Star India Private Limited vs Kaleidoscope Entertainment Private ... on 8 May, 2015

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1011 OF 2011

Star India Private Limited,)
a company incorporated under)
the Companies Act, having its)

registered office at Star House,)
Off. Dr.E.Moses Road,)

Mahalaxmi, Mumbai 400 011) .. Petitioners
..Versus..
Kaleidoscope Entertainment Private)
Limited, a company incorporated)

under the Companies Act, 1956,)
having its address at 204, Golf)
Apartments, New Delhi - 110 003) .. Respondents

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Dr.Birendra Saraf with Mr.Sanjay Kadam, Mr.Rohan Rajadhyaksha, Mr.Manish Chaudhari, Ms.Apeksha Sharma and Mr.Sanjeel Kadam, i/b. Kadam & Co. for the Petitioners.

Mr.M.P.S.Rao, Senior Advocate with Mr.Ashutosh Kane, Ms.Aditi Kulkarni and Ms.Sakshi Pande, i/b. W.S.Kane & Co. for the Respondents.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 16th APRIL, 2015
PRONOUNCED ON : 8th May, 2015.

JUDGMENT :

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. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short the said "Arbitration Act"), the petitioners have impugned the arbitral award dated 9th September, 2011, ppn 2 arbp-1011.11(j).doc made by the arbitral tribunal, in so far as claims of the petitioners are rejected. Some of the relevant facts for the purpose of deciding this petition are are under :

> 2. The petitioners were originals claimants, whereas the respondents were original respondents in the arbitral proceedings. The respondents had also filed a counter claim against the petitioners in the arbitral proceedings. The respondents have not challenged the impugned award rejecting the counter claims made by the respondents.
>
> 3.

For the sake of convenience, the parties are described in this judgment as claimants and the respondents as were described in the arbitral proceedings.

4. In the month of November 2007, the respondents through its managing director Mr.S.S. Bedi @ Bobby Bedi approached the claimants counterpart in India and group company i.e. STAR India Private Limited with a proposal to produce a television serial based on the epic "Mahabharat".

5. On 7th December 2007 the claimants sent a letter of intent in favour of the respondents regarding the terms and conditions agreed upon by and between the parties for commissioning the television programme "Mahabharat". Expected launched date mentioned in the said letter of intent was May 2008.

6. On 12th February 2008 the parties signed a commissioning letter for the said programme. According to the said letter, the first episode was to ppn 3 arbp-1011.11(j).doc be delivered by 7th May 2008. The respondents were responsible for all cost and element pertaining to the production of the show. It was provided that the parties shall make an endeavor to sign a full formed agreement within 45 days of signing of the commissioning letter.

7. During the period between 22nd February 2008 and 10th May 2008 the claimants made advance payment of Rs. 6.00 crores to the respondents.

8. It was the case of the claimants that though by 7th May 2008 which was the date of delivering first episode to the claimants, no script or dialogues were submitted for approval by the respondents to the claimants prior to that date. On 11th May 2008 and 15th May 2008 the respondents submitted one liners i.e. short summary of episodic story to the claimants. On 14th May 2008 the respondents submitted screenplays for five episodes written by script writers Raman Kumar and Brij Mohan to the claimants. It was the case of the claimants that the said screenplays were not up to the satisfaction of the claimants and were thus disapproved and returned for reworking/verification to the respondents. After series of script meetings, amended screenplays of episodes 1 to 5 were submitted by the respondents to the claimants during the period between 18th September 2008 to 22nd September 2008.

9. It is the case of the claimants that the same were approved on the same day by the claimants. The respondents on their own decided to get screenplays re-written by Kamlesh Pande. The respondents numbered the first two episodes as episode No. A and B and submitted re-written ppn 4 arbp-1011.11(j).doc screenplays for these two episode some time in the first week of October 2008. The claimants, however, disapproved the said two re-written screenplays and thus the screenplays approved by the claimants in the month of September 2008 attained finality.

10. It was the case of the claimants that as per the said commissioning letter dated 12th February 2008 the respondent had agreed and was bound to deliver the first episode of programme latest on 7 th May 2008. The respondents however, had not even commenced the shooting of the programmed by 7th May 2008. The respondent had not made any arrangement for the erection of sets, selection of cast, appointment of crew members, directors, costume designing, finalization of screenplay etc. Until the middle of July 2008, there was no progress at the work.

11. On 18th July 2008 the claimants sent an e-mail to the respondents' managing director expressing its concern about the progress by the respondents. The respondents however, give very vague and evasive reply to the said e-mail by their e-mail 18th July 2008.

12. On 19th July 2008 the parties met and agreed on a revised schedule for delivery of episodes from middle of September 2008 so that the claimants could exploit the high viewership of the programme on account of Navratri. The parties accordingly fixed revised delivery schedule. The date of delivery agreed for episode numbers 1 to 8 was 20 th September 2008. Similarly the schedule was fixed also in respect of the other episodes. The respondents had agreed to deliver the episodes 27 onwards, 8 episodes every months to the claimants. The said revise delivery ppn 5 arbp-1011.11(j).doc schedule was thereafter incorporated in the production agreement entered into between the parties on 1st October 2008 to be effective from 12th February 2008.

13. It was the case of the claimants that until middle of September 2008, there was no progress on the part of the respondents of production of the said programme. The claimant vide their e-mail 12th September 2008 expressed their concern about the innumerable delays on the part of the respondent and informed that the claimants had in their minds the October 26 for the launch of their show which had been delayed indefinitely once again. The claimants called upon the respondents to give a date schedule for delivery of episodes so that the claimant could plan on air launch of the said show. There was no response of the respondents to the said e-mail of the claimants dated 12 th September 2008.

14. At the time of entering into the agreement with the claimants the respondent had informed the claimants that it had availed of certain financial facilities from Kotak Mahindra Bank Ltd. The respondent had undertaken that the amounts payable by the claimants towards the costs of the said programme would be paid to the said Bank. The claimants accordingly signed an escrow letter on 7th October 2008 jointly in favour of the bank and the respondents.

15. Since there was no progress on the project by the respondents till the end of October 2008 the claimants by their e-mail dated 30th October 2008 placed on record that no location to shoot other than arena 16, ppn 6 arbp-1011.11(j).doc important characters were not approved and finalized, 12 more days time was required for sets to be ready, costumes and jewelry were not purchased.

