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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: April 29, 2022
Pronounced on: October 17, 2022

\+ O.M.P. (COMM) 152/2021

CALCOM CEMENT INDIA LTD. ..... Petitioner
Through Mr.Mahesh Agarwal, Mr. Saurabh Seth and Ms.Niyati Kohli, Advs.

versus

BINOD KUMAR BAWRI & ORS. ..... Respondents
Through Mr. Aman Sinha, Sr. Advocate with Mr. Pravesh Thakur, Ms. Shivangi Pareek, Ms. Nupoor Sinha, Ms. Ishita Sinha, Mr. Rahul Narayanan and Dr. V. Chandra Maurya, Advs.

\+ O.M.P. (COMM) 153/2021 and IA 5524/2021

DALMIA CEMENT (BHARAT) LIMITED ..... Petitioner
Through Mr. Sandeep Sethi, Sr. Advocate with Mr. Mahesh Agarwal, Mr. Rishi Agrawala, Ms. Niyati Kohli, Mr. Rishabh Parikh, Ms. Manavi Agarwal and Mr. Shravan Niranjan, Advs.

versus

BINOD KUMAR BAWRI & ORS. ..... Respondents
Through Mr. Aman Sinha, Sr. Advocate with Mr. Harish Nadda, Mr. Pravesh Thakur, Ms. Shivangi Pareek, Ms. Nupoor Sinha, Ms. Ishita Sinha, Mr. Rahul Narayanan and Dr. V. Chandra Maurya, Advs.

\+ O.M.P. (COMM) 279/2021, I.A. 12113/2021, I.A. 12114/2021 and I.A. 12115/2021

BINOD KUMAR BAWRI AND ORS ..... Petitioners

Through Mr. Aman Sinha, Sr. Advocate with Mr. Pravesh Thakur, Ms. Shivangi Pareek, Ms. Nupoor Sinha, Ms. Ishita Sinha, Mr. Rahul Narayanan and Dr. V. Chandra Maurya, Advs.

versus

CALCOM CEMENT INDIA LTD AND ANR ... Respondents

Through Mr. Mahesh Agarwal, Mr. Saurabh Seth and Ms. Niyati Kohli, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T**
17.10.2022

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1. The dispute in the present case pertains essentially to three entities/group of entities. They are Dalmia Cement (Bharat) Ltd (Dalmia), Calcom Cement India Ltd (Calcom), a group of companies/individuals comprising "the Bawri Group" ("the Bawris")

and Saroj Sunrise Pvt Ltd (SSPL), which is a company of the Bawris.

2. The issue in conspectus

2.1 Various agreements were executed among Calcom, Dalmia, the Bawris and SSPL. Once the cobwebs are brushed away and the air is cleared, the controversy is essentially found to relate to Clause 9.1 of the Share Holder Agreement (SHA) dated 16th January 2012 and Clause 3.20 of the Amendment to the SHA dated 30th November 2012 executed among the parties. These clauses read as under:

> Clause 9.1 of the SHA
>
> "9.1 *The Bawri Group* undertakes to complete or ensure the completion of the following conditions ("Project Conditions") to the reasonable satisfaction of the Dalmia Group on or before June 30, 2013:
>
> > (a) The Company shall have obtained necessary clearance and renewals, as the case may be from the Ministry of Environment and Forests with respect to its operations and use of land at: (i) Grinder Plant in Lanka, District Nagaon, Assam; (ii) Clinker Plant at Jamunanagar, Umrangshu, Assam for 0.75 mtpa; and (iii) cement grade limestone mining unit at New Umrangshu, North Cachar Hills, Assam.
> >
> > (b) The Company shall obtain "consent to operate" as required under Water (Prevention and Control of Pollution) Act, 1974 and with respect to (i) cement grade limestone mining unit at New Umrangshu, North Cachar Hills, Assam; (ii) Clinker Plant at Umrangshu; and (iii) the Grinder Plant in Nagaon, Lanka, as may be required.
> >
> > (c) The Company shall secure electricity supply through 132 KVA line to be set up by ASEB for the Clinker Plant at Jamunanagar, Umrangshu.

(d) The Company shall have renewed and have valid Mining Lease for the Project and obtained necessary authorizations for running the mines of the Project at its installed capacity, including but not limited to clearance from the Ministry of Environment and Forests and consent to operate.

(e) Subject to funding being made available to the Company, the Company shall have constructed the railway siding at the Project.

(f) Consent of NC Hill council for the surface rights over the area comprised in the Mining Lease.

(g) Company shall have completed all actions and procedural formalities; required under the Central Government and the State Government subsidy schemes (except where such actions are required to be completed after commencement of commercial production), such as obtaining registrations and eligibility certificates with respect to all its units including but not limited to eligibility certificate for VAT remission/incentives for the Company and registration of Haflong unit for transport subsidy.

(h) Registration of Mining Lease as well as the lease deed for the factory land situated at Umrangshu, Assam.

In case of unforeseen delays to the completion of the Project Conditions, the time period to ensure completion of the Project Conditions to the satisfaction of the Dalmia Group shall stand extended to March 3l, 2014 ("**Project CP Satisfaction Date**"). However, if the clinker unit is ready to commence production during the period July 1, 2013 and March 31, 2014 but unable to commence production because of non-availability of lime stone, then the last date for the completion of the Project Conditions i.e. the Project CP Satisfaction Date shall be the date on which the clinker unit is unable to operate because of non-availability of lime stone.

On or before the Project CP Satisfaction Date, the Bawri Group shall issue a notice to the Dalmia Group stating in the

Project Conditions have been completed. Within 10 (ten) days, the Dalmia Group shall issue a notice ("Project CP Satisfaction Notice") to the Bawri Group, indicating that (i) all the Project Conditions have been completed to its satisfaction; or (ii) the Project Condition which have not been completed to the reasonable satisfaction of the Dalmia Group and giving the Bawri Group a time period of 10 (ten) Business Days to complete such Project Condition. If within the aforesaid period of 10 (ten) Business Days, Bawri Group are unable to complete such Project Conditions to the reasonable satisfaction of the Dalmia Group, the Dalmia Group shall have the right, at its sole discretion, to exercise the rights set out in Clause 9.2."

(Emphasis supplied)

Clause 3.20 of the Amendment to Share Holder Agreement

"3.20 The Parties hereby agree that within 60 (sixty) days from the Effective Date, *the Parties shall mutually agree on the amendments to Clause 9.1* with respect to Project Conditions, the support required to be given by the Parties for completion of the Project Conditions and the effect thereof, if any. Such amended Project Conditions shall be deemed to form a part of this Agreement. The Parties hereby agree to forthwith effect necessary changes to the articles of association of the Company to give effect to the change in understanding with respect to the amended Project Conditions."

(Emphasis supplied)

2.2 The arbitral proceedings, wherefrom the present petitions emanate, were initiated by the Bawris against Dalmia and Calcom. Dalmia filed counter-claims before the learned Arbitral Tribunal. Dalmia alleged that the amounts claimed by the Bawris, in its claims before the learned Arbitral Tribunal, were not payable by Dalmia in view of the admitted failure, by the Bawris, to comply with the Project Conditions as required by Clause 9.1 of the SHA. Rather, contended

Dalmia, the failure of the Bawris to comply with the Project Conditions entitled Dalmia to the relief sought by it in its counter-claims.

2.3 That there has been no complete compliance, by the Bawris, with the Project Conditions, as required by Clause 9.1 of the SHA, is not in dispute.

2.4 The learned Arbitral Tribunal has held against Damlia and in favour of the Bawris essentially on two grounds.

2.5 The first is that the Project Conditions enumerated in Clause 9.1 of the SHA were required to be fulfilled, by the Bawris, *only so long as the Bawris retained control of Calcom*. Control over Calcom, which was initially held by the Bawris, shifted to Dalmia in October 2012. This, according to the learned Arbitral Tribunal, resulted in two consequences. The first was that the Bawris were no longer obligated to comply with the Project Conditions as required by Clause 9.1 of the SHA. The second was that, consequent on shifting of control, the requirement of fulfillment of the Project Conditions became the responsibility of Dalmia.

2.6 This finding, in the opinion of this Court, clearly amounts to rewriting Clause 9.1, which specifically required *the Bawri group* to fulfil the obligations envisaged therein. Rewriting of a contract between two parties, especially a commercial contract, is completely impermissible in law, as held in a plethora of decisions, including

Union Territory of Pondicherry v. P.V. Suresh[1]***, Shree Ambica Medical Stores v. Surat People's Co-operative Bank Limited***[2]***, IFFCO Tokio General Insurance Co. v Pearl Beverages Ltd.***[3]***, Tata Consultancy Services v. Cyrus Investments (P) Ltd.***[4] and ***Maharashtra State Electricity Distribution Co. v. Maharashtra Electricity Regulatory Commission***[5]***. N.H.A.I. v. Bumihiway DDB (JV)***[6] holds, moreover, that rewriting of the contract between the parties by an Arbitral Tribunal would be against the law of the land. An Arbitral Tribunal is required to arbitrate within the four walls of the contract, and an arbitral award which does otherwise, or rewrites the contract, "is bound to be set aside", as held in ***P.S.A. Sical Terminals Pvt Ltd v. Board of Trustees***[7], later followed in ***I.O.C.L. v. Shree Ganesh Petroleum***[8].

2.7 The second ground on which the learned Arbitral Tribunal holds against Dalmia and in favour of the Bawris with respect to the fulfillment of the Project Conditions, is predicated on Clause 3.20 of the Amendment to the SHA. According to the learned Arbitral Tribunal, Clause 3.20, as framed, resulted in two consequences. Firstly, holds the learned Arbitral Tribunal, Clause 3.20 *altered* Clause 9.1 of the SHA, and resulted in Clause 9.1, as well as the requirement of fulfillment of the Project Conditions, contemplated therein, effectively being eviscerated. Secondly, it amounted to waiver, by

[1] **(1994) 2 SCC 70**
[2] **(2020) 13 SCC 564**
[3] **(2021) 7 SCC 704**
[4] **(2021) 9 SCC 449**
[5] **(2022) 4 SCC 657**
[6] **(2006) 10 SCC 763**
[7] **2021 SCC OnLine SC 508**
[8] **(2022) 4 SCC 463**

Dalmia, of Clause 9.1 of the SHA as well as Clause 9.2 thereof, which envisaged the consequences of non-compliance with Clause 9.1.

2.8 *It is not in dispute that no amendments to the SHA, in terms of Clause 3.20 of the Amendment to the SHA, were ever agreed upon, among the parties.* In that view of the matter, the above interpretation of Clause 3.20 of the Amendment to the SHA, as accorded to it by the learned Arbitral Tribunal, appears to this Court to be "patently illegal" within the meaning of Section 34(2A) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"). All that Clause 3.20 *envisaged*, at the highest, was mutual agreement, among the parties, *on the amendments* to Clause 9.1 of the SHA. When the terms of the proposed amendments were themselves not agreed upon, it would be impossible, with profound respect to the learned Arbitral Tribunal, to hold that Clause 9.1 stood altered, or that the obligations contemplated thereby stood wiped away.

2.9 Nor does Clause 3.20 of the Amendment to the SHA indicate any intention, of Dalmia, to waive the requirement of fulfilment, by the Bawris, of their obligations as cast by Clause 9.1 of the SHA. Waiver of any clause of the SHA has, as per Clause 22.9 thereof, to be in writing and signed by all parties. Moreover, waiver of a contractual right, in law, has to be a conscious act, and intention to waive must be unmistakable. This Court is unable to agree with the finding of the learned Arbitral Tribunal that, even before any terms of amendment of the SHA were finalized among the parties, Clause 3.20 of the Amendment to the SHA resulted in waiver, by Dalmia, of its rights

under the SHA, consequent to failure, by the Bawris, to fulfil the Project Conditions as required by Clause 9.1.

2.10 This, in substance, is the essential controversy in issue in the present OMPs. The conclusion of this Court, thereon, has also been indicated, in precis, hereinabove. Detailed findings in that regard follow.

2.11 Once this controversy is resolved, all that would remain would be to work out the consequences, inasmuch as the resistance, by Dalmia, to the claims of the Bawris, as also the counter-claims of the Dalmia, are entirely predicated on the premise that Bawris failed to comply with the Project Conditions as required by Clause 9.1 of the SHA.

Facts

3. With the aforesaid prefatory recitals, one may proceed to the facts in somewhat greater detail.

4. Calcom was incorporated on or around 20th September 2004 by the Bawris with Assam Industrial Development Corporation (AIDC), to build and operate a cement plant in Assam. As the cost of the project increased, Calcom desired to bring in an outside investor to meet the enhanced costs. Dalmia evinced its interest to collaborate. Following mutual discussions and negotiations, a Term Sheet was drawn up among the Bawris, Dalmia and Calcom on 2nd December

2011, setting out the mechanism of the proposed transaction. On the heels of the Term Sheet, the following agreements (hereinafter collectively referred to as "**Definitive Agreements**") were executed among the Bawris, Dalmia, SSPL and Calcom:

(i) Shareholders' Agreement (SHA) executed by and among the Bawri Group including SSPL, Calcom and Dalmia,

(ii) Debenture Subscription Agreement (DSA) executed by and among the Bawris, Dalmia and SSPL,

(iii) Share Pledge Agreement - I (Pledge Agreement-I) executed by and among the Bawris and Dalmia,

(iv) Share Pledge Agreement – II (Pledge Agreement-II), executed among SSPL, Dalmia and Calcom,

(v) Share Purchase Agreement – I (SPA-I) executed by and among SSPL, Dalmia and Calcom,

(vi) Share Purchase Agreement - II (SPA-II) executed by and between SSPL, Dalmia and Calcom, and

(vii) Share Subscription Agreement (SSA) executed by and among the Bawri Group, SSPL, Calcom and Dalmia.

5. Various supervening circumstances necessitated a change in the management of Calcom. On 8th October 2012 Binod Kumar Bawri, then Chairman of Calcom circulated the following email:

From: **Binod Bawri** <binod.bawri@calcom.co.in>
Date: Mon, Oct 8, 2012 at 12:39 PM
Subject: Important News
To: CCIL ALL ccil.all@calcom.co.in

Dear Friends,

As all of you are aware, we collectively started Vinay Cement in 1987. The dream was to build an organization that we could all be proud of, one where we took pride in our culture as much as any success that we created along the way. I have been privileged to work with the finest human beings, people who brought a human touch, to an otherwise competitive environment. Along the way we built an institution that people felt ownership in, an organization that could provide a great working environment to professionals. We succeeded in doing many things and failed in many; this is part of the process of building any organization. Through it all, we maintained our sense of values, our sense of right and wrong and gave it our best possible at all times. I want to thank each and every one of you who are part of this organization today and also all the countless people who have at some point participated in this journey to bring us to where we are today. Also, I want to thank the family members who have made great sacrifices, oftentimes unknown and unrecognized. Thank you!

In order to realize our vision of being the dominant cement player in East India, we had earlier this year partnered with the Dalmia family. Dalmia Bharat has recently acquired another cement company, in the North East. I believe that it would be beneficial to create a common management to drive the full benefit of synergy between the two companies. This will create value for employees, shareholders and stakeholders. Dalmia Bharat brings a rich history of over 80 years of experience in running cement companies successfully. They also bring the same sense of values and sensitivity to people that have made your company so unique, the reason why we partnered with them.

I have therefore requested Mr. Puneet Dalmia to create a common management which will look after the interest of Calcom. I am therefore very pleased to announce that Mr. Chandrasekhar Kini is being appointed as CEO of the cement business in the North East, to look after both the companies. Under him there will be a common team to look after businesses of both the companies. Mr Kini has rich experience of 33 years in the industry. I have met him personally and have a lot of faith in entrusting the responsibility of the business and our employees to him. I am sure he will lead Calcom to a new orbit of success. Our

prayers are with him and we wish him great success.

All employees of Calcom who were reporting to Bawri family will now report to Mr Kini with immediate effect. As Mr Kini takes over his responsibility, he will interact with all of you and will be more than happy to address any concerns. With our rich history of over 140 years in the North East, I, along with the family, will continue to play a role in steering the company in the role of a significant shareholder.

All the best!

Binod Kumar Bawri

6. Following the aforenoted email, a fresh set of agreements were executed among Calcom, Dalmia, Bawris and SSPL on 30th November 2012. Of this, the present dispute concerns itself only with

(i) a new SPA which, *vide* Clause 17.8[9] thereof, superseded all prior agreements with respect to the subject matter thereof, which would include SPA-I and SPA-II dated 16th January 2012 and

(ii) the "Amendment to Shareholder Agreement", whereby the earlier SHA dated 16th January 2012 was amended.

7. The new SPA executed on 30th November 2012 was further amended *vide* "Amendment to New SPA" dated 1st December 2012.

8. The relevant clauses of the aforesaid agreements may be reproduced thus:

SHA dated 16th January 2012

[9] Refer para 8

Opening recitals

"SHAREHOLDERS AGREEMENT

THIS SHAREHOLDERS' AGREEMENT (the "Agreement") dated this 16th day of January, 2012 (the "Execution Date") by and between:

1. **BAWRI GROUP**, comprising of individuals and entities as set out in Schedule I hereto represented by Mr. Binod Kumar Bawri, by virtue of an irrevocable power of attorney dated December 01, 2011, hereinafter collectively referred to as the "Bawri Group", which expression shall, unless repugnant to the meaning or context thereof, be deemed to include their successors, legal heirs; executors, administration and permitted assigns;

AND

2. **SAROJ SUNRISE PRIVATE LIMITED**, a private limited company incorporated under the Companies Act, 1956 having its registered office at 31, Padmavati Complex, H. No. 38, G.S. Road, Dimapur-797112, Nagaland, hereinafter referred to as the "Hold Co-1 ", which expression shall, unless repugnant to the meaning or context thereof be deemed to include its successors and permitted assigns;

AND

3. **DALMIA CEMENT (BHARAT) LIMJTED**, a public limited company incorporated under the Companies Act, 1956 having its registered office; at Dalmiapuram, 621651, District Tiruchirapalli, Tamil Nadu, hereinafter referred to, as the "Dalmia Group", which expression shall, unless repugnant to the meaning or context thereof, be deemed to include its successors and permitted assigns:

AND

4. **CALCOM CEMENT INDIA LIMITED**, a company incorporated under the Companies Act, 1956 having its registered office at "Miri", Silpukhuri South Bank. Silpukhuri, Guwahati - 781003, Assam, hereinafter referred to as the

"Company", which expression shall, unless repugnant to the meaning or context thereof, be deemed to include its successors and permitted assigns.

(Hold Co-1 and the Bawri Group shall collectively be referred to as the “Promoter Group".)

(The Promoter Group, the Dalmia Group and the Company are hereinafter collectively referred to as “Parties” and individually as “Party”).

*****

1.2(x) For the purpose of calculating the Shareholding .of a Shareholder in the Company, including for determining the rights and privileges available to such Shareholder in the Company, the Shareholding of the Affiliates of such Shareholder shall be aggregated to the Shareholding of such Shareholder, provided however that (i) Vinay Ce1tlents Limited and RCL Cement Limited shall .not constitute an Affiliate of either Shareholder; and (ii) the Shareholding of the Persons set out in Schedule XII or any transferee thereof shall be aggregated to the Shareholding of the Promoter Group;

*****

6.5.1 At any time after July 31, 2017 and for a period upto July 31, 2020 (the "Put Option Period"), the Promoter Group shall have the right to but not the obligation to issue a notice ("Put Notice") to the Dalmia Group, to sell all, and not less than all, of the Equity Shares held by it in the Company (“Promoter Put Option Shares”) to the Dalmia Group or its Affiliates or any Person nominated by the Dalmia Group (the "Put Option Purchaser"), as applicable at the Promote: Group Pm Option Price, on the terms and Conditions contained in this Agreement (the "Promoter Group Put Option"). Such Put Notice shall only be issued by the Promoter Group after the accounts for the previous Financial Year has been approved by the Board. Such Put Notice shall specify the date on which such Transfer shall take place ("Put Date"), which shall· not be less than 180 (one hundred and eighty) days from the issuance of the Put Notice.

The Promoter Group Put Option Price ·shall be arrived at in accordance with the formula and the terms set out in Schedule VI.

6.5.2 Upon the exercise of the Promoter Group Put Option the Dalmia Group shall have the obligation to purchase at its discretion either (i) the Promoter Put Option Shares; or; (ii) the entire Shareholding of the Promoter Group in the Company on a Fully Diluted Basis less 5% (five percent) of the Shareholding of the Promoter Group in the Company (such that the Promoter Group shall retain 5% (five percent) of the Share Capital of the Company on a Fully Diluted Basis post the exercise of the Promoter Group Put Option.

