorded above the majority award needs no interference. It is well within the framework of law and the record.

The reliance on the following paragraphs of Supreme Court in no way applicable to the present facts and circumstances in view of above findings:-

> "d) The Supreme Court in the case of State of U.P. Vs. Jai Bir Singh (2005) 5 SCC 1 observed "As has been stated by us above, the decision in Bangalore Water is not a unanimous decision. Of the five Judges who constituted the majority, three have given a common opinion but two others have given separate opinions projecting a view partly different from the views expressed in the opinion of the other three Judges.

Beg, C.J. having retired had no opportunity to see the opinions delivered by the other Judges subsequent to his retirement. Krishna Iyer, J. and the two Judges who spoke through him did not have the benefit of the dissenting opinion of the other two Judges and the separate partly dissenting opinion of Chandrachud, J., as those opinions were prepared and delivered subsequent to the deliver of the judgment in Bangalore Water case.

> "In such a situation, it is difficult to ascertain whether the opinion of Krishna Iyer, J. given on his own behalf and on behalf of Bhagwati and Desai, JJ., can be held to be an authoritative precedent which would require no reconsideration....."

34 All the Arbitrators have applied their mind and passed and 39 arbp272.10.sxw ssm signed the two reasoned awards majority and minority award, this itself shows application of minds. The dissenting reasoned award shows, independent view expressed on law and the record. This itself is sufficient for compliance of provisions of Arbitration Act. The case cited, therefore, in view of above find itself are of no assistance to the submission so made in this regard.

35 The concept of bad debts, good debts, reasonable and/or recoverable are also important from the point of Income Tax Act and also Companies Act. The financial statement of the Company in the balance-sheet is recognized mode of declaration of Company's assets and liabilities for all. The agreements therefore, if made based upon the same binds all. The clauses which provides indemnifier, guarantors, sureties and/or warranties, inspite of earlier disclosures and/or discussion,

even if any, no way takes away the binding effect of such clauses. The statement, therefore, so made and declared cannot be overlooked only for the Respondent in view of the alleged prior information, even if any.

36 The contention of the learned Senior counsel appearing for the Petitioner that the finding so arrived at by the majority Arbitrators is 40 arbp272.10.sxw ssm based upon the hearsay evidence is also incorrect. The reasons so provided and as recorded above by the learned Arbitrators is based upon the evidence/ admitted documents and the proper and correct interpretation of clauses of the agreement between the parties. It is not even a case of possible view. It is settled that the Arbitrator is the sole Judge of the quality, as well as, the quantity of the evidence. The Court under Section 34 is not a Court of Appeal. The clear terms of the agreements if interpreted by the experienced Arbitrators, the reliance and the reference by the Petitioner to BCG or DDR in no way sufficient to overlook the subsequent binding agreement between the parties. The majority award in no way cannot be stated to be passed on extraneous and irrelevant considerations. Therefore, in view of the specific clauses and agreements between the parties and the facts and circumstances are totally distinct and distinguishable. The Judgment so cited by the learned senior counsel appearing for the Petitioner on facts are of a little assistance. The settled principles of law are not in dispute, but in view of above, reasonings those are also of little importance. Those support the case of the Respondent to the extent that; as there is no perversity and/or legality as the Court is not exercising Appellate jurisdiction; and the reasonings so given based upon the material and the evidence placed on record; and further 41 arbp272.10.sxw ssm considering the scope and power of the Court under Section 34 of the Arbitration Act, the award needs no interference.

37 Resultantly, the Petition is dismissed. The majority award is maintained. There shall be no order as to costs.

(ANOOP V. MOHTA, J.)