16. It is the case of the claimants that the respondents did not shoot of the programme between 3rd and 6th November 2008 and even until 14th November 2008. On 14th November 2008 at about 1.00 p.m. the respondents informed the claimants that the respondent had not stalled the shoot, but pushed it by few days by 19th November 2008 that the respondent was planning it for. It is the case of the claimants that the respondent had deferred the shoot from Ist week of November to 19th November 2008 and from 19th November 2008 to indefinitely, date of which was not disclosed by the respondents to the claimants. Till 14th November 2008 the respondents did not deliver any episode of the said programme to the claimants.

17. The claimants accordingly by their advocate's letter dated 14th November 2008 exercised their rights under clause 11.1 of the said agreement and terminated the said agreement making it effective from 28th November 2008 i.e. after giving two weeks notice to the respondents in accordance with the said clause. The claimants called upon the respondents to forthwith refund the said advance payment of Rs.6.00 crores and a further sum of Rs.87 Lakhs being interest accrued thereon at the rate of 24% per annum.

18. The respondents addressed a letter through their advocates on 2nd December 2008 in response to the said notice dated 14 th November 2008 and denied the said claim.

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19. The dispute arose between the parties which was referred to arbitral tribunal. Pursuant to the liberty granted by the arbitral tribunal, in the month of April 2009, the claimant filed statement of claim inter-alia praying for a declaration that the termination and cancellation of the agreement dated 1st October 2008 between the parties was lawful and valid and prayed for an order against the respondents to pay to the claimants a sum of Rs. 7,43,21,095/- comprising of principal amount of Rs.6.00 crores and interest thereon. The claimants also prayed for an order against the respondents to pay a sum of Rs.4,87,50,000/- as and by way of damages along with interest thereon. The said statement of claim was resisted by the respondents by filing the written statement - cum-counterclaim on 1st July 2009. The respondents made counterclaims against the claimants for the sum of Rs.6814.22 lakhs under various heads.

20. The arbitral tribunal framed seven points for consideration. Both the parties led all oral as well as documentary evidence before the arbitral tribunal. On 9th September, 2011, the arbitral tribunal passed an award thereby rejecting the claims as well as counter claims and directed that there shall be no order as to costs. The claimants have impugned part of the award rejecting the claims made by the claimants. The respondents have not impugned any part of the award rejecting the counter claims made by the respondents.

21. Dr.Saraf, learned counsel for the claimants invited my attention to various clauses of the letter of intent and also production agreement. In the said letter of intent dated 7th December, 2007 expected launch date ppn 8 arbp-1011.11(j).doc was provided as May 2008. Number of episodes provided was 150. It was provided that the content duration of each episode shall be of 45 minutes and a slot duration of 60 minutes. The said letter of intent was signed by the authorised representative of both the parties.

22. In the commissioning letter issued by the claimants, the consideration amount per episode mentioned was at Rs.24.00 lakhs. The claimants agreed to pay Rs.6.00 crores as and by way of advance payment which was to be deducted at the rate of Rs.4.00 lakhs per episode for all 150 episodes. The delivery of first episode was to commence not later than 7th May 2008. The claimants had right to terminate with a notice period of four weeks from the date of intimation by the claimants to the respondents. It was provided that in case of earlier termination, the claimants shall forgo un-amortized advance. The parties had to make an endeavor to sign full form agreement within 45 days of signing that letter. Learned counsel for the claimants invited my attention to the definition of 'agreement' in clause 1.1 of the production agreement which included any extensions/addendum(s)/amendments, to, if any, to the said production agreement. Learned counsel for the claimants also invited my attention to clause 1.14 of the said agreement which provided that 'unless, otherwise stated, time shall be of the essence for the purpose of performance of the KEPL's obligation under the said agreement.'

23. Under clause 4.1 of the said agreement it was provided that subject to and in consideration of the full and timely performance and observance by the respondents of all its warranties and on the delivery of satisfactory program under the said agreement without any material breach of its ppn 9 arbp-1011.11(j).doc obligations, the claimants had agreed to pay the sum specified in Schedule D to the said agreement. Schedule D provided for advance of Rs.6 crores payable by the claimants to the respondents during the period between 22nd February, 2008 and 10th May, 2008. Under Clause D of Schedule D it was provided that "in case agreement is terminated under clauses 11.1, 11.2 or 11.3, KEPL shall be liable for refund to STEL any unadjusted monies as aforesaid together with 24% interest per annum. Clauses 11.1 to 11.5 of the said production agreement which are relevant are extracted as under :-

> "11.1 for breach of any of the terms of this Agreement (express or implied). A notice period of a minimum of two (2) weeks would be given by STEL prior to such termination.
>
> 11.2 in cases where any act done by KEPL is prejudicial to the interest of STEL and/or its associates/ affiliates and/or the program, STEL has the right to terminate this agreement without notice.
>
> 11.3 in cases the quality of the Episode(s) of the Program produced by KEPL is not to the satisfaction of STEL.
>
> 11.4 STEL shall be at liberty to rescind/cancel this agreement without assigning any reasons thereof by giving KEPL four (4) weeks notice in advance irrespective of number of program contracted and/or produced or for which work is in progress. The advances already paid to DEPL will not be refunded to STEL.
>
> 11.5 Save and except for termination under clause 11.4, in the event of this Agreement being terminated before its stipulated time period KEPL will be liable to refund any advances made by STEL at any time given point of time during the subsistence of the Agreement."

24. Clause 17.3 of the said production agreement provided for waiver which is extracted as under :-

> "17.3 No failure or delay on the part of any of the Parties to this Agreement relating to exercise of any right, privilege or remedy provided under this Agreement shall operate as a waiver of such right, power, privilege or remedy or as a waiver of any preceding or succeeding breach ppn 10 arbp-1011.11(j).doc by the other party to this Agreement, nor shall any single or partial exercise of any right, power, privilege or remedy preclude any other or further exercise of any right, power, privilege or remedy provided in this Agreement, all of which are several and cumulative, and are not exclusive of each other, or of any other rights or remedies otherwise available to a party at law or in equity."