In the event the Promoter Put Option Shares are pledged by the Promoter Group with the Lenders in accordance with Clause 6.2C, the Dalmia Group shall be obliged to purchase these Equity Shares subject to (i) the pledge on these Equity• Shares in favour of the Lenders; and (ii) the Lenders consenting to such Transfer. In such cases the Dalmia Group also agrees to make best efforts to obtain the consent of the Lenders for such Transfer.

6.5.3 The Dalmia Group will indicate if it wishes to acquire the Promoter Put Option Shares or the entire Shareholding of the Promoter Group in the Company on a Fully Diluted Basis less 5% (five percent) of the Shareholding of the Promoter Group in the Company (such that the Promoter Group shall retain 5% (five percent) of the Share Capital of the Company on 11 Fully Diluted Basis post the exercise of the Promoter Group Put Option ("Primary Put Option "Shares") in the notice issued to the Promoter within 15 (fifteen) days of the issuance of the Put Notice ("Put Acceptance Notice"). The Put Acceptance Notice will also disclose the identity of the Put Option Purchaser. For the avoidance of doubt, it is hereby clarified that upon the exercise of the Promoter Group Put Option, the Dalmia Group shall only be obliged to purchase the Primary Put Option Shares at the Promoter Group Put Option Price.

6.5.4 On the Put Date, the following events shall take place:

(a) the Put Option Purchaser shall pay the Promoter Group the amount calculated in accordance with and on the terms set

out in Schedule VI by wire transfer to the bank account of the Promoter Group, details of which shall be intimated in writing by the Promoter Group to the Dalmia Group 3 (three) days prior to Put Date;

(b) the Promoter Group shall deliver: (A) signed instruction slips instructing their respective depository participants to debit it, relevant demat account to the extent of all, and not less than all, of the Primary Put Option Shares in favour of the Put Option Purchaser's demat account in accordance with the rules and bye laws of the relevant depository; and (B) deliver to the Put Option Purchaser a certified copy of such delivery slip evidencing acceptance of instructions from the respective depositary participants to transfer the Primary Put Option Shares from the Promoter Group's demat accounts to the Put Option Purchaser's demat account; and

(c) the Board shall be reconstituted in accordance with the terms of this Agreement.

6.5.5 At the time of such Transfer, the Promoter Group shall represent to the Put Option Purchaser that the Equity Shares being Transferred by them are free of any Encumbrances (save and except for any preemptive rights in favour of the Dalmia Group contained in this Agreement and the Company's Organizational Documents) and that the Put Option Purchaser shall acquire clear tide to the Primary Put Option Shares. Each Party shall bear its own costs (except stamp duties) in relation to such Transfer of Equity Shares. The stamp duty however on such Transfer shall be borne by the Put Purchaser.

*****

6.7.1 At any time after July 31, 2011 and for a period upto July 31. 2020 (the "Call Option Period"), the Dalmia Group shall have the right to but not the obligation to issue a notice ("Call Notice") to the Promoter Group, to sell to the Dalmia-Group or any nominee or Affiliate of the Dalmia Group ("Call Option Purchaser"), at its sole discretion, either (i) all, and not less than all, of the Equity Shares held by the Promoter Group in the Company; or (ii) the entire Shareholding of the Promoter Group in the Company on a Fully Diluted Basis less

5% (five percent) of the Shareholding of the Promoter Group in the Company (such that the Promoter Group shall retain 5% (five percent) of the Share Capital of the Company on a Fully Diluted Basis post the exercise of the Dalmia Group Call Option ("Call Option Shares") at the Call Option Price, on the terms and conditions contained in this Agreement (the "Dalmia Group Call Option"). Such Call Notice shall only be issued by the Dalmia Group after the accounts for the previous Financial Year has been approved by the Board, Such Call Notice shall specify the date on which such Transfer shall take place ("Call Date"), which shall not be less than 30 (thirty) days and not more than 90 (ninety) days from the issuance of the Cal! Notice, the identity of the Call Option Purchaser, the Call Option Price and the number of Call Option Shares.

The Call Option Price shall be arrived at in accordance with the formula and the terms set out in Schedule VIII.

6.7.2 For the avoidance of doubt, it is hereby clarified that upon the exercise of the Dalmia Group Call Option, the Promoter Group shall only be obliged to sell the Call Option Shares at the Call" Option Price.

In the event the Dalmia Group exercises the Dalmia Group Call Option and the Call Option Shares are verified by the Promoter Group with the lenders in accordance with Clause 6.2C, then Dalmia Group shall purchase these Equity Shares Subject to (i) the pledge on these Equity Shares in favour of the Lenders; and (ii) the Lenders consenting to such Transfer in such cases the Dalmia Group also agrees to make best efforts to obtain the consent of the Lenders for such Transfer.

6.7.3 On the Call Date, the following events shall take place:

(a) the Call Option Purchaser shall pay the Promoter Group the amount calculated in accordance with and on the terms set out in Schedule VIII by wire transfer to the bank account of the Promoter Group, details of which shall be intimated in writing by the Promoter Group to the Dalmia Group 3 (three) days prior to the Call Date;

(b) the Promoter Group shall deliver: (A) signed

instruction slips instructing their respective depository participants to debit its relevant demat account to the extent of all, and not less than all, of the Call Option Shares in favour of the Call Option Purchaser's demat account (details of which account shall be intimated in writing by the Dalmia Group to the Promoter Group 3 (three) days prior to the Call Date, in accordance with the rules and by laws of the relevant depository; and (B) deliver to the Call Option Purchaser a certified copy of such delivery slip evidencing acceptance of instructions from the respective depositary participants to transfer the Call Option Shares from the Promoter Group's demat accounts to the Call Option Purchaser's demat account; and

(c) the Board shall be reconstituted in accordance with the terms of this Agreement.

6.7.4 At the time of such Transfer, the Promoter Group shall represent to the Call Option Purchaser that the Equity Shares being Transferred by them are free of any Encumbrances (save and except for any pre-emptive rights in favour of the Dalmia Group contained in this Agreement and the Company's Organizational Documents) and that such Call Option Purchaser shall acquire clear title to the Call Option Shares. Each Party shall bear its own costs (except stamp duties) in relation to such Transfer of Equity Shares. The stamp duty however ·on such Transfer shall be borne by the Call Option Purchaser.

6.7.5 The Parties agree to provide all such assistance and support to each other as may be requested by either the Promoter Group or the Dalmia Group to achieve the Transfer of the Call Option Shares.

*****

9.1 (Reproduced *supra*)

9.2 The Parties agree that upon the happening of any of the following events:

(a) the Bawri Group are unable to complete the Project Conditions in accordance with Clause 9.1

above;

(b) the Bawri Group and/or the Company issues a notice, in-writing, to the Dalmia Group, that the Project Conditions will not be completed on the Project CP Satisfaction Date;

then notwithstanding the provisions of Clause 6, the Dalmia Group shall have the right, at its sole discretion, to either:

(i) Purchase, by itself or through any nominee, Affiliate or Third Person nominated by the Dalmia Group, at its sole discretion, all and ·not less than all of the Shareholding of the Promoter Group in the Company for an aggregate consideration of Re. 1 (Rupee One Only) and upon exercise of such right by the Dalmia Group, the Promoter Group shall be obliged to sell, and the Bawri Group shall cause Hold Co-1 to sell, all and not less than all of its Shareholding in the company to the Dalmia Group for an aggregate consideration of Re.1 (Rupee One Only); or

(ii) Exercise the right to convert the Warrants issued to it; such that the Warrants shall be converted upto 99% (ninety nine percent) of the Share Capital of the Company. The Company shall be obliged to, and the Promoter Group shall be obliged to cause the Company to, undertake all necessary actions and obtain all necessary approvals, to effect the conversion of the Warrants.

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11. BRAND NAME

The Dalmia Group shall have the right to decide the brand to be used for the Company as well as decide on the use of the Brand Names currently being used or owned or registered in the name of the Company and the time period or its use. In the event, the Dalmia Group decides to completely phase out the Brand Names, then the Bawri Group shall retain the Brand Names and the Shareholders shall cause the Company to assign the Brand Names to a member of the Bawri Group or any nominee of the Bawri Group for a consideration of Re.1

(Rupee One Only). Subject to the provisions of Clause 12 below, such entity will be free to use the aforesaid Brand Names in any part of India, or abroad, for any business other than the Business.

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15. PERSONAL GUARANTEE OF THE BAWRI GROUP

15.1 The Bawri Group shall, during the term of this Agreement, provide and continue to provide the personal guarantees in relation to the existing and future loans and finances of and for the benefit of the Company and its Subsidiaries, provided that, upon the appening of any of the following two events, the Dalmia Group shall exercise all its powers, to the extent reasonably possible, to enable the release of the personal guarantees of the Bawri Group:

(a) The Promoter Group holding less than 26% (twenty-six percent) of the Voting Shareholding in the Company; or

(b) The Promoter Group Transfers 1 (one) or more Equity Shares of the company, other than in accordance with Clause 6.2A, Clause 6.2C and Clause 10 below and to any Person other than to a Permitted Transferee.

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18. CONFIDENTIALITY

18.1 Without the prior written consent of the other Party, each of the Parties agree not to divulge any information (directly or indirectly) in relation to this Agreement or the Company or any of its Affiliates to any Third Party other than

(i) strictly on a need to know basis to their own representatives, accountants, financial, legal advisors, banks and financial institutions who shall be bound by the confidentiality obligations set out under this Clause 18; and

(ii) disclosure required under any Applicable Law or any order of a court or appropriate Governmental Authority (including appropriate tax authorities).

18.2 None of the Parties hereto shall issue a press release or make any public announcement or other public disclosure with respect to any of the transactions contemplated herein without obtaining the prior written consent of the other Party. The provisions of this Clause 18.2 shall not apply in relation to any announcement or disclosure as may be required by Applicable Law or any Governmental Authority.

18.3 The restrictions in this Clause 18 shall not apply:

(i) in relation to any information that is or enters the public domain other than pursuant to a breach of this Clause;

(ii) to the extent that any of such information is/are later acquired by a Party from a source not obligated to any other Party hereto, or its Affiliates, to keep such information confidential, provided that the Party receiving such information from the source has made best efforts to verify that the source acquired such information lawfully and has the legal right to disseminate it;

(iii) to the extent that any of such Information was previously known or already in the lawful possession of a Party, prior to disclosure by any other Party hereto, subject to such Party, which already has the information, in its possession, notifies in writing the same to the disclosing Party immediately upon such disclosing Party sharing the information with it.

18.4 Each Party acknowledges that damages alone would not be an adequate remedy for any breach of the provisions of this Clause18 and, accordingly, without prejudice to any and all other rights or remedies that a Party might have, each Party shall be entitled without proof of special damage to the remedies of injunction and other equitable relief for any threatened or actual breach of the provisions of this Clause.

18.5 The provisions of this Clause 18 will survive the termination of this Agreement for a period of 3 (three) years.

19. TERMINATION

19.1 This Agreement shall remain valid until the earlier of the following:

i) if the Dalmia Group or the Promoter Group, as the case may be, ceases to hold any Equity Share or Share Equivalent in the Company;

(ii) if the Company is wound up or liquidated;

(iii) it is terminated by mutual consent of the Shareholders.

Provided however, that in the event this Agreement is terminated, Clause 12 (*Non-compete*), Clause 13 (*Non-solicitation*); Clause 16 (*Indemnity*), Clause 17 (*Dispute Resolution and Governing Law*), Clause 18 (*Confidentiality*), Clause 22.2 (*Notices*) and Clause 22.3 (*Costs*) shall survive any termination hereof.

20. EVENT OF DEFAULT

20.1 In the event of a material breach of any provisions of the Definitive Agreements by one Party ("**Defaulting Party**"), (the remedy for which has not been specifically provided in any of the respective Definitive Agreement), and which breach is remediable and the same in not cured within 90 (ninety) days ("**Cure Period**") of notification of the same by the other Party ("**Non-defaulting Party**"), then such event shall constitute an event of default ("**Event of Default**") for the purposes of this Agreement.

20.2 Consequences of an Event of Default

20.2.1 Upon the occurrence of an Event of Default, the Non-defaulting Party shall have the right but not the obligation to issue a notice ("**Default Notice**") to the Defaulting Party, to sell to the Non-defaulting Party or any nominee or Affiliate of such Non-defaulting Party ("**Default Purchaser**"), the entire

Shareholding of the Defaulting Party ("**Default Shares**") on the terms and conditions set out in this Clause 20.2 at the Default Price. Such Default Notice shall specify the date on which such Transfer shall take place ("**Default Date**"), which shall not be more than 6 (six) months from the issuance of the Default Notice, the identity of the Default Purchaser, the Default Price.

20.2.2 The Default Price shall be 75% (Seventy five percent) of the Fair Market Value, provided that the Fair Market Value shall be determined as on the date of issuance of the Default Notice.

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22.1 Amendments

No modification, amendment or waiver of any of the provisions of this Agreement shall be effective unless made in writing specifically referring to this Agreement and duly signed by each of the Parties.

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22.6 Entire Agreement

This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matters of this Agreement and supersedes all prior agreements and undertakings, both written and oral, with respect to the subject matter hereof, except as otherwise expressly provided herein.

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22.9 No waiver

No Waiver of any provision of this Agreement or consent to any departure from it by any Party shall be effective unless it is in writing. A waiver or consent shall be effective only for the purpose for which it is given. No default or delay o~ the part of any Party in exercising any rights, powers or privileges operates as a waiver of any right, nor does a single or partial exercise of a right preclude any exercise of other rights, powers or privileges."

Amendment to SHA dated 30th November 2012

"B. The BW Group, the Dalmia Group and the Company have executed a share purchase agreement ("Share Purchase Agreement"), whereby the BW Group has agreed to sell and the Dalmia Group has agreed to purchase 9,32,84,485 (Nine crore thirty-two lakh eighty four thousand four hundred and eighty five) Equity Shares of the Company for the consideration, on the terms and conditions and in the manner set out in the Share Purchase Agreement.

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1.3 The interpretation and/or construction of this Agreement shall be in accordance with the rules of interpretation annexed and marked Schedule II. To the extent there is any conflict between interpretation of the provisions of this Agreement and the provisions of the Shareholders' Agreement, the provisions of this Agreement shall take precedence.

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3.6 (vi) Pursuant to the terms of the Share Pledge Agreement-2, Hold Co-1 has assigned/transferred to the Dalmia Group, and executed an irrevocable power of attorney in a form as set out in Share Pledge Agreement -2, all of its voting rights in respect of the Voting Shares. Pursuant to the terms of the Share Purchase Agreement, the BW Group has transferred to the Dalmia Group the Purchase Shares in the manner set out therein, pursuant to which the Dalmia Group is entitled to exercise any and all voting and other consequential rights pertaining to the Voting Shares and the Purchase Shares, for any purpose not in violation of or inconsistent with any of the terms of the Share Pledge Agreement-2 or this Agreement ("**Dalmia Voting Right**"), subject to the Dalmia Voting Right being exercised by the Dalmia Group only to the extent necessary for the Dalmia Group to exercise in aggregate (coupled with the voting rights held directly in the Company by the Dalmia Group) 76% (seventy six percent) of the voting rights in the Company. The Dalmia Voting Right and the number of Voting Shares shall stand proportionately reduced to the extent paid up on the Share Capital of the Company pursuant to the Share Subscription Agreement and

this Agreement such that the Dalmia Group shall be entitled to exercise in aggregate (coupled with the voting rights held directly in the Company by the Dalmia Group) 76% (seventy six percent) of the voting rights in the Company. By way of illustration:

Particulars	Opening		Scenario 1		Scenario 2		Scenario 3	
	INR	%	INR	%	INR	%	INR	%
Opening paid-up voting share capital	20,83,93,240		20,83,93,240		29,43,93,240		32,83,93,240	
Fresh paid-up share capital infused (A)			*8,60,00,000*		*3,40,00,000*		*3,03,93,240*	
Closing paid-up voting share capital	20,83,93,240		29,43,93,240		32,83,93,240		35,87,86,480	
Voting rights to be held by Dalmia (B)	15,83,78,862	76.00%	22,37,38,862	76.00%	24,95,78,862	76.00%	27,26,77,725	76.00%
Dalmia - Opening paid-up direct voting share capital held	*12,22,84,485*	*58.68%*	*12,22,84,485*	*41.54%*	*20,82,84,485*	*63.43%*	*24,22,84,485*	*67.53%*
Fresh paid-up share capital infused (A)			*8,60,00,000*	*29.21%*	*3,40,00,000*	*10.35%*	*3,03,93,240*	*8.47%*
Dalmia - Closing paid-up direct voting share capital held (C)	12,22,84,485		20,82,84,485	70.75%	24,22,84,485	73.78%	27,26,77,725	76.00%
Balance voting rights to be held on pledged/Escrow shares/Escrow shares-2 worth (B-C)	3,60,94,378	17.32%	1,54,54,378	5.25%	72,94,378	2.22%	-	0.00%

It is clarified that in case Dalmia Group acquires Equity Shares equivalent to or more than 76% (seventy six percent) of the Voting Shares Capital of the Company, then the Dalmia Group will not have any voting rights over the Escrow Shares-2 or such other Equity Shares held by the BW Group over which the Dalmia Group has been granted Dalmia Voting Right."

3.20 (Reproduced *supra*).

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6.10.3 Release of Escrow Shares-2 on non-completion of Project Conditions:

(a) In the event the BW Group is unable to complete the Project Conditions by the Project CP Satisfaction Date, the Dalmia Group shall give written instructions to the Escrow Agent for release of the Escrow Shares-2 in the form set out at **EXHIBIT 2** ("**Dalmia Release Instructions-1**"), with a copy to the BW Group.

(b) If, within 5 (five) Business Days from the date of the Dalmia Release Instructions-1, the Escrow Agent does not receive either (x) a Disagreement Notice from the BW Group; or (y) written instructions from the Dalmia Group in the form set out at **EXHIBIT 3** ("**Dalmia Stop Instructions-1**"), the Escrow Shares-2 shall be transferred to the Dalmia Group in the manner set out in the Escrow Agreement-2.

(c) In case the BW Group provides a Disagreement Notice to the Escrow Agent, the Disagreement shall be resolved in the manner set out in Clause 7.3 to Clause 7.7. A written decision of the Committee (duly signed by 2 members thereof) shall be forwarded by any Party to the Disagreement to the Escrow Agent, together with release instructions in the form set out at **EXHIBIT 4** ("**Disagreement Resolution Notice-1**"). The Escrow Agent shall thereafter release the Escrow Shares-2 in the manner set out in the Escrow Agreement-2

(d) In the event the Dalmia Group provides Dalmia Stop Instructions-1 to the Escrow Agent, the Escrow Agent shall continue to hold the Escrow Shares-2 until receipt of further instructions in the manner set out in the Escrow Agreement-2.

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14.14.2 After the completion of the Project Conditions, the Dalmia Group and the BW Group shall mutually agree on the time and manner of repayment of inter corporate deposits given by the BW Group to Company (details whereof are set out at **Annexure 4**).

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14.14.4 The Dalmia Group shall ensure release of pledge over the following Equity Shares ("**Pledged Equity Shares**") within 180 (one hundred eighty) days from the Effective Date:

Sl.	**Name of Shareholder**	**No. of Equity Shares**	**Details of Share Pledge with name of Lender**
1.	Binod Kumar Bawri	7,170,336	Fully Pledged with Axis Bank (Security trustee)
2.	Ritesh Bawri	15,961,913	Fully Pledged with Axis Bank (Security trustee)
3.	Vinay Bawri	15,230,770	Fully Pledged with Axis Bank (Security trustee)
4.	Saroj Bawri	3,888,745	Fully Pledged with Axis Bank (Security trustee)
5.	Mala Bawri	7,368,869	Fully Pledged with Axis Bank (Security trustee)
6.	Pragati Veneers Private Limited	2,413,380	Fully Pledged with Axis Bank (Security trustee)
	TOTAL	**52,034,013**	

14.14.5 The BW Group shall ensure that the Pledged Equity Shares are deposited in the Escrow Account-2 within 4 (four) Business Days from release of pledge thereon, failing which the provisions of Clause 20.4 shall apply.

14.15 Past Liabilities

14.15.1 The past liabilities of the Company (for the period prior to 16 January 2012), as identified by the Parties on the date of this Agreement, shall be dealt with in the following manner:

(i) The liabilities amounting to Rs 688.19 lakhs, the breakup whereof is set out at **Annexure 6**, shall be indemnified by the BW Group. In the event the BW Group requires the Company to contest any of these liabilities pursuant to which the Company is liable to pay any expenses, interest and /or penalty thereon, the BW Group shall be liable to pay such liability together with the expenses, interest and / or penalty thereon.

(ii) No payment is required to be made by the BW Group for the items stated in **Annexure 7**. It is hereby clarified that any liabilities arising out of the items set out at **Annexure 7** shall be borne solely by the Company.

(iii) The liabilities amounting to Rs 367.84 lakhs, the breakup whereof is set out at **Annexure 8**, will be contested by the Company. In the event the Company is liable to pay the same, the BW Group shall be liable to pay these amounts together with expenses, interest and penalty thereon.

(iv) The amounts mentioned in **Annexure 9** shall not be payable by the Company and in case the Company is required to make payment of these amounts, the same shall be borne and paid by the BW Group.

(v) The amounts mentioned in **Annexure 10** shall be payable by the BW Group to the Company if such amount is not received by the Company from the persons mentioned at **Annexure 10** within a period of 90 (ninety) days from the Effective Date.

14.15.2 Except for the statutory liabilities disclosed in the Disclosure Letter under the Share Purchase Agreement - 1, all the statutory liabilities for the period prior to 16 January 2012 (including with respect to the items set out at **Annexure 8** but excluding the items set out in **Annexure 7**), shall be indemnified by the BW Group together with all expenses, interests and penalties thereon (if any). It is hereby clarified that the Company shall make all efforts to defend the Company in order to avoid these liabilities.

14.15.3 The Company is expected to receive (i) entry tax refund of Rs 13,00,00,000 (Rupees Thirteen crore); (ii) excise duty refund of Rs 4,00,00,000 (Rupees Four crore); and (iii) interest thereon for the period prior to 16 January 2012. If such amounts are received by the Company from the relevant authorities, then the BW Group shall be eligible for the refund of amount paid by the BW Group towards statutory liabilities under Clause 14.15.1(i) and Clause 14.15.1(iii), to the extent of amount received by the Company.

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14.15.7 With respect to any amounts payable by the BW Group under this Clause 14.15, the BW Group may, at its option, either pay 100% (one hundred percent) of the liability amount (including expenses, interest and penalties, if any) to Company or 50% (fifty percent) of the liability amount (including expenses, interest and penalties, if any) to the Dalmia Group within 15 (fifteen) days of the payment made by the Company. If the BW Group fails to make the payment within the stipulated period of 15 (fifteen) days, then it shall be liable to pay this amount together with interest thereon calculated @ 18% (eighteen percent) p.a. (compounded half-yearly) from the date of actual payment by the Company.

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15.1 It is hereby clarified that while negotiating for new loans as well as restructuring of the existing loans, the Dalmia Group will try on best efforts basis to negotiate that the Promoter Group am not required to give any personal guarantee.

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20.3.1 In case the Dalmia Group fails to pay to the BW Group any part of (i) Initial Consideration (as defined in the Share Purchase Agreement); (ii) Additional Consideration (as defined in the Share Purchase Agreement); (iii) SW Group Put Option Price/Call Option Price (as the case may be); or (iv) Secondary rut Option Price/Secondary Call Option Price (as the case may be), the SW Group shall send a written notice to the Dalmia Group "Demand Notice") demanding payment of the amount mentioned at Clause 20.3.1 as is outstanding together with interest thereon @ 18% (eighteen

percent) p.a. compounded half-yearly, calculated from (i) the date on which such payment became clue; or (ii) In case of a Disagreement, the date of decision of the Committee under Clause 7.3 determining the Initial Consideration or Additional Consideration, BW Group Put Option Price/Call Option price or Secondary Put Option Price/Secondary Call Option Price (as the case may be).

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20.4.1 **Specific Default by BW Group**

Each of the following events shall constitute a "Specific Default Event":

(a) non-deposit of Funding Shares by the BW Group in the Escrow Account-2;

(b) breach of Clause 5.3.5 by the BW Group;

(c) non-transfer by the BW Group of Equity Shares of the BW Group pursuant to Clause 9.2(i);

(d) failure of BW Group to deposit Pledged Equity Shares in the Escrow Account in the manner set out in Clause 14.14.5;

(e) non-transfer by the DW Group of the Escrow shares upon final determination of the Additional Consideration in the manner set out in the Share Purchase Agreement by the Second Committee (as defined therein) other than due to non-payment of Additional Consideration by Dalmia Group;

(f) non-transfer by the BW Group of the Escrow Shares-2 upon final determination of the BW Group Put Option Price/Call Option Price (as the case may be) in the manner set out in Clause 7.3 to Clause 7.7 other than due to non-payment of BW Group Put Option Price/Call Option Price (s the case may be) by Dalmia Group, or

(g) non-transfer by the BW Group of Secondary Put Option Shares/ Secondary Call Option Shares (as the

case may be) upon determination of Fair Market Value in the manner set out in this Agreement other than due to non-payment of Secondary Put Option Price/secondary Call Option Price (as the case may be) by Dalmia Group.

20.4.2 Upon the occurrence of a Specific Default Event:

(a) the BW Group shall forthwith lose (i) the right to appoint any Director; (ii) affirmative voting rights set out at Clause 3.10; (iii) information right set out at Clause 14.8; and (iv) audit related rights set out at Clause 14.12; and

(b) the Dalmia Group shall have the right (but not an obligation) to require the BW Group to sell its entire Shareholding in the Company to the Dalmia Group at the "Specific Default Call Price", being a price equal to 75% (seventy five percent) of the Fair Market Value ("Specific Default Call Option").

(c) In the event the Dalmia Group choses to exercise the Specific Default Call Option, the Dalmia Group shall forthwith send a written notice to this effect to the BW Group ("**Specific Default Call Notice**") and the BW Group shall thereafter be obligated to sell its entire shareholding in the Company to the Dalmia Group per the terms of this Agreement. The Dalmia Group shall have a period of 6 (six) months from the date of the Specific Default Call Notice to consummate the Specific Default Call Option.

(d) The Specific Default Call Price shall be determined as on the date of issuance of the Specific Default Call Notice and shall be communicated by the Dalmia Group to the BW Group forthwith upon determination of Fair Market Value.

(e) At the time of consummation of the Specific Default Call Option:

(i) the Dalmia Group shall pay the Specific Default Call Price to the BW Group by

demand draft to be deposited by the Dalmia Group with the Escrow Agent together with release instructions to the Escrow Agent for release of Escrow Shares-2 to the Dalmia Group in the form set out at **EXHIBIT 16**;
(ii) the Dalmia Group shall give release instructions to the Escrow Agent for release of Escrow Shares to the Dalmia Group in the form set out at **EXHIBIT 17**;

(iii) the Directors nominated by the BW Group shall resign from the Board; and

(iv) upon consummation of the transactions mentioned at sub-clause (i) to (iii) above, the Shareholders' Agreement shall stand terminated.

DSA dated 16th January 2012

"**6. CONVERSION ON COMPLETION OF PROJECT CONDITIONS**

6.1 Upon to the completion of the Project Conditions in accordance with the Shareholder Agreement, the Debentures shall be converted into such number of shares of the Company so as to constitute 0.01% (Point Zero One Percent) of the fully paid up equity share capital of the Company and the Company shall issue such number of equity shares so as to constitute 0.01% (Point Zero One Percent) of the fully paid up equity share capital of the Company ("Debenture Conversion"). Upon such Debenture Conversion, the pledge pursuant to Share Pledge Agreement-2 shall be released in accordance with the terms thereof.

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10. EVENT OF DEFAULT AND CONSEQUENCES OF EVENT OF DEFAULT

10.1 Event of Default

The following events shall constitute an event of default under this Agreement (except to the extent such default is caused or brought about by the Investor) (an **"Event of Default")**:

(a) Failure for any reason whatsoever to complete the Acquisition, provided that the failure is not cured within a pe1iod of 30 (Thirty) Days of notice from the Investor; or

(b) Failure to create the Security as stipulated in Clause 3.2 above; or

(c) Breach of Clause 9.1 (k) above; or

(d) Failure by Calcom to fulfil the Project Conditions in accordance with the Shareholders' Agreement.

10.2 Consequences of Events of Default

If one or more of the Events of Default occur or are continuing and the same has not been cured within the cure period, if any, stipulated herein, without derogation from the rights mentioned in this Agreement and without prejudice to any other right or action that the Investor may be entitled to under Applicable Law or this Agreement against the Company and / or the Shareholder, the Investor shall be entitled to exercise all or any of the following rights:

(i) require the Company to redeem the Debentures for an aggregate amount of Rs. 59,00,00,000 (Rupees Fifty Nine Crores Only) pursuant to a written notice (the "Redemption Notice") of not less than 7 (seven) Business Days ("Redemption Notice Period") to the Company. The redemption shall take place on the date specified in the Redemption Notice ("Specified **Redemption** Date") and the Investor shall submit the debenture certificates and such other document as may be necessary for su(;h redemption; or

(ii) require the Company to compulsorily convert the Debentures into such number of Conversion Shares so as to constitute upto 99.99% (Ninety Nine Point Nine Nine Percent) of the fully paid up equity share

capital of the Company in accordance with and pursuant to a written notice (the "Conversion Notice ") of not less than 7 (seven) Business Days ("Conversion Notice Period") to the Company. The conversion shall take place on the date specified in the Conversion Notice ("Specified Conversion Date"); or

(iii) Upon failure of the Company to repay the Debentures by the Specified Redemption Date, invoke the pledge under the Share Pledge Agreement-2 or the Share Pledge Agreement-1, as the case may be, and the Debentures shall accordingly stand redeemed upon invocation of pledge under Share Pledge Agreement - 2 or the Share Pledge Agreement-1, as the case may be."

New SPA dated 30th November 2012

"3. Purchase Price

3.1 Subject to the terms and conditions of this Agreement, the Purchaser agrees to pay the Purchase Price to the Sellers for the Purchase Shares.

3.2 The Purchase Price shall be payable in the following manner:

3.2.1 Tranche 1 Payment: On the Transfer Date, the Purchaser shall pay an amount of Rs.45,00,00,000 (Rupees Forty Five Crore) ("Tranche 1 Payment") to the Sellers as per the details set out in Annexure 1.

3.2.2 Tranche 2 Payment: Within 10 (ten) Business Days from the date of issue of the Project CP Satisfaction notice (as defined in the Shareholders' Agreement) by the Purchaser under the Shareholders' Agreement, the Purchaser shall pay an amount of 30,00,00,000 (Rupees Thirty Crore) ("Tranche 2 Payment") to the Sellers as per the details set out in Annexure 1.

Tranche 1 Payment and Tranche 2 Payment are hereinafter collectively referred to as "Initial Consideration"."

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7. Project Conditions and Tranche 2 Payment

7.1 **Completion of Project Conditions:**

Within 10 (ten) Business Days from the date of issue of the Project CP Satisfaction Notice (as defined in the Shareholders' Agreement) by the Purchaser under the Shareholders' Agreement, the Purchaser shall pay the Tranche 2 Payment by wire transfer or demand draft into the Sellers Designated Bank Account.

7.2 **Non Payment of Tranche 2 Payment:**

7.2.1 In case the Purchaser does not pay the Tranche 2 Payment within the time set out at Clause 7.1, the BW Group may exercise the Default Call Option (as defined under the Shareholders' Agreement) requiring, *inter alia,* the Escrow Shares to be released to the Sellers (if the same are still in the Escrow Account) and the Purchase Share, to transferred to the Sellers/BW Group or its nominee, on payment of the Default Call Price (as defined in the Shareholders' Agreement).

7.2.2 In the event the BW Group chooses to exercise the Default Call Option, the same shall be exercised in the manner set out in the Shareholders' Agreement Default Call Date (as defined in the Shareholders' Agreement), the BW Group shall give written instructions to the Escrow Agent (with a copy to the BW Group) for release of the Escrow Shares in the form set out at **EXHIBIT 1** ("Default Instructions") together with a demand draft for the Default Call Price (as defined in the Shareholders' Agreement).

7.2.3 Upon issuance of the Default Release Instructions, the Escrow Shares shall be released by the Escrow Agent in the manner set out in the Escrow Agreement.

7.3 Non completion of Project Conditions:

7.3.1 In the event the BW Group is unable to complete the Project Conditions by the Project CP Satisfaction Date (as defined in the Shareholders' Agreement), the Purchaser shall give written instructions to the Escrow Agent for release of the Escrow Shares in the form set out at **EXHIBIT 2**

("**Dalmia Release Instructions-1**"), with a copy to the BW Group.

7.3.2 If, within 5 (five) Business Days from the date of receipt of the Dalmia Release Instructions-1 by the Escrow Agent, the Escrow Agent does not receive either (x) a Disagreement Notice from the BW Group; or (y) written instructions from the Purchaser in the form set out at **EXHIBIT 3** ("**Dalmia Stop Instructions-1**"), the Escrow Shares shall be transferred to the Purchaser in the manner set out in the Escrow Agreement and the Sellers shall forthwith pay the Refund Amount to the Purchaser.

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17.8 Entire Agreement

This Agreement constitutes the entire agreement of the Parties relating to the subject matter hereof and supersedes any and all prior agreements, including letters of intent and term sheets, either oral or in writing, between the Parties with respect to the subject matter herein.

*****

Schedule II

1.14 If there is any conflict or inconsistency between a term in the body of this Agreement and a term in any of the schedules or any other document referred to or otherwise incorporated in this Agreement, the term in the body of this Agreement shall take precedence"

Amendment to new SPA dated 1st December 2012

"**2. Acquisition of Purchase Shares**

2.1 Subject to the terms and conditions of and in the manner set out in this Agreement and the Escrow Agreement, the Purchaser agrees to purchase from the Sellers, and the Sellers agree to sell and transfer to the Purchaser, the Purchase Shares, free and clear of any and all Encumbrances or other restrictions whatsoever and together with all rights and advantages attaching thereto on and from the Transfer

Date, including all voting rights and the right to receive all distributions and dividends declared, paid or made in respect of the Purchase Shares.

3.2.1 Tranche 1 Payment: On the Transfer Date, the Purchaser shall pay an amount of Rs 47,16,25,479 (Rupees Forty seven crore sixteen lakhs twenty five thousand four hundred seventy nine) ("**Tranche 1 Payment**") to the Sellers as per the details set out in **Annexure 1**.

3.2.3 Additional Consideration: On the Additional Consideration Payment Date, the Purchaser shall pay the Additional Consideration (if payable) to the Sellers in respect of the Purchase Shares, to be calculated in the manner set out below:

(a) Additional Consideration = A – B + C + D
Where:

A = BW Group Put Option Price in respect of the Purchase Shares, subject to adjustment to E.V. (to the extent due upto the date of valuation of E.V. but not paid by the Company to the Purchaser) in the manner set out in **Annexure 3** (in case the Additional Consideration Payment Date has been triggered as a result of exercise of BW Group Put Option)

OR

A = Call Option Price in respect of the Purchase Shares, subject to adjustment to E.V. (to the extent due upto the date of valuation of E.V. but not paid by the Company to the Purchaser) in the manner set out in **Annexure 3** (in case the Additional Consideration Payment Date has been triggered as a result of exercise of Dalmia Group Call Option)

B = Initial Consideration together with interest calculated @ 15% (fifteen percent) p.a. compounded yearly on the Initial Consideration (from the date of actual payment for each tranche until the date of valuation of E.V.) - Rs 13,00,00,000 (Rupees Thirteen crore)

C = Amount of dividend paid on the Purchase Shares together with interest calculated @ 18% (eighteen percent) p.a. compounded yearly accrued thereon

D = Rs 2,16,25,479 (Rupees Two crore sixteen lakhs twenty five thousand four hundred and seventy nine) together with interest calculated @ 15% (fifteen percent) p.a. compounded yearly on the Initial Consideration (from the date of actual payment of Tranche 1 Payment until the date of valuation of E.V.)

(b) If the Additional Consideration is a negative amount then the same shall be reduced from the BW Group Put Option Price / Call Option Price (as the case may be) payable to BW Group in respect of its shareholding in the Company only up-to the amount payable to BW Group in respect of such of its shareholding in the Company as has subject to exercise of BW Group Put Option or Dalmia Group Call Option (as the case may be) ("**Relevant Shares**"). In the event the negative Additional Consideration is not fully adjusted against the consideration payable in respect of the Relevant Shares, then (i) neither the Sellers nor BW Group shall be required to refund any part of the Initial Consideration; and (ii) the Initial Consideration shall be considered as the full and final payment towards acquisition of the Purchase Shares and the Relevant Shares.

(c) In the event the Additional Consideration is negative or zero and upon adjustment against the consideration payable in respect of the Relevant Shares, if consideration for the Relevant Shares is found to be payable, then the same shall be payable in the manner set out in the Shareholders' Agreement and the Initial Consideration shall be considered as the full and final payment towards acquisition of the Purchase Shares.

(d) It is hereby clarified that upon exercise of the BW Group Put Option / Dalmia Group Call Option in the manner set out in the Shareholders' Agreement, if the BW Group is required by the Purchaser to retain 5% (five percent) of its shareholding in the Company, then, for the purpose of calculating the Secondary Put Option Price / Secondary Call Option Price (as defined in the Shareholders' Agreement),

adjustment shall be to E.V. for the items set out in **Annexure 3**.

(e) In the event, pursuant to the provisions of the Shareholders' Agreement, the BW Group transfers any Funding Shares to the Dalmia Group (whether directly or deposit in the Escrow Account), the consideration payable for the same shall be the Purchase Price only and no further consideration shall be payable with respect to the same.

(f) It is hereby further clarified that the final amount of the Purchase Price can only be arrived after calculation of the Additional Consideration in the manner set out in this Clause.

*****

7.8 Entire Agreement

This Agreement constitutes the entire agreement of the Parties relating to the subject matter hereof and supersedes any and all prior agreements, including letters of intent and term sheets, either oral or in writing, between the Parties with respect to the subject matter herein."

Escrow Agreement 2 dated 16th January 2012

"2.5.1 In case Project Conditions are not satisfied

(a) In the event the BW Group is unable to complete the Project Conditions by the Project CP Satisfaction Date (as defined in the Shareholders' Agreement), the Dalmia Group shall give written instructions to the escrow Agent for release of the Escrow Shares-2 in the form set out at **EXHIBIT 4** ("**Dalmia Release Instructions-1**"), with a copy to the BW Group.

(b) If, within 5 (five) business Days from the date of receipt by the Escrow Gent of the Dalmia Release Instructions-1 , the Escrow Agent does not receive either (x) a Disagreement Notice from the BW Group; or (v) written instructions from the Dalmia Group in the form set out at **EHIBIT 5** ("**Dalmia Stop**

> **Instructions-1**"), The Escrow Agent shall, on the sixth Business Day from the date of the BW Release Instructions-1, transfer the Escrow Shares to the Dalmia Group Demat Account.
>
> (c) In case the BW Group provides a Disagreement Notice to the Escrow Agent, the Escrow Agent shall continue to hold the Escrow Shares until such time as the Escrow Agent is given instructions by any party in the form set out at **EXHIBIT 6** ("**Disagreement Resolution Notice-1**")
>
> (d) Upon receipt of the Disagreement Resolution Notice-1, the Escrow Agent shall forthwith comply with the instruction set out therein.
>
> (e) In the event the Escrow Agent is not presented with a Disagreement Notice by any Party, but is presented only with a Disagreement Resolution Notice-1, the provisions of Clause 2.5.1(d) shall apply.
>
> (f) In the event the Dalmia Group provides Dalmia Stop Instructions-1 to the Escrow Agent shall continue to hold the Escrow Shares-2 until receipt of further instructions in the manner set out in this Agreement."

9. One of the significant clauses in the aforesaid agreements executed on 30th November 2012 was Clause 3.6(vi) of the Amendment to SHA, whereby the voting rights of Dalmia, on the board of the Calcom, were enhanced from 50% to 76% by adding 26%. This also manifested the fact that Dalmia had taken over control of Calcom.

10. The amount of ₹ 45 Crores representing the Tranche 1 payment as per Clause 3.2.1 of the Amendment to the new SPA was released by Dalmia to the Bawris on 1st December 2012. No further Tranche 2

payment or payment of additional consideration, in terms of Clause 3.2.2 of the new SPA or 3.2.3 of the Amendment to the new SPA was made by Dalmia to the Bawris. The Bawris, therefore, in their claims before the learned Arbitral Tribunal, claimed the aforesaid amount from Dalmia. Dalmia, in turn, contended that Clause 3.2.2 required the payment of ₹ 30 Crores to be made by Dalmia to the Bawris within ten days from the date of issue of Project CP Satisfaction Notice, as defined in the SHA. Clause 9.1 of the SHA stipulated thus:

> "On or before the Project CP Satisfaction Date, the Bawri Group shall issue a notice to the Dalmia Group stating that the Project Conditions have been completed. Within 10 (ten) days, the Dalmia Group shall issue a notice ("Project CP Satisfaction Notice") to the Bawri Group, indicating that (i) all the Project Conditions have been completed to its satisfaction; or (ii) the Project Condition which have not been completed to the reasonable satisfaction of the Dalmia Group and giving the Bawri Group a time period of 10 (ten) Business Days to complete such Project Conditions to the reasonable satisfaction of the Dalmia Group, the Dalmia Group shall have the right, at its sole discretion, to exercise the rights set out in Clause 9.2."