25. Learned counsel for the claimants submits that under the provisions of the said production agreement, time was an essence of the contract. The claimants did not waive their right of time being essence of contract. Mere forbearance to sue would not amount to waiver in view of clause 17.3. It is submitted that in any event the claimants had given two weeks time under the said notice dated 14th November, 2008 to make termination effective only after expiry of the said notice period. He submits that the such time of two weeks given in the said notice was making time as an essence of contract and was a reasonable period. The respondents did not come forward even during the period of two weeks for rectifying the breaches committed by the respondents and did not agree to show any further progress. In support of the aforesaid submission, the learned counsel for the claimants placed reliance on the judgment of this court in case of Anandram Mangturam and others vs. Bholaram Tanumal reported in AIR (33) 1946 Bombay 1.

26. The claimants placed reliance on the judgment of Webb vs.Hughes reported in Equity Cases 281 Volume X at page 286.

27. Learned counsel for the claimants invited my attention to the various findings of fact rendered by the arbitral tribunal in favour of the claimants and against the respondents regarding gross delay on the part of the respondents in producing any episode. He submits that though ppn 11 arbp-1011.11(j).doc various finding of breaches are rendered by the arbitral tribunal against the respondents in the impugned award, which findings are not challenged by the respondents, the arbitral tribunal has rejected the claims made by the claimants for refund of the advance with interest and claim for damages merely on the ground that till 14th November, 2008 time had not been made on the essence. The arbitral tribunal held that it was difficult to accept the contentions of the claimants that because there was delay in submitting episodes on scheduled date, it resulted in breach of contract, which entitled termination.

28. Learned counsel for the claimants submits that this finding of the arbitral tribunal is totally perverse. The agreement entered into between the parties had provided that time was an essence of agreement. The respondents themselves by their letter, which is on record i.e. 14th November, 2008 had unilaterally shifted the date of commencement of shoot. The claimants had repeatedly expressed their concern by sending various e-mails to the respondents for commencement of the shoots. The respondents, however, did not take any steps under the said agreement.

He submits that the claimants could not have waited indefinitely for the respondents to perform their agreement.

29. Learned counsel strongly placed reliance on clause 17.3 of the agreement and would submit that even if the claimants have not exercised their rights immediately under the said agreement, it would not amount to waiver of their rights under such clause. The finding rendered by the arbitral tribunal is thus perverse and contrary to the terms of the agreement. The conclusion drawn by the arbitral tribunal is contrary to ppn 12 arbp-1011.11(j).doc law laid down by the Supreme Court and this court. He submits that the conclusions drawn by the arbitral tribunal is contrary to the finding rendered by the arbitral tribunal and the award shows patent illegality on the face of award.

30. Learned counsel for the claimants then submits that even if the finding of the arbitral tribunal that the termination of the agreement was unlawful, the arbitral tribunal could not have rejected the claim for refund of advance paid by the claimants to the respondents. He submits that the counter claims made by the respondents for compensation against the claimants and more particularly claim no.1, which was for a sum of Rs.5.94 crores alleged to have been over spent by the respondents came to rejected. He submits that once the respondents having failed to prove that the respondents had spent any amount on the said project and/or suffered any loss due to termination of the agreement by the claimants, the arbitral tribunal as a result of such finding and rejecting the claim made by the respondents thus ought to have allowed the claim made by the claimants for refund of the said advance amount with interest. He submits that the impugned award shows patent illegality on the face of award and shows contradiction and inconsistency with the findings rendered. In support of this submission, learned counsel invited my attention to the findings rendered by the arbitral tribunal while rejecting the counter claims rejected by the respondents.

31. The learned counsel for the claimants submits that even if the claimants have wrongly terminated the agreement, the respondents could not have appropriated the said advance amount unless the respondents ppn 13 arbp-1011.11(j).doc would have suffered any loss or damages. There would not be any windfall in favour of the respondents merely because the claimants have terminated the said agreement. The said advance amount was thus liable to be refunded to the claimants. He submits that though the claimants had exercised such rights under clause 11.1 and 11.5 of the production agreement and in compliance thereof had issued two weeks notice and in view of clause 11.5 read with 11.1 the respondents were liable to refund the advance paid by the claimants, the arbitral tribunal has overlooked those provisions of the agreement and have illegally construed the said termination under clause 11.4 while holding that the respondents would not be liable to refund any amount to the claimants. He submit that the award is thus contrary to the terms of the agreement and is in conflict with the public policy.

32. Dr.Saraf, learned counsel for the claimants placed reliance on the judgment of the Supreme Court in case of M/s.Kailash Nath Associates vs. Delhi Development Authority and another delivered on 9th January, 2015 in Civil Appeal No.193 of 2015 and in particular paragraphs 43 and 44 which read thus :-

> "43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:- Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

Reasonable compensation will be fixed on well known principles that are ppn 14 arbp-1011.11(j).doc applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

The Section applies whether a person is a plaintiff or a defendant in a suit. The sum spoken of may already be paid or be payable in future. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that the DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages - namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall."

33. Mr.Rao, learned senior counsel for the respondents on the other hand submits that the arbitral tribunal has rendered unanimous award and has rendered various findings of fact while rejecting the claims made by the claimants and more particularly that time was not made an essence of an agreement and thus the respondents were not liable to refund the amount advanced by the claimants, which findings are not perverse and thus cannot be interfered with under section 34 of the Arbitration Act. Learned senior counsel invited my attention to various clauses of the production agreement and also to commissioning letter. He submits that though the agreement was executed on 1st October, 2008, under the said ppn 15 arbp-1011.11(j).doc agreement it was provided that the date of delivery of first eight episodes would be on or before 20th September, 2008.

34. Learned senior counsel submits that on conjoint reading of clauses 11.1, 11.4 and 11.5 of the production agreement, it was clear that the arbitral tribunal had exclusive jurisdiction to decide whether to grant refund to the claimants of the advance paid or not. He submits that the arbitral tribunal has rightly construed the said termination of the agreement under clause 11.4 and has rightly refused to allow the claim for refund of the advance. He submits that the said interpretation of the arbitral tribunal of the terms of the agreement is a plausible interpretation and thus cannot be substituted by another interpretation by this court under section 34 of the Arbitration Act.