11. The Bawris contended, *per contra*, that Clauses 9.1 and 9.2 of the SHA had been rendered unenforceable and ineffective by Clause 3.20 of the Amendment to the SHA. They also sought to contend that they had done everything possible to comply with the Project Conditions as enumerated in Clause 9.1 of the SHA and could not, therefore, be said to be in default thereof.

Issues

12. The learned Arbitral Tribunal framed the following issues as arising for consideration before it:

> "1. Whether the Dalmia group committed breach of the agreements and assurances in the manner and to the effect set out in sub para (a too) of para 14 of the Statement of Claims? If so to what effect? O.P. Claimants Bawri
>
> 2. Whether Dalmia group resorted to wrongful means, threats undue influence and inducement as alleged in the statement of claims to pressurise the Bawri group to handover control and management of the Calcom to Dalmia? If so to what effect? O.P. Claimants Bawri
>
> 3. Whether the parties had agreed to amend the Shareholders Agreement dated 16.01.2012 to take care of matters set out in sub paras (a) to (i) of para 19 of SOC? If so to what effect? O.P. Claimants Bawri
>
> 4. Whether Bawri Group signed and executed documents dated 30.11.2012 referred in para 23 of the SOC on the representations made & assurances given, and under undue influence, duress & threats referred to in para 21 to 23 of the SOC? O.P. Claimants Bawris
>
> 5. Whether the parties had agreed to formally amend Clause 9.1 of the agreement dated 16.1.2012 and to make necessary changes to the Articles of Association of the company? If so to what effect? O.P. Claimants Bawris
>
> 6. Whether after execution· of agreements dated 30.11.2012 Dalmia Group alone was responsible for fulfilment of the Project Conditions? and O.P. Claimants Bawris
>
> 7. In case answer to issue No.6 is in the negative, whether Dalmia Group had waived the enforcement of Clauses 9.1 & 9.2 of the agreement dated 16.1.2012? O.P. Claimants Bawris

8. Whether bilateral rights and obligations created under several agreements executed between the parties were no longer dependent on the fulfilment of the Project Conditions by the Bawri Group, especially after Dalmia Group had assumed control and taken over the management of Calcom? O.P. Claimants Bawris

9. Whether company petition under Sections 397 & 398 of the Companies Act has been filed by Bawris to frustrate the Arbitration proceedings? If so how and to what effect O.P. Respondent Dalmia

10. Whether Dalmia Group is acting in a premeditated manner and trying to take control of Calcom and the entire shareholding of the company without making any payment therefor, by falsely accusing Bawri Group of breach of the Project Conditions? O.P. Claimants Bawris

11. Whether Dalmia has committed acts of siphoning and waste as alleged in Para 34 to 40 of the SOC so as to diminish the value of the assets of the company? If so to what extent and to what effect? O.P. Claimants Bawris

12. Whether Bawris Group is entitled in full or in part, to all or any of the monetary and other reliefs enumerated by them in the statement of claim, with interest and costs as claimed including transfer of the shares held by Dalmia in Calcom? O.P. Claimants Bawris

13. Whether the Bawri group refused, failed or neglected to complete the project condition within the time frame prescribed in the share holder's agreement dated 16.01.2012? If so to what extent and to what effect? O.P. Counter-Claimants Dalmia

14. In case issue no. 13 is proved in the affirmative.

i) Whether Dalmia is entitled to 73642742 equity shares of Calcom referred to in para 17 (1)(a) (b) & (c) of the statement of Counter Claim for Re. l /- and whether a direction can be issued to the holders of the said shares to execute all such deeds and documents as are necessary for transfer of the said shares from Bawri to Dalmia?

ii) Whether Dalmias are entitled to 1612590 equity shares of Calcom currently held by persons set out at schedule XII to the share holders agreement with a further direction to the members of the Bawri Group jointly and severally to transfer the said shares in favour of Dalmia for Re.1 /-?

iii) Whether Dalmias are entitled to 57405837 equity share of Calcom referred to in para 17 of the statement of Counter Claim in terms of Clause 7.3 of the Share Purchase Agreement dated 30.11.2012 with direction to the Bawri Group to execute all such documents as are necessary for transfer of the said shares?

iv) Whether Dalmias are entitled to a refund of sum of Rs.67,40,89,372/representing the principal amount of Rs.32,00,00,000/- alongwith interest of Rs.35,40,89, 732 /- referred to in para 17 (C) of the statement of Counter Claim?

v) Whether Dalmias are entitled to a direction against Saroj Sunrise (Claimant-13) to pay to Dalmias a sum of Rs.62,32,77,414/- towards the redemption of 5,900 shares referred to in Para 17 (D) of the statement of Counter Claim alongwith interest amount mentioned therein? And

vi) Whether Bawri group committed a deliberate, flagrant and mala fide breach of their .obligation not to divulge the confidential information in terms of Clause 18 of Share Holders Agreement and Clauses (11) of SPA -1 and SPA - 2 with interest thereon@ 18% / annum?

vii) In case Issue no. (vi) above, is proved in the affirmative, whether Dalmias are entitled to recover from Bawri group a sum of Rs.200 crores by way of damages?

viii) Whether Dalmias are entitled to the grant of a perpetual prohibitory injunction restraining Bawris from divulging any confidential information in terms

of confidentiality obligations cast upon them under Clause 18 of the Share Holder's Agreement dated 16.1.2012 & Clauses 11 of the Share Purchase Agreements both dated 16.11.2012? O.P. Counter-Claimants Daimia

15. Whether Calcom is entitled to reimbursement in terms of Clause 14.15.1 (i) (iii) & 14.15.2 of the amended shareholder's agreement dated 30.11.2012 and the averments made in Para 29 and 44 of the Counter Claim? If so to what extent? O.P. Counter-Claimants Calcom

16. Whether Calcom is entitled to recover an amount of Rs.1,68,01,611/- with interest on account of disallowance of transport subsidy in terms of Clause 9.1 read with 9.8 of the of the Share Purchase Agreement dated 16.1.2012? O.P. Counter-Claimants Calcom

17. Whether Bawri group violated the confidentiality Clause (Clause 18) of the Shareholders Agreement dated 16.1.2012 and Clauses 11 of the Share Purchase Agreements both dated 16.1.2012? If so how and to what effect? O.P. Counter-Claimants Calcom

18. In case Issue No. 17 is answered in the affirmative, whether Calcom is entitled to recover Rs.200, crores from Bawri Group towards damages with interest at 18%p.a.? O.P. Counter-Claimants Calcom"

Findings of the learned Arbitral Tribunal, submissions of parties and analysis thereof

Re: Issue 1

13. Issue 1 has been answered by the learned Arbitral Tribunal in the negative, i.e. against the Bawris. There is no challenge to the said finding in any of the OMPs under consideration including OMP 279/2021, filed by the Bawris. The finding of the learned Arbitral Tribunal on Issue 1 is, therefore, upheld.

Re: Issues 5, 6, 8 and 13

14. The learned Arbitral Tribunal took up Issues 5, 6, 8 and 13, as framed by it, together for consideration, as the issues were interrelated.

15. As these issues form the core issues for consideration, it would be appropriate to take them up first, before adverting to the other issues, and the findings of the learned Arbitral Tribunal thereon.

16. The nature of the obligation cast on the Bawris by Clause 9.1 of the SHA was correctly identified, by the learned Arbitral Tribunal, as the first and foremost issue to be addressed at the threshold. The learned Arbitral Tribunal relied on Recital B in the amendment to SHA dated 30th November 2012, to observe that, on the date of execution of the Amendment to the SHA, the Bawris were in control of Calcom as its promoters. Reliance was also placed on the definition of "promoter" as contained in Section 2(69)[10] of the Companies Act, 2013. The learned Arbitral Tribunal held that the obligations envisaged by sub-clauses (a) to (h) of Clause 9.1 of the SHA had been cast on the Bawris in their capacity as the promoters of Calcom, who were legally in a position to complete the Project

[10] (69) "promoter" means a person –
(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
(c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:
Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity.

Conditions. According to the learned Arbitral Tribunal, "a plain reading" of Clause 9.1 "would show that Bawri group – in control and management of the company as its promoter – were obliged to complete or ensure completion of the Project Conditions at (a) to (h) above latest by 31st March 2014".

17. Additionally, notes the learned Arbitral Tribunal, the obligations envisaged by sub-clauses (a) to (h) of Clause 9.1 were obligations in relation to Calcom, in which context the learned Arbitral Tribunal has referred to the opening words of most of the clauses which commence with the "the company shall....". Each permission, renewal or consent, it is observed was to be "in the name of" and "for the benefit of" Calcom. The applications for such permission, renewal and consent, could, therefore, be made only by persons in management and control of the affairs of Calcom. Clause 9.1, it is held by the learned Arbitral Tribunal, placed the obligation to fulfil the Project Conditions on the Bawris only because, at the time of execution of the SHA on 16th January 2012, the Bawris were in management and control of the affairs of Calcom. As such, holds the learned Arbitral Tribunal, "the placement of the obligation upon the Bawri group was predicated entirely by the fact that they and they alone were in control and management of the company". The learned Arbitral Tribunal observes that there was nothing, either in the SHA, or elsewhere "to suggest that the obligation was personal to those comprising the group so as to be enforceable against them even after they had lost control of the company and were by reason of such loss were unable to act for and/or on its behalf". This position, it is noted,

was underscored by the fact that, in the Amendment to the SHA dated 30th November 2012, the Bawris were removed from their status as promoters of Calcom and were referred to, in the amended SHA, only as "the Bawri Group".

18. Predicated on these premises, the learned Arbitral Tribunal proceeds to hold as under:

> "There is no manner of doubt that each one of permissions, renewals, consents, etc. referred to in the above Clauses, including consent of N.C. Hill Council and Registration of Mining Lease under Clauses (f) & (h) were to be "in the name of' and "for the benefit", of the Company and could have been applied for and obtained only by those in management and control of its affairs. Since on the date of the execution of the definitive agreements Bawri Group alone was in the management and control of the Company the obligation to complete the Project conditions could not have been placed on any one other than them. The placement of the obligation upon the Bawri group was predicated entirely by the fact that they and they alone were in control and management of the Company. There is nothing either in the Share Holders Agreement dated 16.1.2012 or elsewhere to suggest that the obligation was personal to those comprising the group so as to be enforceable against them even after they had lost control of the Company and were by reason of such loss unable to act for or on its behalf. On the contrary, the parties had in the amending Share Holders Agreement dated 30.11.2019, to which we shall presently advert, clearly noticed the change in the status of the Bawri Group and instead of describing them as 'Promoters' simply described them as the 'Bawri Group'.
>
> The sequitur therefore is that the obligation to complete the Project Conditions was to remain current only during the time the Bawris were in the management and control of Calcom and not beyond. The obligation to complete the Project Conditions was in that sense co-terminus with Bawri group's managing control over the company unless Bawris had

> despite loss of managing control over the company contracted to complete the Project Conditions. No such contract post loss of the control of the Company by the Bawris has been executed or even set up by Dalmias. Bawri's case on the contrary is that Share Holders Agreement dated 30.11.2012 had far from creating any such obligation for them clearly negated Clause 9.1 of the earlier agreement by introducing Clause 3.20 to the agreement. We shall presently advert to that part of the case set up by the Bawris. All that we need say at this stage is that completion of the Project Conditions was conditioned by Bawri Group being in management and control of the Company, which implied that if the Bawris lost control they lost their ability to complete the Project Conditions also. The Share Holders Agreement did not stipulate that the obligation to complete the Project Conditions would continue regardless whether the Bawris were or were not in control of the Company. If the intention was to make the obligation go beyond the period of the Bawri's managing control of the Company, nothing prevented the parties from stipulating so. In as much as no such provision was made, it is reasonable to hold that the completion of Project Conditions was entrusted to the Bawris only because they and they alone could have completed them."

19. The learned Arbitral Tribunal goes on to observe that, by their communications to Dalmia, consequent to transfer of control of the company passing from the Bawris to Dalmia, the Bawris had flagged the issue regarding their inability to complete the Project Conditions under Clause 9.1 of the SHA and "were not agreeable to the responsibility for completing of Project Conditions continuing with them once they were out of control of the company". Thus, according to the learned Arbitral Tribunal, Clause 9.1 of the SHA, even while the SHA was in its unamended form, did not obligate the Bawris to complete the Project Conditions enumerated in the said clause, once management and control of the affairs of Calcom had passed from the

Bawris to Dalmia.

20. The learned Arbitral Tribunal thereafter proceeds to examine the effect of Clause 3.20 of the Amendment to the SHA.

21. Clause 3.20 of the Amendment to the SHA, observes the learned Arbitral Tribunal, provided "that the Project Conditions shall be amended and that the conditions so amended shall constitute the Project Conditions for the agreements in questions". Rejecting the submission, advanced before it by Dalmia, that Clause 3.20 was merely in the form of an agreement to agree, the learned Arbitral Tribunal holds, even while acknowledging that it was "not in dispute" "that the parties had not been able to arrive at any agreement in regard to continuation of the obligations to complete Project Conditions with or without the amendment thereof", as under:

> "Clause 3.20 reassured Bawris that Clause 9.1 shall be suitably amended to address their concern. The Clause was in that view not an agreement to enter into an agreement as argued by the Respondents. It was on the contrary a part and parcel of the completed transaction under which the parties had changed their positions and modified the agreement earlier executed between them. One of the changes/modifications was that Share Holders Agreement to the extent it made a provision in Clause 9.1 would not hold good. They had contracted to say that instead of Clause 9.1 as originally incorporated, it would be Clause 9.1 as amended that would govern their relationship, rights and obligations."

The learned Arbitral Tribunal holds that it was "clear from a bare reading of the clause that the Project Conditions had to be amended and Project Conditions so amended were to be the Project Conditions

under the agreement". The fact that Clause 3.20 envisaged providing of support by the parties for completion of the Project Conditions as well as the consequence which would follow in the event such support not provided, according to the learned Arbitral Tribunal, rendered it "presumptuous" for Dalmia to say that the Bawris had to complete the Project Conditions while Dalmia had to lend them support especially when the Bawris' case was that Dalmias having taken over the management and control of the company, the obligation to complete was also theirs. "Be that as it may", holds the learned Arbitral Tribunal, "Shareholders Agreement dated 30th November 2012 had altered the earlier Agreement dated 16th June 2012 in material aspects in as much as Clause 9.1 was no longer a part of the contract between the parties and *had to be replaced* by a suitably amended Clause."

22. The learned Arbitral Tribunal also relies, to arrive at its findings, on Section 62[11] of the Indian Contract Act, 1872 ("the Contract Act"). The parties, it is held, "admittedly entered into an agreement dated 30th November 2012 *by which they altered* the Shareholders Agreement dated 16th June 2012, *inter alia* to the effect that Clause 9.1 as contained in the earlier agreement *shall be amended within a period of 60 days*". In the opinion of the learned Arbitral Tribunal, "*the fact that no amendment was, pursuant to the agreement dated 30th November 2012, made in the Project Conditions does not mean that there was no alteration in the Shareholders Agreement dated 16th June 2012*". The learned Arbitral Tribunal notes the

[11] **62. Effect of novation, rescission, and alteration of contract. –** If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

contention of the Bawris that, despite having written to Dalmia on 4th January 2013, 26th March 2013, 2nd June 2013, 25th June 2013, 23rd August 2013 and 26th November 2013, to complete the exercise of amendment of SHA, Dalmia did not choose to respond, and "nothing worthwhile was done in the direction of amending of Clause 9.1".

23. The learned Arbitral Tribunal goes on to observe that the fact that "no novation" within the meaning of Section 62[11] of the Contract Act "actually came about did not mean that the original SHA including Clause 9.1 contained therein were not altered". It further goes on to hold thus:

> "That stipulations contained in Clause 9.1 of SHA dated 16th January 2012 would no longer constitute the Project Conditions as the parties had agreed to amend the said Clause and stipulate amended Project conditions and provide for matters incidental thereto clearly signifies that SHA dated 16.1.2012 stood altered to that extent. Section 62 of the Contract Act would in that view relieve Bawris of the obligation to perforrn the contract as originally framed assuming that their obligation to complete Project Conditions could have continued even after they had lost control and management of Calcom."

24. The learned Arbitral Tribunal also placed reliance on Section 18[12] of the Specific Relief Act, 1963. The impugned Award holds that

[12] **18. Non-enforcement except with variation. –** Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, namely:—

(a) where by fraud, mistake of fact or mis-representation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contact;

(b) where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce;

(c) where the parties have, subsequently to the execution of the contract, varied its terms.

Dalmia was, in arbitral proceedings, seeking to enforce, against the Bawris, Clauses 9.1 and 9.2 of the SHA dated 16th January 2012. This, holds the learned Arbitral Tribunal, was completely impermissible in view of Section 18[12] of the Specific Relief Act, which envisaged that where the parties had, subsequent to the execution of a contract, varied its terms, specific performance would not be possible without such variation. Inasmuch as Clauses 9.1 and 9.2 of the SHA dated 16th January 2012 stood (according to the impugned award) altered by Clause 3.20 of the Amendment to the SHA dated 30th November 2012, Dalmia could not seek to specifically enforce Clauses 9.1 and 9.2 of the unamended SHA dated 16th January 2012. By operation of Clause (c) of Section 18[12] of Specific Relief Act, the learned Arbitral Tribunal holds that "the parties had altered the said earlier agreement and contracted to replace Clause 9.1 which replaced provision alone would then constitute a contract between the parties".

25. Adverting, next, to Clause 9.2 of the SHA dated 16th January 2012, the learned Arbitral Tribunal holds that Clause 9.2 of the SHA dated 16th January 2012 stood neutralised by Clause 20.4, which was added in the amended SHA, and which provided for a "specific default event". The finding of the learned Arbitral Tribunal in this regard may be reproduced thus:

> "It is clear from a reading of the above that non transfer of the shares held by Bawris pursuant to Clause 9.2 was also a specific default event which would entitle Dalmias to require the Bawris to sell their equity to Dalmia group at the Specific Default Call Price in terms of Clause 20.4.2 extracted above. Specific Default Call Price was in terms of Clause 20.4.2 (b) equivalent to 75 % of the Fair Market Value of the shares

> determined in terms of the agreement. This necessarily means that Bawris could refuse to transfer their equity for a sum of Re.1/- stipulated in Clause 9.2 in which case Dalmias had only one option viz to ask Bawris to transfer their shareholding in consideration of the default call price as stipulated in Clause 20.4.2 (b). This in essence meant that Clause 9.2 to the extent it provided for transfer of the equity held by Bawris for a sum of Re.1/- was wholly inconsequential in as much as the Bawris could as any other prudent person in their position would have refused to transfer their equity for Re. l / - knowing full well that by doing so they can force Dalmias to pay them the Specific Default Call Price which may not be the full Fair Market Value of the shares held by them but which was also not as good as asking them to transfer their shares for free as is now being claimed by Dalmias. Suffice it to say that while introduction of Clause 3.20 altered Clause 9.1, the addition of Clause 20.4 took the wind out of Clause 9.2 and brought about a paradigm shift in the scheme and the substance of the said two provisions as they stood before amendment."

26. The learned Arbitral Tribunal next proceeds to examine the individual obligations envisaged in the various sub-clauses of Clause 9.1 of the SHA dated 16th January 2012, and holds, in that regard, as under:

> (i) Re. Clause 9.1(a): Necessary clearances and renewals from the MoEF had been obtained with respect to operation and use of the land at Lanka District Nagaom, Assam and at the Clinker plant at Jamunanagar, Umrangshu, Assam. Apropos the cement grade limestone mining unit at New Umrangshu, it was observed that environment clearance had been obtained for the said unit, subject, however, to forest clearance. Insofar as obtaining of forest clearance was concerned, the learned Arbitral Tribunal observed that all due efforts had been made by

the Bawris and that the application was pending with the Competent Authority. The learned Arbitral Tribunal goes on to hold thus:

> "We assume that Dalmias have been following the forest clearance case with the Competent Authority diligently. Despite such diligence however the required clearance has not come. This would abundantly show that a party who has applied for any statutory permission or clearance can do no more than pursue the matter with the required diligence before the Competent Authority. Grant or refusal of such permission is however a matter that rests entirely with the authority. It is at any rate not the case of the Respondents that the delay in the grant of the Forest Clearance has caused any loss to the Respondents nor is there any evidence to prove any such loss."

(ii) Re. Clause 9.1(b): The learned Arbitral Tribunal holds that (a) the application for MoEF clearance in respect of the grinder plant at Lanka, District Nagaom could be made only after forest clearance for the plant had been granted, so that the Bawris could not be faulted for not having applied for such clearance, (b) insofar as the Clinker plant at Jamunanagar was concerned, the Bawris could have applied for consent to operate Clinker plant only after the Clinker plant was commissioned by Dalmia; hence, the delay in that regard lay at Dalmia's doors, and (c) consent to operate the Grinder plant at Nagaom had been granted as far back as on 24th March 2010 and was being renewed on a yearly basis.

(iii) Re. Clause 9.1(c): With respect to sub-clause (c) of

Clause 9.1, the learned Arbitral Tribunal observes that the application seeking sanction of load of 12 MW for the Clinker plant at Jamunanagar had been made by the Bawris on 28th December 2005, followed by a further application for load enhancement made on 22nd November 2011. Both applications remained pending, and were eventually granted on 2nd March 2015. Inasmuch as the Clinker plant was commissioned only after 2nd March 2015, the impugned award holds that no adverse consequence ensued to Dalmia as a result of pendency of the application filed by the Bawris.

(iv) Re. Clause 9.1(d): Sub-clause (d) of Clause 9.1 required Calcom to have a renewed and valid mining lease for the project and to have obtained necessary authorisations for running the mines of the project at its installed capacity, including clearance from MoEF and consent to operate. In that regard, the learned Arbitral Tribunal observes that an application for renewal of the mining lease had been made by the Bawris on 19th May 2011, a year before expiry of the lease. The application was pending with the competent authority. The learned Arbitral Tribunal has held, on this aspect, in favour of the Bawris, for two reasons, predicated on Rule 24A (6)[13] of the Mineral Concession Rules 1960 and Section 8A[14] of the Mines and Minerals Development

[13] **24A. Renewal of mining lease. –**

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(6) If an application for renewal of a mining lease made within the time referred to in sub-rule (1) is not disposed of by the State Government before the date of expiry of the lease, the period of that lease shall be deemed to have been extended by a further period till the State Government passes order thereon.

[14] **8A. Period of grant of a mining lease for minerals other than coal, lignite and atomic minerals. –**
(1) The provisions of this section shall apply to minerals other than those specified in Part A

and Regulation Act, 1957 ("the MMDRA"). Rule 24A (6)[13] of the Mineral Concession Rules deemed the period of lease to have been extended till the State government passed an order on the application for renewal. In that view of the matter, the learned Arbitral Tribunal held that Dalmia could not contend that, despite the protection extended by Rule 24A (6)[13], Calcom necessarily had to obtain renewal. The finding of the learned Arbitral Tribunal, in this regard, reads thus:

> "Dalmias cannot therefore argue that Bawris ought to have even in the teeth of the said policy decision taken by the Government which decision applied to all the cases of renewals pending before it, obtained a renewal notwithstanding the protection granted to Calcom

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and Part B of the First Schedule.

(2) On and from the date of the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 (10 of 2015), all mining leases shall be granted for the period of fifty years.

(3) All mining leases granted before the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 (10 of 2015) shall be deemed to have been granted for a period of fifty years.

(4) On the expiry of the lease period, the lease shall be put up for auction as per the procedure specified in this Act.

(5) Notwithstanding anything contained in sub-sections (2), (3) and sub-section (4), the period of lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 (10 of 2015), where mineral is used for captive purpose, shall be extended and be deemed to have been extended up to a period ending on the 31st March, 2030 with effect from the date of expiry of the period of renewal last made or till the completion of renewal period, if any, or a period of fifty years from the date of grant of such lease, whichever is later, subject to the condition that all the terms and conditions of the lease have been complied with.

(6) Notwithstanding anything contained in sub-sections (2), (3) and sub-section (4), the period of lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 (10 of 2015), where mineral is used for other than captive purpose, shall be extended and be deemed to have been extended up to a period ending on the 31st March, 2020 with effect from the date of expiry of the period of renewal last made or till the completion of renewal period, if any, or a period of fifty years from the date of grant of such lease, whichever is later, subject to the condition that all the terms and conditions of the lease have been complied with.

(7) Any holder of a lease granted, where mineral is used for captive purpose, shall have the right of first refusal at the time of auction held for such lease after the expiry of the lease period.

(8) Notwithstanding anything contained in this section, the period of mining leases, including existing mining leases, of Government companies or corporations shall be such as may be prescribed by the Central Government.

(9) The provisions of this section, notwithstanding anything contained therein, shall not apply to a mining lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 (10 of 2015), for which renewal has been rejected, or which has been determined, or lapsed.

> under Rule 24A (6) whereunder the lease stood Extended/renewed till such time the State Government took a decision."

Additionally, with respect to Section 8A[14] of the MMDRA, the learned Arbitral Tribunal holds, after reproducing the provision, as under:

> "A plain reading of the above should show that the lease in favour of Calcom and so also in favour of other lessees were by fiction of law deemed to have been granted for a period of fifty years. The amendment converted the lease held by Calcom as well as all other leases granted before the enactment of Section 8A (supra) for a period of fifty years. Not only that, even the Respondents had understood the said provision to be granting a deemed renewal of the mining lease in favour of Calcom. This is evident from letters dated 29.3.2016, 29.7.2016, 11.4.2016 and 26.4.2016 issued by the Respondents to the competent authorities claiming that lease in favour of Calcom stood renewed by operation of law. Also, an E-mail dated 27th January 2015 from Manish Aggarwal representing Dalmia group rightly asserted on behalf of that group and Calcom that the mining lease held by Calcom stood renewed by operation of law."

Further, holds the learned Arbitral Tribunal, Dalmia had not suffered any financial loss or prejudice as a result of non-renewal of the mining lease.

(v) Re. Clauses 9.1(e) and (f): No default of the Project Conditions stipulated in sub-clauses (e) and (f) of Clause 9.1 of the SHA could, in the opinion of the learned Arbitral Tribunal be alleged, as the condition envisaged by Clause 9.1(e) was dropped by Dalmia and, apropos Clause 9.1(f), application

seeking consent of the NC Hill Council had been granted on 21st January 2014.

(vi) Re. Clause 9.1(g): Clause 9.1(g) of the SHA was also held to have been complied with, except in respect of registration of the Clinker Plant for transport subsidy. That, too, it was noted, had been completed on 26th September 2014, prior to commissioning of the Clinker Plant. As such, delay in obtaining registration for the transport subsidy for the Clinker Plant had not resulted in any loss or prejudice to Dalmia or Calcom. Similarly, eligibility certificate for full VAT subsidy for the Grinder Plant had been applied for and was pending till 14th November 2014. No loss had been suffered by Calcom on that account, and Calcom had, in fact, reflected such subsidies in its income for FY 2010-11 till FY 2014-15 in its books of accounts. On this premise, the learned Arbitral Tribunal held that the Bawris could not be treated as having breached Clause 9.1(g) of the SHA either.

(vii) Re. Clause 9.1(h): Apropos Clause 9.1(h), the learned Arbitral Tribunal noted that the contention of the Bawris, to the effect that, at Umrangshu, there was no Registering Authority where mining leases/factory land could be registered, had not been disputed by Dalmia. The response of RW-1 Krishna Swaroop, to various questions put to him in cross-examination was relied upon, in this regard.

27. In view of the aforesaid, the learned Arbitral Tribunal holds that the Bawris had completed the Project Conditions envisaged in Clause 9.1 of the SHA dated 16th January 2012 *to the extent possible*. In any event, there was more than substantial compliance with the said Project Conditions. The Bawris could not, therefore, be visited with any adverse consequence on this score.

28. In this context, the learned Arbitral Tribunal placed reliance on the words "to the reasonable satisfaction of the Dalmia Group", contained in Clause 9.1. These words, according to the learned Arbitral Tribunal, indicated that the Bawris were required, under the said Clause, only to do whatever was reasonably possible, in order to achieve the Project Conditions contemplated by the individual Clauses of the said provision. Clause 9.1, holds the learned Arbitral Tribunal, could not be understood to oblige the Bawris to do something beyond their power and control, and in the discretion and power of a statutory or other public body. In the words of the learned Arbitral Tribunal, "the obligation to obtain permissions from any statutory or public authority cannot be said to be absolute howsoever resourceful, diligent or litigious the person giving any such undertaking may be". In a similar vein, the learned Arbitral Tribunal proceeds to hold that "delay arising out of indifference of the authorities concerned or apathy or the procedural complexities involved in the grant of any license or permission cannot be counted against a party who has acted diligently". In the present case, therefore, according to the learned Arbitral Tribunal, the test to be applied was the following:

> "The test that should therefore apply in situations like the present is whether Bawris acted with due diligence to obtain the licences, permissions and approvals referred to in Clause 9.1. If the answer is in the affirmative, Bawris must be deemed to have discharged their obligation. That in our opinion ought to be the approach for interpreting Clause 9.1 especially when Clause 9.2 prescribes adverse consequences which ought to flow and be countenanced only when the party is found to be in contumacious default of the obligation cast upon it under the agreement and not otherwise."

The learned Arbitral Tribunal goes on to hold, further, thus:

> "What permeates Clause 9.1 is an element of reasonableness not only in the matter of satisfaction of the Project Conditions but even in the matter of satisfaction of Dalmias as to their completion. If the obligation was indeed absolute there is no reason why Clause 9.1 would have used the expression "reasonable satisfaction" of the Dalmias. This clearly implies that even at the stage of execution of the Agreement in January 2012, the parties had taken "reasonableness" as the only test for completion of the conditions and not an "absolute completion" or an "absolute obligation" regardless of the imponderables that always beset statutory processes prescribed and followed for granting or refusing permissions and/or approvals."

Inasmuch as the Bawris had not only made applications to the concerned authorities, for ensuring compliance with the Project Conditions envisaged by Clause 9.1, but had also pursued the applications diligently, Bawris had done all that was expected of a reasonable person. The learned Arbitral Tribunal noted that Dalmia had not accused the Bawris of not doing what could be done by a reasonable person or of not following up the applications with the concerned authorities.

29. The learned Arbitral Tribunal has also distinguished the judgment of the Supreme Court in ***Naihati Jute Mills Ltd. v. Khayaliram Jagannath***[15], as having been rendered in a different factual context.

Contentions of Dalmia

30. Assailing the findings of the learned Arbitral Tribunal on Issues 5, 6, 8 and 13, Dalmia contends as under, through learned Senior Counsel Mr. Sandeep Sethi:

(i) Fulfillment of the Project Conditions by the Bawris, to the reasonable satisfaction of Dalmia was the basis of the entire rubric of obligations and reciprocal obligations in all the agreements executed among the Bawris, Calcom and Dalmia.

(ii) This was further reflected by the fact that, on 18th January 2012, consequent to the unamended SHA, the Articles of Association (AOA) of Calcom were amended to reflect the SHA. Post the agreement for amendment of the SHA dated 30th November 2012, the AOA of Calcom were amended, and the Project Conditions and the obligation of the Bawris in that regard, as envisaged by Clause 9.1 of the SHA, which were reflected in Articles 57 and 58 of the unamended AOA, continued to be reflected, as such and without any alteration whatsoever in Articles 53 and 54 of the amended AOA of

[15] **(1968) 1 SCC 522**

Calcom. For ready reference, Articles 53 and 54 of the amended AOA, which were identical to Articles 57 and 58 of the pre-amended AOA of Calcom, may be reproduced thus:

> "53. The Bawri Group undertakes to complete or ensure the completion of the following conditions ("**Project Conditions**") to the reasonable satisfaction of the Dalmia Group on or before June 30, 2013:
>
> (a) The Company shall have obtained necessary clearances and renewals, as the case may be, from the Ministry of Environment and Forests with respect to its operations and use of land at: (i) Grinder Plant in Lanka, District Nagaon, Assam; (ii) Clinker Plant at Jamunanagar, Umrangshu, Assam for 0.75 mtpa; and (iii) cement grade limestone mining unit at New Umrangshu, North Cachar Hills, Assam.
>
> (b) The Company shall obtain "consent to operate" as required under Water (Prevention and Control of Pollution) Act, 1974 and with respect to (i) cement grade limestone mining unit at New Umrangshu, North Cachar Hills, Assam; (ii) Clinker Plant at Umrangshu; and (iii) the Grinder Plant in Nagaon, Lanka, as may be required.
>
> (c) The Company shall secure electricity supply through 132 KVA line to be set up by ASEB for the Clinker Plant at Jamunanagar, Umrangshu.
>
> (d) The Company shall have renewed and have valid Mining Lease for the Project and obtained necessary authorizations for running the mines of the Project at its installed capacity, including but not limited to clearance from the Ministry of Environment and Forests and consent to operate.

(e) Subject to funding being made available to the Company, the Company shall have constructed the railway siding at the Project.

(f) Consent of N C Hill council for the surface rights over the area comprised in Mining Lease.

(g) Company shall have completed all actions and procedural formalities, required under the Central Government and the State Government subsidy schemes (except where such actions are required to be completed after commencement of commercial production), such as obtaining registrations and eligibility certificates with respect to all its units including but not limited to eligibility certificate for VAT remission/incentives for the Company and registration of Haflong unit for transport subsidy.

(h) Registration of Mining Lease as well as the lease deed for the factory land situated at Umrangshu, Assam.

In case of unforeseen delays to the completion of the Project Conditions, the time period to ensure completion of the Project Conditions to the satisfaction of the Dalmia Group shall stand extended to March 31, 2014 ("**Project CP Satisfaction Date**"). However, if the clinker unit is ready to commence production during the period July 1, 2013 and March 31, 2014 but unable to commence production because of non-availability of lime stone, then the last date for the completion of the Project Conditions i.e. the Project CP Satisfaction Date shall be the date on which the clinker unit is unable to operate because of non-availability of lime stone.

54. On or before the Project CP Satisfaction Date, the Bawri Group shall issue a notice to the Dalmia Group stating that the Project Conditions have been completed. Within 10 (ten) days, the Dalmia Group

shall issue a notice ("**Project CP Satisfaction Notice**") to the Bawri Group, indicating that (i) all the Project Conditions have been completed to its satisfaction; or (ii) the Project Conditions which have not been completed to the reasonable satisfaction of the Dalmia Group and giving the Bawri Group a time period of 10 (ten) Business Days to complete such Project Condition. If within the aforesaid period of 10 (ten) Business Days, Bawri Group are unable to complete such Project Conditions to the reasonable satisfaction of the Dalmia Group, the Dalmia Group shall have the right, at its sole discretion, to exercise the rights set out in Article 53. The Parties agree that upon the happening of any of the following events:

(a) the Bawri Group are unable to complete the Project Conditions in accordance with Article 53 above;

(b) the Bawri Group and/or the Company issues a notice, in writing, to the Dalmia Group, that the Project Conditions will not be completed on the Project CP Satisfaction Date;

then notwithstanding the provisions set out in these Articles, the Dalmia Group shall have the right, at its sole discretion, to either:

(I) Purchase, by itself or through any nominee, Affiliate or Third Person nominated by the Dalmia Group, at its sole discretion, all and not less than all of the Shareholding of the BW Group in the Company for an aggregate consideration of Re. l (Rupee One Only) and upon exercise of such right by the Dalmia Group, the BW Group shall be obliged to sell, and the Bawri Group shall cause Hold Co-1 to sell, all and not less than all of its Shareholding in the Company to the Dalmia Group for an aggregate consideration of Re.1 (Rupee One Only); or

(II) Exercise the right to convert the Warrants issued to it, such that the Warrants shall be

> converted upto 99% (ninety nine percent) of the Share Capital of the Company. The Company shall be obliged to, and the BW Group shall be obliged to cause the Company to, undertake all necessary actions and obtain all necessary approvals, to effect the conversion of the Warrants."

(iii) Clause 22.1 of the SHA specifically required all amendments of the SHA to be made in writing, specifically referring to the SHA and to be duly signed by all parties to the SHA. There could, therefore, be no "deemed amendment" of the SHA.

(iv) The entire valuation, and the structure of the composite transaction among Calcom, Dalmia and the Bawris, across all the agreements executed among them, pivoted around completion/non-completion of the Project Conditions by the Bawris in terms of Clause 9.1 of the SHA. In its written submissions, Dalmia has thus set out the consequences of completion/non-completion, by the Bawris, of the Project Conditions:

> "Scenario 1 – If Bawri Group completes Project Conditions by 31.03.2014:
>
> (i) Debentures issued by Saroj Sunrise to the Dalmia Group under DSA against payment of Rs. 59 crores to be converted into 0.01% equity of Saroj Sunrise (Clause 6 of DSA);
>
> (ii) Dalmia Group to pay to Bawri Group Tranche 2 payment of Rs. 30 crores (Clause 7.2 of New SPA) and consequently, the 16% shares

held in Escrow-1 would be released in the favour of Dalmia Group;

(iii) Bawri Group would retain the entire Tranche-1 payment of 47.16 crores;

(iv) Bawri Group to exit Calcom under a Call/ Put option mechanism at a valuation to be determined based on a pre-agreed formula between 31.07.2017 and 31.07.2020 (Clause 6.5 and 6.7 of SHA).

Scenario 2 – Non-completion of Project Conditions by Bawri Group:

(i) Dalmia Group would redeem debentures issued by Saroj Sunrise and get back Rs. 59 crores or convert the debentures into 99.99% equity of Saroj Sunrise (Clause 10.2 of DSA);

(ii) Bawri Group would refund Rs. 32 crores alongwith interest to Dalmia Group from the advance Tranche-1 payment of Rs. 47.16 crores;

(iii) No Tranche-2 payment of Rs. 30 crores would be made to Bawri Group;

(iv) Dalmia Group to receive balance shares held by Bawri Group in Calcom on payment of Re. 1 resulting in immediate exit of Bawri Group (Clause 9.2 of SHA). Consequently, the shares held Escrow 2 would be released in favour of Dalmia Group.

(v) The shares held in Escrow 1 would be released to Dalmia Group."

(v) Prior to execution of the new/Amendment Agreements on 30th November 2012, no consensus could be reached among the parties as to the amendments to be executed. Clause 9.1 of the SHA was, therefore, retained as it stood, reserving the option, in

Clause 3.20 of the Amendment to the SHA, of amending the Project Conditions, if any, by mutual negotiations, within 60 days of 30th November 2012. This never took place. As such, the obligations on the Bawris, as envisaged by Clause 9.1 of the SHA, continued unaltered.

(vi) The finding of the learned Arbitral Tribunal to the effect that, despite there having been no formal amendment of Clause 9.1 of the SHA, the Clause stood altered, was an impossible interpretation. It amounted to rewriting the SHA and was, therefore, patently illegal. Such a rewriting of the contract could not be sought to be justified on the ground that the clauses of the contract were required to be read not only textually but also contextually. Rewriting of the contract, by an Arbitral Tribunal, is completely proscribed by Sections 28(3)[16] and 34(2A), 34(2)(b)(ii) and 34 (2)(a)(iv)[17] of the 1996 Act.

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[16] **28. Rules applicable to substance of dispute. –**

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(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.

[17] **34. Application for setting aside arbitral award. –**

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(2) An arbitral award may be set aside by the Court only if –

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that –

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was

(vii) *De hors* the issue of whether the SHA had, or had not, been amended, the learned Arbitral Tribunal had acknowledged the fact that the AOA of Calcom remained, in fact, unamended. In such a case, applying the law laid enunciated in ***Tata Consultancy Services***[4] and ***Vodafone International Holdings BV v. UOI***[18], the AOA would be entitled to precedence over the SHA.

(viii) Clause 3.20 of the Amendment to the SHA was merely an agreement to agree, and was not, therefore, enforceable at law.

(ix) The finding of the learned Arbitral Tribunal that, without novating or amending the SHA, the terms of the SHA had been altered, was a finding bereft of reasons. Besides, in law, "alteration" and "amendment" were synonymous.

(x) The finding of the learned Arbitral Tribunal that Clause

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in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

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

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

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

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

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

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

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

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

[18] **(2012) 6 SCC 613**

3.20 of the Amendment to the SHA altered the Project Conditions was violative of Section 62[11] of the Contract Act and Clause 22.1 of the SHA, which required every Amendment to the SHA to be in writing and signed by the parties.

(xi) The findings of the learned Arbitral Tribunal in respect of Clause 9.1 of the SHA effectively equated the expression "Bawri Group" with "Promoter Group", though, these expressions were separately defined in the SHA. Replacement of the words "Bawri Group" with "Promoter Group" in Clause 9.1 of the SHA altered the entire commercial understanding of the agreements executed among the parties.

(xii) There was no factual or legal justification whatsoever, forthcoming in the impugned Arbitral Award, for the finding that, once Dalmia acquired control over Calcom, the Project Conditions envisaged in Clause 9.1 of the SHA were required to be discharged and fulfilled by Dalmia.

(xiii) The finding, of the learned Arbitral Tribunal, that the Bawris were no more at the helm of affairs of Calcom, once Dalmia had acquired 76% of shareholding in Calcom, was against admitted facts, as the Bawris had three nominee directors on the Board of Calcom, and Binod Kumar Bawri was the non-executive chairman of Calcom. These facts had been completely overlooked by the learned Arbitral Tribunal.