35. Learned senior counsel submits that under clause (D) of Schedule 'D' of production agreement, even if the respondents were liable to refund any amount of advance paid by the claimants, the respondents were liable to pay only the amount then remained unadjusted. The respondents had spent more than Rs.6 crores on taking various steps to produce the episodes under the said agreement. The respondents had produced proof before the arbitral tribunal of the amount spent on the said project. He submits that the respondents had not made counter claim for appropriation of Rs.6 crores which was paid as and by way of advance by the claimants to the respondents.

36. Learned senior counsel submits that the respondents had already spent the said amount on the production and therefore the respondents ppn 16 arbp-1011.11(j).doc had only claimed the amount over spent by the respondents, over and above the said amount of Rs.6 crores in their counter claim. He submits that the arbitral tribunal has thus not rendered any finding that the respondents had not even spent the said amount of Rs.6 crores which was paid by the claimants by way of advance to the respondents. He submits that this court cannot come to a conclusion that the respondents had not even spent the said sum of Rs.6 crores given by the claimants as advance to the respondents.

37. Learned senior counsel invited my attention to various averments made in the statement of claim filed by the claimants and more particularly in paragraphs 4.14, 4.15, 4.19 and paragraph (6) and would submit that it was not the case of the claimants that the respondents have not spent any amount on production of episodes.

38. Learned senior counsel submits that the claimants had not still approved the scripts. The first nine episodes had not even approved till 11th November,2008. He submits that since the respondents had not committed any breach of the terms of the agreement, the respondents were absolved from refunding any amount to the claimants. The claimants had never made time as an essence of agreement before terminating the same. He submits that since the arbitral tribunal has declared the termination as illegal, the arbitral tribunal could not have granted the claim for refund of the advance paid by the claimants. He submits that the claimants had already given up the case of the claimants based on clause 11.5 in the arbitral proceedings. In support of this submission, learned senior counsel invited my attention to paragraph (6) of the statement of claim.

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39. It is submitted by learned senior counsel that since the claimants had not pleaded that the respondents could not have appropriated the said sum of Rs.6 crores and had not prayed for refund of the said amount on that basis, the arbitral tribunal did not frame any point for determination in respect thereof. If the claimants would have raised such plea which is now sought to be canvassed across the bar, the respondents would have dealt with such plea and would have led specific oral evidence to the effect that the respondents had spent the said amount of Rs.6 crores in production of episodes. He submits that there was also no specific pleading about the alleged unjust enrichment of the respondents.

ig In support of this submission, learned senior counsel placed reliance on sections 65 to 72 of Indian Contract Act and placed reliance on the judgment of the Gujarat High Court in case of

Gujarat Steel Tubes Ltd. vs. Board of Trustees of Port of Kandla and another reported in AIR 2002 Gujarat 173 and in paragraph (4).

40. Learned senior counsel also placed reliance on the judgment of the Supreme Court in the case of State of Gujarat and others vs. Essar Oil Limited and another reported in (2012) 3 SCC 522 and in particular paragraphs 57 to 66 and would submit that the principles of unjust enrichment would not apply to the contracts.

41. Learned senior counsel placed reliance upon the judgment of the Supreme Court in case of Mahabir Kishore and others vs. State of Madhya Pradesh reported in (1989) 4 SCC page 1 and more particularly paragraph (11).

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42. Learned senior counsel for the respondents also placed reliance on the judgment of Supreme Court in case of Bachhaj Nahar vs. Nilima Mandal & Ors. reported in AIR 2009 SC 1103 and in particular paragraphs 9 and 10 and would submit that since there was no specific pleading by the claimants to the effect that the respondents had not suffered any loss or had not spent any amount, the arbitral tribunal rightly did not consider any such case and in absence of such specific pleading in the statement of claim, the claimants cannot be allowed to raise this issue at this stage under section 34 of the Arbitration Act.

43. Learned senior counsel for the respondents placed reliance on an e- mail dated 14th November, 2008 sent by the claimants to the respondents alleging that the shoot was stalled because the respondents were waiting for a telecast date from the channel. The claimants were moving ahead with A and B episode and were waiting for shoot schedule and details to be shared with the claimants along with the final scripts. He also placed reliance on an e-mail from the respondents to the claimants of 14th November, 2008 informing the claimants that the final episodes with all changes were discussed and the respondents were going ahead with shoot as discussed.

44. Learned senior counsel invited my attention to an e-mail dated 3 rd May, 2008, from the claimants to the respondents informing that it would be good for the project overall, if both parties would begin shoot post discussing script. The claimants informed the respondents that once all seven episodes were with them, the claimants would go through them at the earliest and it would help the claimants to have chat on the script.

ppn 19 arbp-1011.11(j).doc Learned senior counsel also placed reliance on an e-mail dated 2 nd June, 2008 from the claimants to the respondents informing that the claimants wanted to reconfirm that the shoot had been suspended till the scripts were finalized. The claimants informed that till such time the claimants had cracked the tone and pitch of the scenes it would not make much sense to shoot the earlier dialogue sequences. The claimants enquired as to when it was possible to meet up for some script discussions with writers.

45. Learned senior counsel invited my attention to an e-mail dated 2 nd June, 2008 from the respondents to the claimants informing that the respondents could not suspend shoot till 7 th June, 2008 as studios were booked, sets in place and teams contracted. The claimants were informed that after 7th June, 2008, the respondents would be moving so they could do patchwork for changed dialogues. The claimants were informed that the respondents would like to be in the script discussions and enquired as to when the respondents could meet the claimants. He submits that the arbitral tribunal has rendered a finding of fact on the issue as to whether the time was an essence of agreement and such finding of fact cannot be interfered with by this court.

46. Dr.Saraf, learned counsel for the claimants in rejoinder submits that the finding of the arbitral tribunal that the agreement was illegally terminated by the claimants on the ground that the time was not an essence of agreement, is totally perverse and is contrary to the provisions of the agreement. The claimants had shown anxiety in each of their e- mails and were repeatedly calling upon the respondents to do progress in proceeding with shoots and to produce the episodes but the respondents ppn 20 arbp-1011.11(j).doc failed and neglected to complete the shoot and produce any episodes. He submits that the though the arbitral tribunal has rendered a finding that the respondents could not give any episodes and that they were not ready to shoot, the arbitral tribunal rendered a perverse finding that the termination of the contract was unlawful. Dr.Saraf heavily placed reliance on the judgment in the case of Webb vs.Hughes (supra) and submits that the claimants had issued a notice making time an essence of the contract by giving two weeks notice making it clear that the agreement would be terminated within two weeks. The arbitral tribunal overlooked the material and crucial piece of evidence in the impugned award and rendered a patently illegal finding.