(xiv) Clause 3.20 of the amendment to SHA contemplated an agreement to take place *in futuro*, and could not, therefore, be

treated as resulting in a waiver *in praesenti*. That apart, waiver of a contractual stipulation was required, in law, to be express and specific. Clause 9.1 of the SHA had never been waived by any of the parties. In any event, assumed waiver of the terms of the SHA was impossible, in view of Clause 22.9 thereof. The finding, of the learned Arbitral Tribunal, that, by Clause 3.20, Dalmia had waived the rights enuring in its favour, emanating from failure, on the part of the Bawris, to fulfil the Project Conditions under Clause 9.1 of the SHA was, therefore, completely unsustainable.

(xv) It had never been pleaded, by the Bawris, that they had "substantially complied with" the Project Conditions envisaged in Clause 9.1 of the SHA. The finding of substantial compliance, as returned by the learned Arbitral Tribunal, therefore, travelled beyond the pleadings of the parties and resulted in making out of a case, in favour of the Bawris, which the Bawris themselves had never pleaded. This resulted in the Award contravening Explanation I (iii) to Section 34(2)[17] of the 1996 Act, as well as the judgment of the Supreme Court in ***J.C. Budhraja v. Chairman, Orissa Mining Corporation Ltd.***[19].

(xvi) The reliance of the learned Arbitral Tribunal, on the words "to the reasonable satisfaction of Dalmia Group", as contained in Clause 9.1 of the SHA, was thoroughly misplaced. Based on the said words, the learned Arbitral Tribunal held that the Project Conditions enumerated in Clause 9.1 were only

[19] **(2008) 2 SCC 444**

required to be "reasonably performed" by the Bawris. No such conclusion could emanate from Clause 9.1. All that the words on which the learned Arbitral Tribunal placed reliance indicated was that the performance of the Project Conditions in Clause 9.1 of the SHA had to be to the reasonable satisfaction of Dalmia.

(xvii) The "reasonable satisfaction" envisaged in Clause 9.1 was of Dalmia, and not of the learned Arbitral Tribunal. The learned Arbitral Tribunal could not, therefore, have returned a finding that the Bawris had performed their obligations as per the Project Conditions enumerated in Clause 9.1 of the SHA, to the reasonable satisfaction of the learned Arbitral Tribunal and, on that ground, indemnified Bawris of the consequence of non-performance.

(xviii) In any event, this issue could arise only if, in the first instance, the Bawris had issued a notice stating that they had completed the Project Conditions. No such notice having been issued by the Bawris, the learned Arbitral Tribunal erred in holding that the Bawris had effectively completed the Project Conditions in Clause 9.1.

(xix) The finding of the learned Arbitral Tribunal that Clause 9.1 was required to be fulfilled only on "best effort" basis was also foreign to the terms of the SHA and directly contrary to Clause 9.1 thereof as well as Article 53 of the amended AOA of Calcom. Where fulfillment of an obligation was required to be

on "best effort" basis, the SHA specifically so provided, as in the case of Clause 15.1. The finding of the learned Arbitral Tribunal to this effect, therefore, made out a case for interference within the parameters of Sections 34(2)(a)(iv), 34(2)(b)(i) and 34(2A)[17] of the 1996 Act.

31. Calcom, through OMP (COMM) 152 of 2021, adopted the submissions of Dalmia.

Contentions of the Bawris

32. The Bawris' case was articulated by Mr Aman Sinha, learned Senior Counsel. While endorsing, for acceptance, the findings of the learned Arbitral Tribunal, insofar as they were in favour of his clients, Mr Sinha further submitted, apropos issues 5, 6, 8 and 13, as under:

(i) A perusal of the Project Conditions in Clause 9.1 of the SHA indicated that, for their performance, the Bawris were required to be in control of Calcom. The finding of the learned Arbitral Tribunal that, once the Bawris ceased to be in control of Calcom, the Project Conditions would cease to operate as, thereafter, they could not apply for the requisite licences and permissions as a minority shareholder group was, therefore, unexceptionable.

(ii) The finding, of the learned Arbitral Tribunal, that, applying the existing contractual stipulation in Clause 9.1 of the SHA to the changed facts, it was not possible for the provision

to continue to operate as it had become unworkable, was a finding of fact, which could not invite interference under Section 34 of the 1996 Act, as the learned Arbitral Tribunal was well within its jurisdiction in returning the said finding.

(iii) The learned Arbitral Tribunal had merely interpreted Clause 9.1 of the SHA in a reasonable fashion. According to the learned Arbitral Tribunal, a contractual stipulation requiring a party to obtain requisite permissions and licenses could not be read as absolute in terms, where the grant of such permissions and licenses was subject to the discretion of public authorities and outside the control of the contracting party. In such cases, the party could only be expected to make best efforts to obtain the said permissions and licenses.

(iv) In any event, the original understanding between the parties stood altered by the comprehensive amendment agreements subsequently executed. At the time of execution of the original SHA, the Bawris and Dalmia had four directors each, alongwith executive chairman and managing director on the board of Calcom. By virtue of the amendment agreements dated 30th November 2012, the ratio of the representation, on the board of Calcom, of Dalmia to the Bawris stood enhanced to 5:3, with all three directors of the Bawris being non-executive, without even a casting vote. The Bawris ceased to be the promoter group of Calcom and management of Calcom had been handed over to Dalmia.

(v) It was in these circumstances that Clause 3.20 had been engrafted in the Amendment to SHA dated 30th November 2012. The Clause clearly stated that the amended conditions would be deemed to form a part of the SHA. This itself indicated that the Project Conditions, as originally framed in Clause 9.1, stood amended by execution of Clause 3.20 of the Amendment to the SHA. Clause 3.20 also alluded to "the change in understanding with respect to the amended Project Conditions". Clearly, therefore, the Clause acknowledged the existence of a "change in understanding" and manifested the intention of both parties, i.e. the Bawris and Dalmia, not to be bound by the original Project Conditions.

(vi) Reliance was placed, in this context, on the definition of "Project Conditions" as contained in the SPA dated 30th November 2012 as amended with effect from 1st December 2012, which defined "Project Conditions" as meaning "the Project Conditions as defined in the Shareholders Agreement, as modified by mutual agreement of the purchaser and the BW Group". This, according to the Bawris, clearly indicated that the earlier definition of "Project Conditions" stood altered/replaced. Dalmia could not, therefore, insist on compliance, by the Bawris, with the original Project Conditions as contained in Clause 9.1 of the SHA.

(vii) Clause 1.14 of Schedule II to the new SPA dated 30th November 2012, moreover, stipulated that, in the event of conflict or inconsistency between a term in the body of the SPA

dated 30th November 2012 and in any other document, the term in the body of the new SPA would take precedence.

(viii) Besides, Clause 7.8 of the Amendment to the new SPA, dated 1st December 2012, clearly stated that the amendment to the new SPA constituted the entire agreement between the parties and superseded any and all prior agreements.

(ix) Clause 1.3 of the Amendment to the SHA dated 30th November 2012 further clarified the position by providing that, to the extent of conflict between interpretation of the provisions of the Amendment to the SHA and the SHA, the provisions of the Amendment to the SHA would take precedence.

(x) These covenants clearly indicated that, with the amendments to the original agreements, as drawn up between the parties on 30th November 2012 and 1st December 2012, a new contractual regime had been put in place, which clearly altered the prior understanding among the parties.

(xi) The definition of "parties" in the SHA had also been amended. The original SHA dated 16th January 2012 defined "parties" as "the promoter group, the Dalmia group and the company" collectively. The Amendment to the SHA dated 30th November 2012, on the other hand, defined "parties" as "the BW group, the Dalmia group and the company", collectively. Simultaneously, Clause 3.20 also used the expression "parties", instead of the expression "promoters group" or "Bawri group" or "BW group". The responsibility to fulfil the Project

Conditions, therefore, ceased to be solely the responsibility of the Bawris, with the incorporation of Clause 3.20 in the Amendment to the SHA.

(xii) In view thereof, the learned Arbitral Tribunal was correct in holding that Clause 3.20 was not merely an agreement to agree, but was in the nature of a concluded agreement between the parties.

(xiii) In line with the assurances extended by Clause 3.20 of the Amendment to the SHA, the Bawris repeatedly took up the matter with Dalmia, to incorporate the necessary amendments in the SHA, but "Dalmias did nothing worthwhile in the direction of amending Clause 9.1 and providing for the matters that Clause 3.20 envisaged".

(xiv) The learned Arbitral Tribunal, therefore, correctly held that, with the introduction of Clause 3.20 in the Amendment to the SHA, the requirement of fulfillment of the Project Conditions became co-terminus with the Bawris being in control of the management of Calcom. Clause 3.20 created a new understanding between Dalmia and the Bawris with respect to the obligation to perform the Project Conditions and did away with the obligation of the Bawris to do so.

(xv) The finding of the learned Arbitral Tribunal, to the effect that there had been substantial compliance, by the Bawris, with the Project Conditions envisaged in Clause 9.1 of the SHA had to be understood in this context.

(xvi) Reliance was also placed, by the Bawris, in this context, on Clauses (27)[20] and (69)[10] of Section 2 of the Companies Act, which defined "control" and "promoter".

(xvii) The fact that many of the Project Conditions in Clause 9.1 of the SHA commenced with the words "the company shall" indicated that compliance with the Project Conditions could only be the responsibility of the entity which was in charge of and in control of Calcom. With the cessation of control over Calcom, it became impossible for the Bawris to continue to work towards fulfillment of the Project Conditions or ensure completion thereof. Any such interpretation, if accorded to Clause 9.1 of the SHA, would be absurd.

(xviii) It was in these circumstances that the learned Arbitral Tribunal held that the Bawris had complied with the Project Conditions to the extent it was possible to do so. Reliance was also placed, by the Bawris, on the finding of the learned Arbitral Tribunal, in the impugned Award, that it was not Dalmia's case that the Bawris were negligent in applying for or obtaining the permissions and licenses required for completion of the Project Conditions as enumerated in Clause 9.1 of the SHA, and that Clause 9.1 could not be read as casting, on the Bawris, an absolute obligation to do so. In respect of the obligation to

[20] (27) ―control‖ shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

procure the relevant clearances and licenses, the written submissions of the Bawris further contend thus:

> "Consequently, in terms of risk allocation between parties by contract, it is fairly evident that the obligation to procure relevant clearances and licenses is necessarily to the "reasonable satisfaction" of one party, and not absolute. The risk and responsibility of licenses for the business of the company not being procured, would fall on the party in primary control of the company. The risk would have been to Bawri's in the event when Dalmia was only a shareholder/investor. By Dalmia acquiring the controlling stake in the Company and ousting the Bawri's in the manner recorded, the Dalmia's also necessarily undertook the risk of obtaining the licenses(despite Bawri's best efforts, assuming the Project Conditions still operated against the Bawri Group)."

(xix) Reliance was also placed, in this context on Section 62[11] of the Contract Act, to contend that, by operation of the said provision, the effect of Clause 3.20 of the Amendment to the SHA was that Clause 9.1, as it originally stood, would no longer operate. Resultantly, the penal consequences envisaged by Clause 9.2 would also not apply.

Reliance was placed by the Bawris, on the decisions in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.***[21]***, Ansal Properties & Infrastructure Ltd. v. Housing & Urban Development Corporation Ltd.***[22]***, Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.***[23] and ***Laxmi Mathur v. CGM, Mahanagar***

[21] **(2022) 1 SCC 131**
[22] **2013 SCC OnLine Del 328**
[23] **(2019) 20 SCC 1**

***Telephone Nigam Ltd.*[24].**

Scope of interference with arbitral awards under Section 34 of the 1996 Act

33. While the general principle of reticence, in the matter of interference with arbitral awards, which also flows from Section 5[25] of the 1996 Act, continues to hold the field, there have been some inroads into that principle by various judicial pronouncements of the Supreme Court. In the matter of interpretation of contractual covenants governing the dispute, a court exercising jurisdiction under Section 34[17] of the 1996 Act would ordinarily defer to the understanding, by the Arbitral Tribunal, of the contract and its clauses, and would not, particularly, substitute its own subjective understanding of the contractual clauses for the understanding, thereof, by the Arbitral Tribunal.

The statutory position

34. Section 34(2)(a)(iv) of the 1996 Act, as it stood prior to its amendment by the Arbitration and Conciliation (Amendment) Act 2016, expressly envisaged interference with an arbitral award, insofar as the merits of the award were concerned, only where

(i) the award dealt with a dispute which was not contemplated by, or falling within the terms of the submission to arbitration or

[24] **2000 SCC OnLine Bom 243**

[25] **5. Extent of judicial intervention. –** Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part**.**

(ii) the award contained decisions on matters beyond the scope of the submission to arbitration.

Apart from this, the only other provision which envisaged interference with an arbitral award, on the merits of the award, was Section 34 (2)(b)(ii), which permitted such interference where the arbitral award was "in conflict with the public policy of India". In this regard, the explanation to the said clause clarified that an award would be treated as in conflict with the public policy of India if

(a) its making was induced or affected by fraud or corruption,

(b) the award was violative of Section 75[26] or

(c) the award was violative of Section 81[27] of the 1996 Act.

35. However, the Explanation was specifically "without prejudice to the generality of" Section 34(2)(b)(ii). The generally wide scope and ambit of the expression "public policy of India" was not, therefore, compromised by the Explanation. The scope of interference with arbitral awards, on merits, under the pre-amended Section 34 had, therefore, to be restricted to cases where the award was in conflict with the "public policy of India". In this regard, guidelines are to be found in the judgments of the Supreme Court in ***ONGC Ltd. v. Saw Pipes Ltd***[28] and ***Associate Builders v. DDA***[29]. Both these decisions advocate a wide interpretation of the expression "public policy of

[26] Section 75 requires matters relating to conciliation proceedings to be kept confidential.
[27] Section 81 proscribes reliance upon, or introduction as evidence, in arbitral or judicial proceedings, of, *inter alia*, suggestion, admissions and proposals, in conciliation proceedings. Breach of these clauses would, therefore, result an arbitral award being in conflict with the public policy of India.
[28] **(2003) 5 SCC 705**
[29] **(2015) 3 SCC 49**

India". Read together, they hold that an arbitral award would be contrary to the public policy of India if it was (i) contrary to fundamental policy of Indian law or (ii) contrary to the interest of India or (iii) contrary to justice or morality or (iv) patently illegal.

36. Thus was introduced, by judicial fiat, the concept of patent illegality, as a ground to interfere with an arbitral award, though the said ground did not find express place in Section 34 as legislatively enacted.

37. "Patent illegality" was also regarded as a ground for interfering with arbitral awards in ***McDermott International Inc. v. Burn Standard Co. Ltd.***[30] and ***DDA v. R.S. Sharma* & Co**[31]. ***McDermott***[30] held that, if the arbitrator had "*gone contrary to or beyond the express law of the contract* or granted relief in the matter not in dispute, the award would be "patently illegal". ***R.S. Sharma***[31] further widened the expression by holding that an award which was

(i) contrary to substantive provisions of law, or

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

(iii) *against the terms of the respective contract, or*

(iv) *patently illegal*, or

(v) prejudicial to the rights of the parties,

would be vulnerable to interference under Section 34(2).

38. "Patent illegality", therefore, unquestionably visits an award

[30] **(2006) 11 SCC 181**
[31] **(2008) 13 SCC 80**

which is contrary to the contract between the parties. This is but obvious, as the arbitral tribunal is a creature of the contract between the parties, and it is well settled that no court, or other judicial or quasi-judicial authority, can go behind the contract, or statute, to which it owes its existence.

39. The Arbitration and Conciliation (Amendment) Act, 2016 introduced, with effect from 23rd October 2015, Explanations 1 and 2 in Section 34(2) and sub-section (2A) in Section 34[17] of the 1996 Act. These provisions read thus:

> "*Explanation 1.* – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -
>
> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 of section 81; or
>
> (ii) it is in contravention with the fundamental policy of Indian law; or
>
> (iii) it is in conflict with the most basic notions of morality or justice
>
> *Explanation 2.* – For the avoidance of any doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.
>
> (2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the fact of the award.
>
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."

40. By this amendment, the legislature departed, somewhat, from the view expressed, in the decisions cited hereinabove, with respect to the scope of expression "public policy of India". The expression "public policy of India" was, by Explanation 1, restricted only to cases where the award was

(i) induced or affected by fraud or corruption,

(ii) violative of Section 75[26],

(iii) violation of Section 81[27],

(iv) in contravention with the public policy of Indian law, or

(v) in conflict with the most basic notions of morality or justice.

Thus, a new expression "fundamental policy of Indian law" came to be introduced in Section 34[17], while entering a note of caution that, in examining whether the award was in contravention with the fundamental policy of Indian law, the court would not review the merits of the dispute.

41. "Patent illegality" was engrafted as a separate ground to vitiate an award, by Section 34(2A)[17], but was not included within the ambit of the expression "public policy of India". Thus, "patent illegality" continued to remain a ground for a valid challenge to an arbitral award and, in addition, the award was also liable to be interfered with, if it was found to be in contravention with the fundamental policy of Indian law.

42. Eight decisions, rendered in the context of the amended Section

34[17], are of relevance. They are ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI***[32], ***South East Asia Marine Engineering & Constructions Ltd. (SEAMEC) v. Oil India Ltd.***[33], ***Project Director, NHAI v. M. Hakeem***[34], ***State of Chhattisgarh v. Sal Udyog Pvt. Ltd.***[35], ***NHAI v. P Nagaraju***[36], ***Delhi Airport Metro Express***[21], ***PSA Sical***[7] and ***IOCL***[8].

43. ***Ssangyong***[32] held, *inter alia*, that an arbitral award was susceptible to interference on the ground that it had overlooked an issue of importance if the issue was such that, had it been dealt with, the whole balance of the award would have been altered and its effect would have been different. ***SEAMEC***[33]**,** even while endorsing the view propounded in earlier decisions, that the mere possibility of an alternative interpretation to the contractual covenants, different from that accorded thereto by the arbitral award, would not constitute a legitimate basis to interfere therewith, held, significantly, that the Section 34 court was justified in examining "whether the interpretation provided to the contract in the award of the tribunal *was reasonable and fair*, so that the same passes muster under Section 34 of the Arbitration Act". "Reasonability" and "fairness" in the manner in which the Arbitral Tribunal had interpreted the contractual covenants, thereby, became a relevant consideration, for the Section 34 court.

44. ***Sal Udyog***[35] is an example of a case in which the Supreme

[32] **(2019) 15 SCC 131**
[33] **(2020) 5 SCC 164**
[34] **(2021) 9 SCC 1**
[35] **(2022) 2 SCC 275**

Court found the interpretation, by the learned Arbitral Tribunal, of the relevant clauses of the agreement to be unacceptable and "patently illegal" by an incisive examination of the contractual clauses. Insofar as the concept of "patent illegality", as a ground to interfere with the arbitral awards, under the amended Section 34 of the 1996 Act, is concerned, paras 43 to 45 of the report in ***PSA Sical***[7] are relevant, and may be reproduced thus:

> "**43.** It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.
>
> **44.** A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or

[36] **2022 SCC OnLine SC 864**

an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in ***Associate Builders***[29], which read thus:

> "**31.** The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:
>
> (i) a finding is based on no evidence, or
>
> (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
>
> (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.
>
> **32.** A good working test of perversity is contained in two judgments. In ***Excise and Taxation Officer-cum-Assessing Authority* v. *Gopi Nath & Sons***[37], it was held:
>
> > "7. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."
>
> In ***Kuldeep Singh* v. *Commr. of Police***[38], it was held:
>
> > "10. A broad distinction has, therefore, to be maintained between the decisions which are

[37] **1992 Supp (2) SCC 312**
[38] **(1999) 2 SCC 10**

> perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

45. ***IOCL***[8] examined, in depth, once again, Section 34[17] of the 1996 Act, having noted the law earlier enunciated in that regard. Paras 33, 42 to 46 and 53 of the report in that case read thus:

> "**33.** The arbitral award is liable to be set aside insofar as the same deals with disputes with regard to the lease agreement which are not contemplated by the arbitration clause in the dealership agreement and/or in other words, do not fall within the terms of the submission to arbitration. The arbitral award is thus liable to be set aside under Section 34(2)(*a*)(*iv*) of the 1996 Act. The decision enhancing the lease rent is patently beyond the scope of the submission to arbitration. Moreover, the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the lease agreement dated 20-9-2005.
>
> *****
>
> **42.** In ***Associate Builders***[29], this Court held that an award could be said to be against the public policy of India in, inter alia, the following circumstances:
>
> **42.1.** When an award is, on its face, in patent violation of a statutory provision.
>
> **42.2.** When the arbitrator/Arbitral Tribunal has failed to adopt a judicial approach in deciding the dispute.
>
> **42.3.** When an award is in violation of the principles of natural justice.

42.4. When an award is unreasonable or perverse.

42.5. When an award is patently illegal, which would include an award in patent contravention of any substantive law of India or in patent breach of the 1996 Act.

42.6. When an award is contrary to the interest of India, or against justice or morality, in the sense that it shocks the conscience of the Court.

43. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract.

44. However, a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a contract, while adjudicating a dispute. An error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.

45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.

*****

53. In ***Satyanarayana Construction Co. v. Union of India***[39], a Bench of this Court of coordinate strength held that once a rate had been fixed in a contract, it was not open to the arbitrator to rewrite the terms of the contract and award a higher rate. Where an arbitrator had in effect rewritten the contract and awarded a rate, higher than that agreed in the

[39] **(2011) 15 SCC 101**

> contract, the High Court was held not to commit any error in setting aside the award.
> ”

46. Rewriting of a contractual covenant has been held, in ***Bumihiway***[6], to be against the law of the land, and fatal to the award. The decisions in ***P.V. Suresh***[1], ***Shree Ambica Medical Stores***[2]**,** ***IFFCO Tokio***[3]**,** ***Tata Consultancy Services***[4] and ***Maharashtra State Electricity Distribution***[5]**,** to which allusion is already to be found in para 2.6 hereinabove, also hold that clauses of a commercial contract cannot be rewritten by a court or arbitral tribunal.

47. The present controversy has to be examined in the backdrop of the afore-noted legal position.

Analysis of findings of learned Arbitral Tribunal on Issues 5, 6, 8 and 13

48. The impugned Award has sought to place reliance on Clause 3.20 of the Amendment to the SHA, to justify its decision. In the process, the impugned Award returns observations and findings which, with utmost respect to the learned authors of the impugned Award, cannot sustain judicial scrutiny. Indeed, with great respect, some of these findings appear to be inherently contradictory in terms.

Clause 9.1 of the SHA

49. It is clear, at a plain glance, that the impugned Award rewrites Clause 9.1 of the SHA.

50. The learned Arbitral Tribunal initially places reliance on Recital B in the SHA dated 16th January 2012 to emphasize that, at that time, the Bawris were in control of Calcom. Following this, the learned Arbitral Tribunal infers that the obligation to complete the Project Conditions, envisaged by Clause 9.1 of the SHA, was cast on the Bawri Group *in its capacity as the Promoter Group of Calcom*.

51. There is, in my opinion, no justification for this presumption.

52. Clause 9.1 is clear and categorical in its terms. It starts with the words "the Bawri Group undertakes to complete or ensure the completion of the following conditions …" The covenant does not, therefore, admit of two interpretations. The finding, of the learned Arbitral Tribunal, that the Bawris were *not* required to complete or ensure completion of the Project Conditions is, therefore, in the teeth of Clause 9.1. It amounts to a clear rewriting of the clause.

53. This position is underscored by the further finding, of the learned Arbitral Tribunal, that, consequent to the change in the management of Calcom with effect from October 2012, the responsibility to fulfill the Project Conditions stood transferred from the Bawris to Dalmia. There is no such provision to be found, anywhere in the SHA, which does not envisage any such "transfer of obligation" at any stage. Requiring Dalmia to complete the Project Conditions would amount, in fact, to replacing Clause 9.1 of the SHA with an entirely new clause, which could be permitted only among the

parties themselves with consensus *ad idem*. In the considered opinion of this Court, the learned Arbitral Tribunal could not have embarked on such an exercise.

54. Clause 9.1 of the SHA does not, at any point, indicate that the fulfillment of the Project Conditions had been placed on the Bawri Group *only because the Bawri Group happened, at that point of time, to be the Promoter Group of, or in control, of Calcom*. This amounts to inserting, in Clause 9.1 of the SHA, the words "as the Promoter Group of Calcom" after the words "Bawri Group", which is impermissible.

55. Even if it were to be assumed, *arguendo*, that, in placing the responsibility of completion of the Project Conditions on the Bawri Group, Clause 9.1 of the SHA was impelled by the consideration that the Bawri Group happened to be the Promoter Group of Calcom and in control of its affairs, that would not, by inference, imply that, on the Bawri Group ceasing to be the majority shareholder of Calcom, or on Dalmia becoming the majority shareholder of Calcom, Clause 9.1 of the SHA would *ipso facto* stand modified by replacing the words "Bawri Group" with "Dalmia Group" or "Dalmias", or that the responsibility to fulfil the Project Conditions, which Clause 9.1 cast on the Bawris, would *ipso facto* stand shifted to Dalmia. That could only have been done by an amendment of the SHA in the manner envisaged in the SHA itself. While tentative and jerky movements, towards such amendment, might have been initiated, no amendment, ultimately, took place, and Clause 9.1 remains as it originally stood, to this day.

56. Equally, the reliance, by the learned Arbitral Tribunal on the words "the company shall", with which some of the sub-clauses of Clause 9.1 of the SHA begin, is also misconceived. These considerations cannot detract from the fact that the responsibility to fulfil the Project Conditions was unequivocally cast, by Clause 9.1 of the SHA, on the Bawri Group/the Bawris. The mere use of the words "the company shall" in some of the sub-clauses of Clause 9.1 would not lead to an implied amendment of Clause 9.1 consequent on change of shareholding of Calcom, or transfer the responsibility to fulfill the Project Conditions from the Bawris to Calcom.

57. For the same reason, the reliance, by the learned Arbitral Tribunal, on the fact that, in the definition of "parties" in the Amendment to the SHA dated 30th November 2012, the words "the Bawri Group" was replaced by "the Promoter Group" does not lead to an automatic amendment of Clause 9.1 of the SHA.

58. In fact, this Court is of the opinion that the aforenoted findings of the learned Arbitral Tribunal are a strained effort at trying to justify reading, in place of the words "the Bawri Group" in Clause 9.1 of the SHA, the words "the Dalmia Group", after control over Calcom was taken over by Dalmia from the Bawris. That, however, is simply not permissible. The Definitive Agreements executed among the parties envisage their amendment only by consensus *ad idem*, in writing and signed by all parties. The modality so contractually envisaged, for amendment of the Definitive Agreements – which include the SHA –

is obviously non-negotiable. An exercise towards that end having, even as per the learned Arbitral Tribunal, been attempted by the Bawris but to no fruitful end, the learned Arbitral Tribunal, could not, by the impugned arbitral Award, achieve, by arbitral fiat, what the Bawris could not achieve in the manner envisaged by the SHA, and effectively amend Clause 9.1 of the SHA.

59. Rewriting of commercial contractual terms is fatal to an arbitral award. It is completely impermissible in law. Interpretation of commercial contractual terms in a manner which is in the best interests of business efficacy and which would promote the intention of the parties to the contract, is undoubtedly permissible. That exercise cannot, however, extrapolate to rewriting of the contract. Where a contract requires that X has to perform a particular task, no court or Arbitral Tribunal can, in the interests of business efficacy or for any other consideration, hold that Y, and not X, would have to perform the said task. This would amount to the Court, or the learned Arbitral Tribunal, stepping into the shoes of the parties to the contract and modifying the contract without their consent. Needless to say, the law does not countenance such an exercise.

60. Commercial contracts, it must be remembered, are executed after a great deal of care and circumspection. The best of legal minds contribute to the execution of such contracts. A considerable amount of give and take is involved in such commercial contracts. Balance and compromise, keeping in mind the best interests of the contracting parties, is endemic to commercial contracts. At times, covenants in

commercial contracts may appear to be unduly strict, or even unworkable as they stand. The Court, or the Arbitral Tribunal has, however, to tread cautiously in arriving at any such finding.

61. While doing so, the distinction between "harshness" and "unworkability" has to be borne in mind. A contractual covenant which appears to be harsh, even to an undue degree, does not, *ipso facto*, become unworkable. Equally, a covenant which was workable at one point of time, but becomes unworkable owing to intervening events – which is the fate that has befallen Clause 9.1 of the SHA, according to the learned Arbitral Tribunal – cannot be ignored or bypassed on that ground. Much less can the learned Arbitral Tribunal use the supervening event as a ground to remodel, or rewrite, the contractual covenant.

62. The present case would, in fact, be the best example to illustrate this position. Clause 9.1 of the SHA specifically required the Bawris to complete and ensure completion of the Project Conditions enumerated in the Clause. The "Bawri Group" was defined in the SHA as "comprising of individuals and entities as set out in Schedule I" to the SHA. Clause 9.1 of the SHA, therefore, required the individuals and entities set out in Schedule I to the SHA, who comprised the Bawri Group, to ensure completion of the Project Conditions. That responsibility could not have been shifted, by the learned Arbitral Tribunal, to any other shoulder, merely because of situational exigencies that might have arisen in the interregnum.

63. It was for the parties who contracted among themselves to provide for such situational exigencies. If they had not done so, the learned Arbitral Tribunal could not step into their shoes and rewrite the contract in the manner which appeared, to it, to be most equitable and appropriate. Equity and commerce are often bad bedpartners. Where equity does not choose, willy nilly, to cohabit with commerce, no Court or Arbitral Tribunal can force them into an uncomfortable alliance.

64. Again, in this context, it must be remembered that such high value commercial contracts involve, in their execution, a considerable degree of foresight. The parties to the contract are expected to be aware of the possible situational changes that may ensue during the tenure of the contract. They are expected to provide for such changes. If they do not do so, the Court, or the Arbitral Tribunal, seized with the responsibility of interpreting the commercial contract, cannot, *suo motu*, step in and act for them, by providing for such changes.

65. In the particular circumstances of the present case, therefore, the learned Arbitral Tribunal could not have re-written Clause 9.1 of the SHA, thereby eviscerating the responsibility of the Bawris to ensure completion of the Project Conditions, as required by the said Clause, and transferring the responsibility to Dalmia. The fact that, during the tenure of the SHA, there may have been a change in the shareholding pattern in Calcom, or even a substantial shift of managerial control over Calcom, from the Bawris to Dalmia, cannot justify such an exercise. The learned Arbitral Tribunal could not have provided for

circumstances to which the contract executed among the parties did not cater.

66. In this context, it must be remembered that, in commercial contracts, consequences for default in compliance with the covenants of the contract are also provided for. Reciprocal obligations carry with them liabilities for failure to fulfil such obligations, with corresponding benefits to the other party or parties to the contract. In the present case, Clause 9.2 of the SHA and other covenants in the agreements executed among the parties provided for the consequences of failure, by the Bawris, to complete execution of the Project Conditions envisaged in Clause 9.1. The contractual benefits which thus enured in favour of Dalmia, as a consequence of the Bawris' default, could not legitimately have been denied to it. Fairness, in commercial contracts, is a two-way street. The learned Arbitral Tribunal could not have rewritten Clause 9.1, thereby denying, to Dalmia, the benefits which were envisaged as resulting, to it, in the contract, consequent on the Bawris' failure to fulfil the Project Conditions.

67. An arbitral award which is contrary to the terms of the contract between the parties is, apart from being violative of well-settled judicial decisions on the point, already cited *supra*, is also violative of Section 28(3)[16] of the 1996 Act which requires the Arbitral Tribunal to, in all cases, take into account the terms of the contract. The Arbitral Tribunal cannot, therefore, rewrite the terms of the contract as that would fly directly in the face of Section 28(3)[16].

68. The finding, of the learned Arbitral Tribunal, that "the obligation to complete the Project Conditions was to remain current only during the time the Bawris were in the management and control of Calcom and not beyond" amounts either to a complete re-writing of Clause 9.1, or to an introduction, into the SHA, of a clause which does not find any place therein. Equally, the finding, of the learned Arbitral Tribunal, that "the obligation to complete the Project Conditions was in that sense co-terminus with Bawri Groups managing control over the Company", again, amounts to re-writing the contract in the manner which, possibly, the learned Arbitral Tribunal found most equitable. Considerations of equity, cannot, however, justify rewriting of commercial contractual terms.

69. Reliance has also been placed, by the learned Arbitral Tribunal, on the "loss of ability", of the Bawris, to comply with the Project Conditions, once control over Calcom shifted from the Bawris to Dalmia. This, again, amounts to rewriting Clause 9.1 to make the responsibility of completing the Project Conditions, thereunder, conditional on the Bawri Group retaining control over Calcom. The *ability* of the Bawris to complete the Project Conditions has nothing to do with the *responsibility* of the Bawris to do so. Clause 9.1 of the SHA does not make the latter subject to the former, i.e. it does not indicate that the Bawri Group would be responsible to complete the Project Conditions only so long as it retained the ability to do so.

70. To elucidate the position in, perhaps, a more appropriate

fashion, the SHA does not indemnify the Bawris of the consequences of failure to fulfil the Project Conditions, as required by Clause 9.1, once the Bawris were no longer in a position – assuming that were the case – to do so. Any such reading of Clause 9.1 would amount to introducing, into the said Clause, a condition not to be found therein, by making the responsibility to perform the Project Conditions conditional upon the Bawri Group retaining the ability to do so.

71. In this context, it is worthwhile to note the finding of the learned Arbitral Tribunal that "the SHA did not stipulate that the obligation to complete the Project Conditions would continue regardless whether the Bawris were or were not in control of the company". This observation, again, in my respectful opinion, highlights the error in perception in which the learned Arbitral Tribunal has fallen. The SHA, specifically Clause 9.1 thereof, unequivocally places the responsibility to comply with the Project Conditions enumerated in the said Clause, on the Bawri Group. That is all. Control over Calcom is not even impliedly a consideration which colours or governs Clause 9.1. For that reason, the finding, of the learned Arbitral Tribunal, that "if the intention was to make the obligation go beyond the period of the Bawris managing control of the company, nothing prevented the parties from stipulating so" is equally misconceived. Rather, if the intention of the contract was to require the Bawri Group to complete the Project Conditions enumerated in Clause 9.1 only so long as it retained control over Calcom, nothing prevented Clause 9.1 from saying so. Clause 9.1, rather, unequivocally and without any caveat, rider, proviso or exception,

requires the Bawri Group, and none other, to comply with the Project Conditions.

72. In stressing on the "lack of ability" of the Bawris to complete the Project Conditions once majority shareholding in Calcom had been transferred to Dalmia, the learned Arbitral Tribunal errs in failing to notice that if, for any reason, the Bawri Group was unable to comply with the Project Conditions envisaged in Clause 9.1, the consequences envisaged in Clause 9.2 and other clauses of the agreements among the parties would inexorably follow. The agreements among the parties, specifically the SHA, therefore, took into account a circumstance in which the Bawri Group would fail to comply with the Project Conditions. Such failure could be on any ground, including inability. All parties to the SHA, with their eyes open, provided for the consequence of such failure. The consequence of such failure being beneficial to Dalmia, the learned Arbitral Tribunal could not divest Dalmia of that benefit by showing undeserved magnanimity to the Bawris, beyond that reflected in the contractual terms. The Court could not be more magnanimous than the contracting parties.

73. Whether Section 56[40] of the Contract Act, which deals with frustration of contracts, could justify the findings of the learned Arbitral Tribunal is also, however, a relevant consideration, to which this judgement would presently allude.

[40] **56. Agreement to do impossible act**. – An agreement to do an act impossible in itself is is void. **Contract to do an act afterwards becoming impossible or unlawful**. – A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Clause 3.20 of Amendment to SHA

74. The learned Arbitral Tribunal next proceeds to examine Clause 3.20 of the Amendment to the SHA.

75. Clause 3.20 commences with the words "the parties *hereby agree that* within 60 days from the effective date, *the parties shall mutually agree* on the amendments to Clause 9.1 with respect to Project Conditions …….". In view of the express words of Clause 3.20, the finding, of the learned Arbitral Tribunal, that the Clause was not in the nature of an agreement to agree, is obviously incorrect. In express terms and without any equivocation in that regard whatsoever, Clause 3.20 stipulates that the parties *agreed*, *vide* the said Clause, *to mutually agree* on the amendments to Clause 9.1. Clearly, therefore, the Clause was in the nature of an agreement to agree.

76. The finding of the learned Arbitral Tribunal that Clause 3.20 of the Amendment to the SHA was not an agreement to agree, therefore, being opposed to the very wording of the said Clause, constitutes an error apparent on the face of the record and, with respect, a "patent illegality" within the meaning of Section 34(2A)[17] of the 1996 Act.

77. That an agreement to agree is not enforceable at law is specifically held in ***Speech & Software Technologies v. Neos Interactive Ltd.***[41], which holds that "agreement to enter into the

[41] **(2009) 1 SCC 475**

agreement is neither enforceable nor does it confer any right upon the parties".

78. Again, the very opening words of Clause 3.20 indicate that the finding, of the learned Arbitral Tribunal, that, by operation of the said clause, Clause 9.1 of the SHA stood altered within the meaning of Section 62[11] of the Contract Act, is incorrect on facts as well as in la, and is opposed to the wording of the Clause. All that Clause 3.20 did was to chalk out a plan for the future. Indeed, the clause was incapable of execution or operation *in praesenti*, as it stood. It envisaged the Bawris and Dalmia mutually agreeing, within 60 days from the effective date, to the amendments in Clause 9.1 with respect to the Project Conditions etc. As such, the amendments to the Project Conditions in Clause 9.1 were also to be subject matter *of future agreement* between the parties. Clause 3.20 recorded the agreement between the Bawris and Dalmia *to mutually agree on the terms of such amendment* within 60 days of the effective date. It did nothing more. It did not agree on any terms of amendment. Indeed, it did not even envisage what the terms of amendment would be. That was to be subject matter of mutual agreement between the Bawris and Dalmia, to take place at a future date within 60 days of the effective date. Clause 3.20 merely evinces the intention of the parties to do so.

79. Mutual agreement cannot, however, be at gunpoint. Mutual agreement, by its very definition, requires consensus *ad idem*. Where such consensus *ad idem*, regarding the terms in which Clause 9.1 of the SHA was to be amended was lacking, quite obviously, there could

be no such mutual agreement. The very fact that Clause 3.20 envisaged future mutual agreement indicates that, in the absence of such future mutual agreement, the Clause would be inoperable and ineffective.

80. There is no dispute about the fact that there was, indeed, no such future mutual agreement among the parties, regarding amendment of Clause 9.1 of the SHA. It is, indeed, admitted by the Bawris and also acknowledged more than once in the impugned Award that no amendment to Clause 9.1 of the SHA, as envisaged by Clause 3.20 of the Amendment to the SHA, ever took place. The fond hope that, at some future time within 60 days of the effective date, the parties would mutually agree on the amendments to Clause 9.1, therefore, never materialized.

81. Clause 3.20 goes on to state that "such amended Project Conditions shall be deemed to form a part of the agreement". The word "such" etymologically, refers to the amended Project Conditions *as mutually agreed upon, between the parties, in terms of Clause 3.20 itself*. No such mutual agreement ever having taken place, there were, in fact, no "such amended Project Conditions". The reliance, on this covenant, in Clause 3.20 is, therefore, fundamentally misconceived.

82. The actual position, both in fact as well as in law, is that Clause 3.20 never worked out, owing to lack of mutual agreement between the parties. It would be facile to seek to lay the blame, in that regard, on one shoulder or the other. The ground reality was that there was no

mutual agreement between the Bawris and Dalmia regarding amendments to be effected in Clause 9.1 of the SHA. Clause 9.1, therefore, remain unamended, and continues to remain unamended till date.

83. There is no distinction, in law, between "alteration" and "amendment". Section 62[11] of the Contract Act does not use the expression "amendment". It envisages "novation, rescission and alteration". "Alternation" of a contract, within the meaning of Section 62[11], amounts to "amendment". The judgement of the Supreme Court in ***All India Power Engineer Federation v. Sasan Power Ltd***[42] unequivocally clarifies this position, by declaring that "alteration", in Section 62[11] of the Contract Act, "is understood in the sense of amendment" (in para 15 of the report). There is, therefore, no distinction between the two. The finding, in the impugned Award, that "the fact that no amendment was, pursuant to the agreement dated 30th November 2012, made in the Project Conditions does not mean that there was no alteration in the Shareholders Agreement dated 16th June 2012" is, therefore, erroneous in law. In the face of the law declared in ***All India Power Engineer Federation***[42], as also from the plain etymological equivalence between "amendment" and "alteration" as understood in law, it cannot, therefore, be held that, though there was no amendment to the SHA, the terms of the SHA nonetheless stood altered. Such a finding is legally, logically and etymologically unsustainable. It is also in the teeth of Section 62[11] of the Contract Act.

[42] **(2017) 1 SCC 487**

84. The admitted position being that no amendment of Clause 9.1 of the SHA ever took place, in terms of Clause 3.20 of the Amendment to the SHA, the sequitur, that inexorably has to follow, is that the terms of Clause 9.1 stood unaltered. Intention to alter may have existed; alteration, however, never occurred. An intention to alter a contract does not result, *ipso facto,* in alteration of the contract.