47. Learned counsel for the claimants invited my attention to the written statement filed by the respondents, in which the respondents themselves had objected to refund of Rs.6 crores claimed by the claimants on the ground that the respondents had over spent. He submits that thus both the parties had made respective allegations as to whether the said amount of Rs.6 crores was spent or not in their respective pleadings and thus there is no substance in the submission of the respondents that the same was not pleaded by the claimants. The respondents had led evidence before the arbitral tribunal, alleging that the respondents had spent more than Rs.6 crores and failed to prove the expenditure of any amount and thus the arbitral tribunal has rejected the counter claims made by the respondents. He submits that if the claimants would have accepted that the respondents had spent Rs.6 crores, which was paid by the claimants by way of advance to the respondents, the claimants would not have made any claims against the respondents. He ppn 21 arbp-1011.11(j).doc submits that the arbitral tribunal has made serious observations about the nature of the counter claim made by the respondents and more particularly for compensation against the claimants based on the alleged over spending.

48. Learned counsel invited my attention to an e-mail dated 7 th November, 2008, which was considered by the arbitral tribunal in the impugned award from the respondents to the claimants, informing that the respondents were away for 8 days more shoot. He submits that the arbitral tribunal did not consider an e-mail dated 14 th November, 2008 sent by the claimants to the respondents at 14.43 p.m.

49. Learned counsel for the claimants invited my attention to the findings rendered by the arbitral tribunal in paragraph 25 of the impugned award and would submit that though the arbitral tribunal has considered an e-mail dated 14th November 2008 sent by the Respondent to the claimants that shooting was pushed back by a few days from 19 th November 2008 and considered the said e-mail while holding that the Respondents were in breach but did not consider the said e-mail while holding that the time was an essence of contract. The award shows in consistency and patent illegality. The findings rendered by the arbitral tribunal is perverse and thus can be interfered with by this Court under section 34 of the Arbitration Act.

REASONS AND CONCLUSIONS :-

50. In the impugned award, the arbitral tribunal has rejected the claims as well as the counter claims. The claimants had claimed refund ppn 22 arbp-1011.11(j).doc of the amount of Rs.6 crores with interest and also had claimed damages. The respondents had claimed various damages. It is not in dispute that the respondents have not challenged any part of the award by filing a separate arbitration petition.

51. A perusal of the record indicates that the arbitral tribunal has rendered the following findings of facts :-

a) The correspondence indicated that inspite of assurances, the respondents had not started shooting;

b) The respondents are responsible for delay in production and not a single episode had been produced till 14th November 2008;

c) The replies sent by the respondents belies the case of the respondents that the shooting could not be commenced without written approval by the claimants;

d) The respondents never considered a written approval to be necessary to enable it to shoot. The production was not taking place because the respondents were not ready/prepared.

e) One does not know what the real reason for non-production was.

But it appears that that being a creative venture, the respondents probably wanted a prefect creation and thus kept altering the scripts and was thus not ready to shoot;

f) On 11th November 2008, the claimants had approved the episodes A & B. Shooting did not start as promised within 8 days from the approval of episodes;

g) On 14th November 2008, the respondents sent a mail without giving any reasons that the shooting was pushed back by a few days from 19th November 2008. No new date or schedule was given.

h) When the claimants' representative had visited the site where the

shooting was to take place, only 5% of the sets were ready. This was acknowledged by the respondents.

i) The respondents by their mail dated 18th July 2008 made an excuse of bad weather and claimed that things were lying at different stores in a dismantled stage. Thus there was no denial that at the site, there was no preparation.

j) The respondents were not in hurry, as from 9 th August 2008 to 15th September 2008, the respondents held on to the Long Form Agreement and did not even respond to the claimants. The respondents themselves were responsible for the delay of 37 days.

k) From perusal of the mails by the respondents, one does presume that by those emails only false promises were being made and there was no mention of the strike. This, therefore, was only an excuse.

52. The arbitral tribunal, however, also rendered the following findings while rejecting the claim made by the claimants.

i) Even though the claimants expressed anxiety about delay in production, they did not make the time as an essence of agreement nor it was made a ground for termination of the agreement. Till 14 th November 2008, time has not been made of essence.

ii) It was difficult to accept the contention of the claimants that because there was a delay in submitting the episodes on scheduled dates, it resulted in breach of agreement which entitled it to termination.

ppn 24 arbp-1011.11(j).doc The position which emerges is that till 11 th November 2008, time for production was kept getting extended by the respondents and the claimants agreed to it.

iii) Even though admittedly no episodes were produced, it will have to be held that the claimants were not entitled to terminate the agreement in the manner they did.

iv) Clause 11.4 of the agreement permits the claimants to terminate the agreement without assigning any reasons but the claimants are then not entitled to ask for refund of Rs.6 crores and damages.

v) The respondents were responsible for delay in production but as the time was not an essence of agreement, the respondents could not be said to be in breach of the production agreement dated 1 st October 2008 and had not committed other breaches as alleged.

vi) The respondents were not bound to produce as per the time schedule attached to production agreement or to the revised schedules.

Termination is not valid under clause 11.1 of the production agreement but could be sustained under clause 11.4 of the agreement.

53. The question that arises for consideration of this Court is whether the time was an essence of the agreement and if so, whether the claimants had made the time as an essence of the agreement before termination of the agreement. Findings rendered by the arbitral tribunal which are demonstrated aforesaid clearly indicate that the respondents had not delivered any episode to the claimants and were not even ready ppn 25 arbp-1011.11(j).doc in any respect. Various false excuses were given by the respondents while seeking extension of time.

54. A perusal of clause 1.1.4 of the agreement clearly indicates that unless otherwise it was stated, the time shall be of the essence for the purpose of performance of the obligations of the respondents under the said agreement. The definition of the agreement under clause 1.1 of the production agreement clearly indicates that it includes extensions/ addendums, amendments, if any, to the said production agreement. A perusal of the award clearly indicates that the arbitral tribunal has rendered finding that the respondents kept on asking for extension from time to time for one or the other reasons. The respondents were not ready at all to commence shooting and/or to deliver the episode to the claimants. The arbitral tribunal also noticed that it was always an anxiety of the claimants to see that shooting should have commenced and episodes should have been delivered to the claimants so that during the Navratri festival, the claimants could have exploited those episodes for viewership at public at large.

55. The claimants were repeatedly calling upon the respondents to comply with their part of the obligation. A perusal of the termination letter dated 14th November 2008 clearly indicates that the claimants had given detailed reasons and had given two weeks' time to make the said termination letter effective. It is not in dispute that even during the period of two weeks, the respondents did not apply for any further extension or showed any progress of the project. In my view, a party to the agreement can not wait indefinitely for the other party to perform his part of the obligation. The claimants had already given advances of ppn 26 arbp-1011.11(j).doc Rs.6 crores for production of various episodes. The respondents had shown no progress in performing their part of the obligation. Be that as it may, in my view, the claimants by notice dated 14 th November 2008 had made the time as an essence of the agreement by giving 15 days which was a reasonable period mentioned in the said notice during which, the respondents did not show any progress. The claimants had made the said notice effective after expiry of two weeks.

56. In my view, though the time was an essence of the agreement, the claimants could not have waited indefinitely for the respondents to perform their agreement. The respondents had not

performed any part of the obligation inspite of repeated reminders by the claimants. Be that as it may, the claimants had made the time as an essence of the agreement before making termination of the agreement effective. In my view, finding of the arbitral tribunal that though the respondents were solely responsible for delay in performing their part of the obligation and were not ready in any respect, termination of the agreement by the claimants was illegal in view of the claimants not having made the time as an essence of the agreement is totally perverse and shows patent illegality and contradictions in the conclusions and findings rendered by the arbitral tribunal. In this respect, the judgment in the case of Webb Vs. Huges (supra) would be relevant. The relevant portion of the said judgment is extracted as under :-

> "It was, therefore, evidently contemplated that the time might extend beyond the day fixed for completion. But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the ppn 27 arbp-1011.11(j).doc contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated."

I am in agreement with the views expressed by the Court in the aforesaid judgment. The claimants, in this case also, had made a fixed period in the said notice in which, the termination of the agreement was to be made effective.

57. In my view, clause 1.14 of the said agreement has to be read with clause 1.1 of the production agreement which included any extensions / addendums /amendments to any of the clauses of the agreement. The arbitral tribunal, however, overlooked the effect of clause 1.1 of the production agreement in the impugned award.

58. Under clause 17.3 of the agreement, it is provided that no failure or delay on the part of any of the parties to the said agreement relating to the exercise of any right, privilege or remedy under the said agreement shall operate as a waiver of such right, power, privilege or remedy or as a waiver of any preceding or succeeding breach by the other party to the said agreement. In my view even if the claimants had granted extension of time for some time at the request of the respondents and thereafter, made the time as an essence of the agreement, it would not amount to a waiver of the rights to terminate the said agreement. The arbitral tribunal, however, completely overlooked the said clause 17.3 of the agreement and decided contrary thereto.

59. A perusal of the record indicates that it was also an admitted position that the claimants had invoked clause 11.1 read with clause ppn 28 arbp-1011.11(j).doc 11.4 of the agreement while issuing notice of termination by providing two weeks' time as contemplated under clause 11.1 of the agreement. The claimants having exercised their right under clause 11.1 of the agreement, the advances already paid to the respondents were liable to be refunded under clause 11.4. A perusal of the award, however, indicates that though the claimants had exercised their right under clause 11.1

read with clause 11.4, the arbitral tribunal has considered the said notice of termination under clause 11.5 and refused to grant prayer for refund of advances made by the claimants. There was neither any such plea raised by the respondents nor the arbitral tribunal could have construed the said notice for termination under clause 11.5. A perusal of the record indicates that the claimants had not given up their rights of termination under clause 11.1 read with clause 11.4. The impugned award is contrary to the terms of the agreement and more particularly clause 11.1 read with 11.4. The award shows perversity on the face of the award.

60. This Court in the case of Anandram Mangturam and Ors. Vs. Bholaram Tanumal (supra) has held that promisee cannot by mere fact of not exercising the option to avoid the contract change or alter the date of performance fixed under the contract itself. Relevant portion of the said judgment reads thus :-

> "I agree. Under the contract between the parties the defendants had to deliver to the plaintiff forty-one bales of Edsu Cloth No. 4488 by the end of February, 1943. The defendants did deliver to the plaintiff five bales of the contract goods on February 27, 1943, but failed to deliver the balance of thirty-six bales and thereby committed a breach of the contract. Now unless the plaintiff can show that something transpired after February 28, 1943, it is clear that the date of breach would be February 28, 1943, and damages must be assessed as of that date. Under Section 55 of the Indian Contract Act, the promisee is given the option to avoid the contract where the promisor fails to perform the contract at the time fixed in the contract. It is ppn 29 arbp-1011.11(j).doc open to the promisee not to exercise the option or to exercise the option at any time, but it is clear to my mind that the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. Under Section 63 of the Indian Contract Act, the promisee may make certain concessions to the promisor which are advantageous to the promisor, and one of them is that he may extend the time for such performance. But it is clear again that such an extension of time cannot be a unilateral extension on the part of the promisee. It is only at the request of the promisor that the promisee may agree to extend the time of performance and thereby bring about an agreement for extension of time.
>
> Therefore it is only as a result of the operation of Section 63 of the Indian Contract Act that the time for the performance of the contract can be extended and that time can only be extended by an agreement arrived at between the promisor and the promisee."

61. A perusal of clause 4.1 of the agreement clearly indicates that the claimants had agreed to pay consideration specified in Schedule D to the said agreement subject to and in consideration of the full and timely performance and observance by the respondents of all its warranties and on the delivery of satisfactory program under the said agreement without any material breach of their obligations. Since the respondents failed to perform their part of the obligation and had not observed timely performance, the claimants were not liable to pay any amount to the respondents.

The respondents were liable to return the amount received from the claimants.

62. A perusal of the counter claims made by the respondents indicates that the respondents had made such counter claims under various heads.

One of such claim was for recovery of Rs.594.22 lacs alleged to have been overspent by the respondents over and above the amount of Rs.6 crores. The respondents had examined the witness Mr.Bedi, who was extensively cross-examined by the claimants' counsel. The arbitral tribunal has rejected all the counter claims including the said claim by rendering finding of fact that the respondents had no explanation for ppn 30 arbp-1011.11(j).doc numerous discrepancies pointed out by the claimants during the course of the arguments and in the cross-examination of the witness examined by the respondents. It is not in dispute that the respondents have not challenged the rejection of the said counter claims and also the findings rendered by the arbitral tribunal against the respondents. All such findings rendered against the respondents by the arbitral tribunal and rejection of the counter claims have attained finality.

63. In so far as the submission of Mr. Rao, learned senior counsel for the respondents that when the respondents had not made any counter claims for appropriation of Rs.6 crores paid as and by way of advances and thus there was no dispute about the said payment is concerned, it is not in dispute that the claim was made by the claimants for Rs.6 crores paid to the respondents in addition to claim for damages. The respondents have not disputed the receipt of Rs.6 crores from the claimants. In the written statement filed before the arbitral tribunal, the respondents had objected to refund of the amount of Rs.6 crores on the ground that the respondents had overspent. It is thus clear that whether the respondents had overspent or not and had spent any amount out of the said amount of Rs.6 crores paid by the claimants as and by way of advances or not was the matter in dispute before the arbitral tribunal. The respondents had submitted one composite statement of accounts and alleged entries in support of their claim. The respondents had alleged to have spent more than Rs.11 crores.

64. In the cross-examination of the witness examined by the respondents, the respondents could not explain those alleged entries by ppn 31 arbp-1011.11(j).doc any supporting vouchers. The arbitral tribunal has disbelieved the story of the respondents that at the material time, the respondents were having only one project i.e. 'Mahabharat' in hand and all such expenses of the respondents were only related to the said project. In paragraph 37 of the impugned award, the arbitral tribunal has set out the flaws pointed out by the claimants in the accounting entries relied upon by the respondents.

It was pointed out that though the respondents had alleged to have spent Rs.11.59 crores, the vouchers/bills of which inspection was given to the claimants added up to Rs.8,46,37,300/- only and out of that, the vouchers for Rs.5,52,67,369/- did not, on their face, show that they related to Mahabharat. The respondents could not answer the several queries raised by the claimants' counsel during the course of cross-examination.

65. The claimants had also pointed out the large number of other discrepancies in the accounting entries submitted by the respondents.

In the impugned award, the arbitral tribunal clearly rendered a finding that it was unbelievable that the respondents were not aware of the obvious discrepancies and it was for them to explain the same in the evidence on their behalf. The arbitral tribunal held that the claimants were right in their submission that the evidence of Mr. Bedi to the effect that there were no other projects and that most of the expenses were on the account of Mahabharat could not be believed. In my view, there is thus no substance in the submission of the learned senior counsel for the respondents that there was neither any pleading nor any issue before the arbitral tribunal whether the respondents had spent at least Rs.6 crores which was given as advances by the respondents to the claimants. In my view, the respondents have failed to prove that any amount was spent by the respondents for producing any episodes.

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66. Question that arises for consideration of this Court is that since the respondents were not ready to shoot and had failed to prove that any amount was alleged to have been spent on this project, the arbitral tribunal having rejected the counter claims made by the respondents, whether ought to have allowed the claims made by the claimants for refund of the advances paid.

67. A perusal of the record indicates that the arbitral tribunal has rejected the claims made by the claimants only on the ground that the termination of the agreement by the claimants without first making the time as an essence of the agreement was illegal. In my view, the finding rendered by the arbitral tribunal is totally perverse and contrary to the agreement entered into between the parties. The impugned award rejecting the claims made by the claimants for refund of the advances with interest and claim for damages thus deserves to be set aside.

68. In my view, even if the termination of the agreement effected by the claimants is considered as illegal since the respondents had failed to prove any amount spent by the respondents for the purpose for which the same was made, the respondents could not have appropriated the said amount and were liable to refund the same to the claimants. In my view, the impugned award rejecting the claims made by the claimants for refund and damages is patently illegal. The conclusion drawn by the arbitral tribunal, in my view, is totally inconsistent and contradictory with the findings rendered by the arbitral tribunal. Though all the findings on breach and delay are rendered against the respondents by the arbitral tribunal, the arbitral tribunal contrary to such findings has rejected the claims made by the claimants.

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69. In the case of Kailash Nath Associates Vs.Delhi Development Authority and Anr. (supra), the Supreme Court has held that if the damage or loss was not suffered, the law does not provide for a windfall.

In my view, since the respondents had failed to prove any expenditure or any loss out of the amount paid by the claimants to the respondents, the respondents could not have appropriated the said amount. There was no wind fall in favour of the respondents. I am respectfully bound by the said

judgment of the Supreme Court in the case of Kailash Nath Associates (supra).

70. This Court in the case of Ajay Singh (Sunny) Deol Vs. Suneel Darshan delivered on 16th April 2015 in Arbitration Petition Nos.819 of 2011 and 908 of 2011 after adverting to the judgment in the case of Kailash Nath Associates (supra) and the judgment of the Division Bench in the case of Maharashtra State Electricity Board, Bombay Vs. Sterlite Industries (India) Ltd., reported in 2000 (3) Bom.C.R. 347 and the judgment of the Division Bench in the case of Edifice Developers and Project Engineers Ltd. Vs.M/s. Essar Projects (India) Ltd. passed in Appeal No.11 of 2012 in Arbitration Petition No.313 of 2007 has held that if a party who has not suffered any losses even if the other party had committed breaches, such party cannot be awarded any compensation under Section 73 of the Contract Act, 1872. Paragraph 89 of the said judgment in the case of Ajay Singh (Sunny) Deol (supra) reads thus :-

> "89. In my view if a party has not suffered any losses, even if the respondent has committed breaches, such party cannot be awarded any compensation under Section 73. When loss in terms of money is prayed, the party claiming compensation has to prove such loss or damages suffered by ppn 34 arbp-1011.11(j).doc him. The division bench of this court in case of Maharashtra State Electricity Board (supra) has held that section 73 of Contract Act does not give any cause of action unless and until any damages or loss was actually suffered otherwise section 73 would become nugatory and party would be penalised though the other party suffered no loss. In my view, if the party who has not suffered any loss is awarded any compensation under section 73 it would amount to unjust enrichment to such party."

71. This Court in the case of Mithalal B. Gurjar Vs. Union of India & Ors. delivered on 7th April 2015 in Arbitration Petition No.511 of 2014 has held that even if the finding of the learned arbitrator that the contract was rightly terminated by the respondents, the learned arbitrator could not have awarded the claims for compensation unless the respondents would have proved the actual losses suffered by the respondents. Paragraph 19 of the said judgment in the case of Mithalal B. Gurjar (supra) reads thus :-

> "19. Be that as it may, a perusal of the record indicates that the learned arbitrator has allowed such counter claims merely on the basis of the amount mentioned in the tender invited by the respondent no.1. There was no actual payment made by the respondent no.1 to the new contractor under the said contract when the claim was made. The said work was started much later. In my view, even if the finding of the learned arbitrator that the contract was rightly terminated by the respondent no.1, the learned arbitrator could not have awarded the claims for compensation merely on the basis of invitation of the tender. The respondent no.1 was liable to prove the actual loss suffered by the respondent no.1. The respondent no.1 was required to prove that the terms and conditions of both the contracts were identical since the respondent no.1 had claimed compensation for the work awarded to other contractor at the risk and cost of the petitioner. In my view, the learned arbitrator has ignored this crucial issue in the impugned award and has rendered findings without

considering the evidence produced by the petitioner."

I am respectfully bound by the aforesaid two judgments of this Court which are squarely applicable to the facts of this case.

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72. In so far as the judgment of the Supreme Court in the case of Bachhaj Nahaar Vs.Nilima Mandal & Ors. (supra) and the judgment of the Gujarat High Court in the case of Gujarat Steel Tubes Ltd. Vs. Board of Trustees of Port of Kandla & Anr. (supra) are concerned, in my view, both these judgments do not assist the case of the respondents.

73. In so far as the judgment of the Supreme Court in the case of Mahabir Kishor and Ors. Vs. State of Madhya Pradesh, reported in (1989) 4 SCC 1 relied upon by the learned counsel for the respondents is concerned, it is held by the Supreme Court that the principle of unjust enrichment requires that the defendants had been enriched by the receipt of a benefit and that this enrichment shall be at the expense of the plaintiffs and that the retention of the enrichment was unjust which justified restitution. It is held that enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved. Paragraph 11 of the said judgment reads thus :-

> "11. The principle of unjust enrichment requires; first, that the defendant has been 'enriched' by the receipt of a "benefit"; secondly. that this enrichment is "at the expense of the plaintiff" and thirdly, that the retention of the enrichment be unjust. This justified restitution. Enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved."

74. In the case of State of Gujarat & Ors. Vs. Essar Oil Limited and Anr., reported in (2012) 3 SCC 522 and more particularly paragraphs 61 to 66, the Supreme Court has dealt with the common law principle regarding unjust enrichment and restitution. Paragraphs 61 to 66 of the said judgment of the Supreme Court read thus :-

ppn 36 arbp-1011.11(j).doc "61. The concept of restitution is virtually a common law principle and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the Court which prevents a party from retaining money or some benefit derived from another which he has received by way of an erroneous decree of Court. Such remedy in English Law is generally different from a remedy in contract or in tort and falls within a third category of common law remedy which is called quasi contract or restitution.

62. If we analyze the concept of restitution one thing emerges clearly that the obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit (See Halsbury's Laws of England, Fourth Edition, Volume 9, page 434).

63. If we look at Restatement of the Law of Restitution by American Law Institute (1937 American Law Institute Publishers, St. Paul) we get that a person is enriched if he has received a benefit and similarly a person is unjustly enriched if the retention of the benefit would be unjust. Now the question is what constitutes a benefit. A person confers benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other or in a way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another but also where he saves the other from expense or loss. Thus the word "benefit" therefore denotes any form of advantage (page 12 of the Restatement of the Law of Restitution by American Law Institute).

64. Ordinarily in cases of restitution if there is a benefit to one, there is a corresponding loss to other and in such cases; the benefiting party is also under a duty to give to the losing party, the amount by which he has been enriched.

65. We find that a person who has conferred a benefit upon another in compliance with a judgment or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set- aside, unless restitution would be inequitable (page 302 of the Restatement of the Law of Restitution by American Law Institute).

66. Equity demands that if one party has not been unjustly enriched, no order of recovery can be made against that party. Other situation would be when a party acquires benefits lawfully, which are not conferred by the party claiming restitution, Court cannot order restitution."

75. In my view, in both the aforesaid judgments which are relied upon by the learned senior counsel for the respondents, the Supreme Court has quoted with approval " Restatement of the Law of Restitution ppn 37 arbp-1011.11(j).doc by American Law Institute." It is held that a person confers benefit upon another if he gives to the other possession of or some other interest in money, land, chattels or perform services beneficial to or at the request of the other satisfies a debt. He confers a benefit not only where he adds to the property of another but also where he saves the other from expense or loss. It is held that the word "benefit" denotes any form of advantage. The benefiting party is also under a duty to give to the losing party, the amount by which he has been enriched. Both these judgments assist the case of the claimants and not the respondents.

76. In my view, the respondents having committed breaches of their obligation and not having proved any amount alleged to have been spent on the project for which such advance was made by the claimants to the respondents, the respondents were liable to refund the said amount to the claimants and could not have appropriated the same by the respondents. The arbitral tribunal by allowing the respondents to retain such amount appropriated though the finding is rendered that the respondents had failed to prove that any such amount was spent by the respondents, the respondents are made unjustly enriched under the impugned award. The respondents, in my view, were thus liable to restore the said benefit to the claimants by returning the amount of advance paid by the claimants to the respondents with interest.

77. In my view, the award in so far as the rejection of the claims made by the claimants is concerned, is patently illegal and is in conflict with the public policy.

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

a) The Arbitration Petition No.1011 of 2011 is made absolute in terms of prayer clause (a).

b) Paragraphs 10 to 18 of the award and paragraph 41 of the award

(to the extent it dismissed the claim) is set aside. There shall be no order as to costs.

R.D. DHANUKA, J.