85. The concept of "alteration", in the context of Section 62[11] of the Contract Act, stands explained by the decision in ***All India Power Engineer Federation***[42], paras 15 and 16 of which read thus:

> "**15.** Under Section 62, apart from novation of a contract and rescission of a contract, alteration of a contract is mentioned. *Alteration is understood here, in the facts of the present case, in the sense of amendment. It is settled law that an amendment to a contract being in the nature of a modification of the terms of the contract must be read in and become a part of the original contract in order to amount to an alteration under Section 62 of the Contract Act.* This is clear from ***Juggilal Kamlapat v. N.V. Internationale Crediet-En-Handels Vereeninging 'Rotterda'***[43], in para 15 of which it is stated:
>
> > "15. The effect of the alterations or modifications is that there is a new arrangement; in the language of Viscount Haldane in ***Morris* v. *Baron & Co.***[44], "a new contract containing as an entirety the old terms together with and as modified by the new terms incorporated". The modifications are read into and become part and parcel of the original contract. The original terms also continue to be part of the contract and are not rescinded and/or superseded except insofar as they are inconsistent with the modifications. Those

[43] **AIR 1955 Cal 65**
[44] **1918 AC 1 (HL)**

> of the original terms which cannot make sense when read with the alterations must be rejected. In my view the arbitration clause in this case is in no way inconsistent with the subsequent modifications and continues to subsist."
>
> **16.** No such thing having occurred on the present facts, it is clear that there is in fact no amendment by written agreement to the PPA. To this extent, the learned counsel for Sasan are correct."
>
> (Emphasis supplied)

86. Indeed, this aspect stands covered even by Clause 22.1 of the SHA which states that "no modification, amendment or waiver of any of the provisions of this Agreement shall be effective unless made in writing specifically referring to this Agreement and duly signed by the parties". In a like vein, Clause 22.9 of the SHA states that "no waiver of any provision of this agreement or consent to any departure from it by any party shall be effective unless it is in writing". As per the said Clause, amendment of the SHA could only be by mutual agreement in writing. No such mutual agreement in writing, amending Clause 9.1 of the SHA, was ever drawn up. The contractual contours of the agreements between the parties, in the present case, did not envisage amendment in any other manner or form.

87. The learned Arbitral Tribunal has, therefore, fundamentally erred in holding that, by operation of Clause 3.20 of the Amendment to the SHA, Clause 9.1 of the SHA stood altered and was rendered inoperative. Not only would the said finding not be justified by Clause 3.20 as it stands; it is also contrary to Clauses 22.1 and 22.9 of the SHA. It is, therefore, an error apparent on the face of the record,

amounting to "patent illegality" within the meaning of Section 34(2A)[17] of the 1996 Act.

88. The reliance, by the learned Arbitral Tribunal, on Section 18[12] of the Specific Relief Act, 1963 is also misconceived, as it applies only where, subsequent to execution of a contract, the parties varied its terms. This Court has already held, hereinabove, that Clause 3.20 of the Amendment to the SHA did not vary the terms of Clause 9.1 or Clause 9.2 or of any other clause of the SHA. Section 18[12] of the Specific Relief Act, therefore, does not apply.

89. The decision to excuse Bawris of the contractual responsibility envisaged by Clause 9.1 of the SHA, to ensure completion of the Project Conditions, cannot, therefore, sustain either on an interpretation of the said clause or by operation of Clause 3.20 of the Amendment to the SHA.

90. The entire Arbitral Award, being founded on the premise that, with the transfer of management of Calcom from the Bawris to Dalmia, and by operation of Clause 3.20 of the Amendment to the SHA, the Bawris stood excused of the responsibility of complying with the Project Conditions in terms of Clause 9.1 and that the responsibility in that regard stood transferred to Dalmia, the impugned Award stands vitiated in its entirety even on that score.

<u>The AOA of Calcom</u>

91. The omission, on the part of the learned Arbitral Tribunal, in

taking note of the fact that, post amendments of the Definitive Agreements in November 2012, the AOA of Calcom, which incorporated the requirement of fulfilment of the Project Conditions by the Bawris remained unaltered is, in the respectful opinion of this Court, a serious infirmity, which vitiates the impugned Award.

92. The learned Arbitral Tribunal has failed to note that, post the amendment of the SHA dated 30th November 2012, the AOA of Calcom, though amended, continued to reflect the Project Conditions, as contained in the unamended AOA. The only difference was that the requirement of fulfilment of the Project Conditions as per Clause 9.1 of the SHA were reflected, in the pre-amended AOA in Articles 57 and 58 thereof, and were reflected, in the post amended AOA, in Articles 53 and 54 thereof[45].

93. The judgment of the Supreme Court in ***Tata Consultancy Services***[4] recognizes, in paras 186 and 187 thereof, that the Articles of Association of a company constitute a contract among its shareholders and is the "backdrop of Company Law". In para 186, the Supreme Court has clearly held that a court cannot declare any of the Articles of Association of a company to be illegal and, in para 188, it was declared that a person who willingly become a shareholder in a company and thereby subscribes to its Articles of Association could not later challenge the said Articles.

94. Para 261 of the report in ***Vodafone International Holdings***

[45] **(Refer para 30 *supra*)**

BV[18] is even more emphatic on the point, and read thus:

> "**261.** Shareholders' Agreement (for short "SHA") is essentially a contract between some or all other shareholders in a company, the purpose of which is to confer rights and impose obligations over and above those provided by the company law. *SHA is a private contract between the shareholders compared to the articles of association of the company, which is a public document. Being a private document it binds parties thereof and not the other remaining shareholders in the company*. Advantage of SHA is that it gives greater flexibility, unlike the articles of association. It also makes provisions for resolution of any dispute between the shareholders and also how the future capital contributions have to be made. *Provisions of the SHA may also go contrary to the provisions of the articles of association, in that event, naturally provisions of the articles of association would govern and not the provisions made in SHA*."
>
> (Italics and underscoring supplied)

95. In their capacity as shareholders of Calcom, the Bawris were bound by the Articles of Association of Calcom. Irrespective of Clause 3.20 of the amendment to the SHA, therefore, inasmuch as the requirement of completion of Project Conditions was specifically engrafted both in the pre-amended AOA as well as in the amended AOA of Calcom, the Bawris could not be excused from the requirement of compliance therewith.

96. The fact that, even after the execution of the new/amended agreements among the parties, consequent to change in the shareholdings of Calcom in October 2012 and December 2012, the AOA of Calcom, though amended, continued to reflect the Project Conditions as requiring to be mandatorily complied with, *by the*

Bawris, indicates that it was never the intention of the parties to do away with the said obligations. The reliance, by the learned Arbitral Tribunal, on Clause 3.20 of the amendment to the SHA, cannot, therefore, be regarded as appropriate, given the fact that the requirement of mandatory completion of the Project Conditions continued to be reflected in the amended AOA of Calcom.

97. In failing to consider the above contention, though specifically addressed to it by Dalmia, the impugned award stands fatally imperiled, applying the principle enunciated in ***Ssangyong***[32]**.**

Clause 20.4.2 of the Amendment to the SHA

98. The learned AT has also held that Clause 20.4.2 of the Amendment to the SHA "took the wind out of the sails" of Clause 9.1 of the SHA. The learned Arbitral Tribunal acknowledged the position that failure, on the part of the Bawris, to complete the Project Conditions would entitle Dalmia, under Clause 9.2 (a), to purchase the entire shareholding of the Bawris in Calcom for ₹ 1. The learned Arbitral Tribunal observed that, however, non-transfer by the Bawri group of its shareholding in Calcom to Dalmia for ₹ 1, in terms of Clause 9.2(i) of the SHA, amounted to a "specific default" by the Bawri group under sub-clause (c) of Clause 20.4.1 of the Amendment to the SHA. Occurrence of a specific default event resulted in the consequences envisaged by Clause 20.4.2 of the Amendment to the SHA. Sub-clause (b) of Clause 20.4.2 required Dalmia, in such event, to call upon the Bawris to sell their entire shareholding in Calcom to Dalmia at the "specific default call price". The learned Arbitral

Tribunal has observed that as, in view of Clause 20.4.2(b) of the Amendment to the SHA, *this was the only option* available to Dalmia, were the Bawris not to transfer their shares in Calcom to Dalmia for ₹ 1 in terms of Clause 9.2(i), the Dalmia could not seek to enforce the obligation envisaged by the said Clause 9.2(i). Thus, holds the learned Arbitral Tribunal, Clause 20.4.2 (b) of the Amendment to the SHA "took the wind out of the sails" of Clause 9.2(i) of the SHA.

99. The error in this finding is obvious. The error constitutes a legitimate ground to interfere with the impugned award as it ignores an express stipulation in Clause 20.4.2(b) and is, thereby, contrary to the contractual covenants. The finding of the learned Arbitral Tribunal that, in the event of breach of Clause 9.2(i), Dalmia had no option but to proceed under Clause 20.4.2(b), ignores the parenthesized words "but not the obligation" contained in the said clause. Clause 20.4.2(b) makes it clear that, in the event of "specific default" by the Bawris within the meaning of Clause 20.4.1, Dalmia would have the right to proceed in accordance with Clause 20.4.2 (b), *but would not be obliged to do so*. The finding, of the learned Arbitral Tribunal, that Clause 20.4.2 obliged Dalmia to proceed under that clause alone, with no other option available to it, is, therefore, directly contrary to the clause and overlooks the words "but not the obligation" to be found therein. It amounts, therefore, to "patent illegality" within the meaning of Section 34(2A)[17] of the 1996 Act.

Individual obligations under Clause 9.1 of the SHA

100. The learned Arbitral Tribunal has proceeded, Project Condition

by Project Condition, through various conditions envisaged in Clause 9.1 of the SHA. The learned Arbitral Tribunal has held that, while some of the Project Conditions stood fulfilled, others had been given up by Dalmia and, with respect to others, Bawris had done everything possible and within their control, to comply with the Project Conditions. Substantial compliance with the Project Conditions thus having been effected by Bawris, and failure to fulfil all the Project Conditions not been attributable to any negligence on their part, the learned Arbitral Tribunal holds that no adverse consequences could be allowed to visit the Bawris.

101. Inasmuch as it is an admitted position, even in the impugned award, that all Project Conditions envisaged in Clause 9.1 had not been completely fulfilled by the Bawris, it is not necessary to enter into the specifics of each Project Condition or the extent to which it had, or had not, been fulfilled. Suffice it to reiterate that fulfilment of all Project Conditions by the Bawri group was mandatory under Clause 9.1.

102. The SHA does not envisage substantial compliance, or making of best efforts, by the Bawris, as sufficient to constitute fulfilment of the Project Conditions within the meaning of Clause 9.1. In introducing the elements of "best efforts" and "substantial compliance" into Clause 9.1, therefore, the learned Arbitral Tribunal has, once again, rewritten the said clause. Albeit in the context of compliance with the terms of bidding documents, the Supreme Court has, in para 34 to 36 of the report in ***National High Speed Rail Corp.***

Ltd. v. Montecarlo Ltd.[46] held thus:

> "**34.** Even otherwise it is required to be noted that once a conscious decision was taken by JICC and JICA, who can be said to be the author of the terms and conditions of the tender document, taking a view and stand that the bid submitted by the original writ petitioner suffers from material deviation and the said decision was taken after considering the relevant clauses of ITB, thereafter it was not open for the High Court to interfere with such a conscious decision in exercise of powers under Article 226 of the Constitution of India and take a view that the bid submitted by the original writ petitioner was in substantial compliance.
>
> **35.** As observed hereinabove, there are as such no allegations of mala fides and/or favouritism at all. *Therefore, the High Court has erred in holding that the bid submitted by the original writ petitioner was in substantial compliance. Whether the bid submitted by a bidder suffers from any material deviation and/or any substantial deviation should be left to the author of the bid document* and normally, the High Courts, in exercise of the powers under Article 226 of the Constitution of India, should not interfere with the same unless such a decision is found to be mala fide and/or there are allegations of favouritism and/or such a decision is arbitrary.
>
> **36.** In the present case, as observed hereinabove, the decision to reject the bid of the original writ petitioner at the first stage on the ground that the bid submitted by the original writ petitioner suffers from material deviation and the same cannot be said to be in substantial compliance has been taken by the Tender Committee in concurrence with JICC and JICA. The role of JICA has been extensively dealt with by the Gujarat High Court in the decision referred to hereinabove. Therefore, when JICA has agreed to fund such a huge amount and the terms and conditions of the tender document are finalised by JICC/JICA, and, therefore, when conscious decision has been taken by JICC/JICA, the same was not required to be interfered with by the High Court lightly and when such a decision of the High Court would have a cascading effect on such a foreign funded Mega project."

[46] **(2022) 6 SCC 401**

(Emphasis supplied)

103. The learned Arbitral Tribunal has relied upon the words "to the reasonable satisfaction of the Dalmia Group" as contained in Clause 9.1 of the SHA, to hold that "substantial compliance", by the Bawris, with the Project Conditions, was sufficient to constitute compliance with Clause 9.1. The reliance is, in my respectful opinion, misplaced. The said expression does not, in any manner, dilute the requirement of implicit completion, by the Bawris, of the Project Conditions enumerated in Clause 9.1 to that of "substantial compliance". Such an interpretation, if accorded to Clause 9.1, would be totally impermissible in law. The words "to the reasonable satisfaction of the Dalmia group", as contained in the said clause, merely imply that completion of the Project Conditions by the Bawris has to be to the reasonable satisfaction of the Dalmia group. The "reasonability" is, therefore, not with respect to the degree or extent of compliance with the Project Conditions, but with respect to the satisfaction of the Dalmia group, with compliance of the Project Conditions by the Bawris. *Complete compliance with the Project Conditions, by the Bawris, is non-negotiable under Clause 9.1.* The question of whether such compliance has, or has not taken place, would be decided by the Dalmia Group, *as per its reasonable satisfaction*. It would be contrary to the express words of the clause, therefore, to read the words "to the reasonable satisfaction of the Dalmia group" as diluting the requirement of complete compliance, by the Bawris, with the Project Conditions enumerated in Clause 9.1.

104. Having so observed, and at the cost of repetition, it must be reiterated that introduction, into commercial contracts, of concepts of "substantial compliance" and "best effort compliance" where the contract itself does not say so, can be fraught with serious consequences. Non-compliance with the terms of a commercial contract has its contractual sequelae. The party guilty of non-compliance suffers adverse consequences, and the opposite party, in nearly every case, benefits as a result. It would be manifestly unjust to deny, to the opposite party the contractual benefits to which it is entitled, consequent to non-compliance, by the other, of the contractual covenants, by introducing, into the covenants, the principle of "substantial compliance" not to be found therein. Even for this reason, therefore, I am unable to subscribe to the view expressed by the learned Arbitral Tribunal that, so long as the Bawris had "substantially complied" with Clause 9.1 or done everything within their power to ensure such compliance, they could not be visited with the consequence of non-compliance.

Section 56[40] of the Contract Act

105. Though the learned Arbitral Tribunal has not specifically so noted, the findings, in the impugned award, especially those related to "substantial compliance", impliedly invokes Section 56[**40**] of the Contract Act, which deals with frustration of contracts. Section 56[40], read with the first proviso thereto, holds that a contract to do an act which, after the contract is made, becomes impossible, becomes void when the act becomes impossible or unlawful. The learned Arbitral

Tribunal holds that with the passing of control, of Calcom, from the Bawris to Dalmia, it became impossible for the Bawris to comply with the Project Conditions and, therefore, there was no further requirement of such compliance by the Bawris.

106. In this context, Dalmia relied, before the learned Arbitral Tribunal, on the judgment of the Supreme Court in ***Naihati Jute Mills Ltd.*** [15], and, in the opinion of this Court, the reliance was well placed.

107. In ***Naihati Jute Mills.***[15], the petitioner Naihati Jute Mills Ltd. ("Naihati" hereinafter) contracted with the respondent Khayaliram Jagannath ("Khayaliram" hereinafter) to sell 2000 bales of jute cuttings from Pakistan. Import of Pakistani jute required an import licence. The contract between Naihati and Khyaliram, therefore, provided that, if Naihati, as the buyer of the cuttings, failed to provide an import licence by December 1958, the contract would be settled at a lower rate. Naihati applied for an import licence. The application was, however, rejected by the licensing authority and the Jute Commissioner. Khayaliram, therefore, claimed damages from Naihati for having failed to furnish the licence required to be furnished by the contract. Naihati disclaimed liability. The learned Arbitral Tribunal held that Naihati was in default and held Naihati liable to pay damages in that regard.

108. Naihati applied to set aside the award raising, *inter alia*, the contention that it had done all that could be expected of it to obtain the licence and that, if it could not do so, that was because of an intervening change in the government policy. The contract having

thus become impossible to perform, Naihati submitted that no adverse consequences could be visited on it for that reason. Khyaliram, *per contra*, contended that, even if performance of the contract by Naihati had become impossible by reason of supervening circumstances, once Naihati had taken upon itself the absolute obligation to procure the licence, even if the contract was discharged by frustration, the consequences of default would nonetheless visit Naihati.

109. The learned Single Judge of the High Court of Calcutta held that the contract could not be said to have been discharged by frustration and that, even if it was, Naihati had to suffer the consequences of default. Aggrieved, Naihati appealed to the Supreme Court.

110. Paras 5 to 12 of the report in ***Naihati Jute Mills.***[15] are of significance and may be reproduced thus:

> "**5.** Section 56 of the Contract Act inter alia provides that a contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. It also provides that where one person has promised to do something which he knew, or, with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such a promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance. *As envisaged by Section 56, impossibility of performance would be inferred by the courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the*

altered circumstances the bargain should no longer be held binding. The courts would also infer that the foundation of the contract had disappeared either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed. Impossibility of performance may also arise where without any default of either party the contractual obligation had become incapable of being performed because the circumstances in which performance was called for was radically different from that undertaken by the contract. But the common law rule of contract is that a man is bound to perform the obligation which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible. Courts in England have, however, evolved from time to time various theories to soften the harshness of the aforesaid rule and for that purpose have tried to formulate the true basis of the doctrine of discharge of contract when its performance is made impossible by intervening causes over which the parties had no control. *One of such theories is what has been called the theory of implied term* as illustrated in ***F.A. Tamplin Steamship Co. Ltd.* v. *Anglo Mexican Petroleum Products Co. Ltd.*** [47] where Lord Loreburn stated:

> "A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or a state of things would continue to exist. And if they must have done so, then a term to that effect would be implied; though it be not expressed in the contract."

He further observed:

> "It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted … Were the altered

[47] **(1916) 2 AC 397**

> conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, "if that happens, of course, it is all over between us'."

The same theory in a slightly different form was expressed by Lord Watson in ***Dahl* v. *Nelson, Donkin & Co.***[48] in the following words:

> "The meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and sensible men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

In the first case the term is a genuine term, implied though not expressed; in the second it is a fiction, something added to the contract by the law [Anson, *Principles of the English Law of Contract*, 22nd Edn. 464]. *It appears that the theory of implied term was not found to be quite satisfactory as it contained elements of contradiction*. For, if the parties foresaw the circumstances which existed at the date of performance they would provide for them in the contract; if they did not, that meant that they deliberately took the risk and therefore no question of an implied term could really arise. In ***Russkoe* v. *John Strik & Sons Ltd***[49]. (quoted at p. 466 in *Anson's Law of Contract*, 22nd Edn.)] *Lord Atkin propounded the theory of disappearance of the foundation of contract stating that he could see no reason why if certain circumstances, which the court would find, must have been contemplated by the parties as being of the essence of the contract and the continuance of which must have been deemed to be essential to the performance of the contract, the court cannot say that when these circumstances cease to exist, the contract ceases to operate. The third theory is that the court would exercise power to qualify the absolutely binding nature of the contract in order to do what is just and reasonable in the new situation*. Denning, L.J. in *British*

[48] **(1881) 6 AC 38**
[49] **(1922) 10 ILR 214**

Movietones Ltd. v. London and District Cinemas Ltd.[50] expounded this theory as follows:

> *"Even if the contract is absolute in its term, nevertheless, if it is not absolute in intent, it will not be held absolute in effect. The day is done when we can excuse an unforeseen injustice by saying to the sufferer, 'It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself.' We no longer credit a party with the foresight of a prophet or his lawyers with the draftsmanship of a Chalmers."*

This theory would mean that the Court has inherent jurisdiction to go behind the express words of the contract and attribute to the Court the absolving power, a power consistently held not to be inherent in it. The House of Lords in the appeal from that decision [reported in 1952 A.C. 166] discarded the theory. In more recent times the theory of a change in the obligation has come to be more and more generally accepted. Lord Radcliffe, the author of this theory, in ***Davis Contractors v. Fareham U.D.C.***[51] formulated it in the following words:

> "*Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would tender it a thing radically different from that which was undertaken by the contract."*
>
> *It is not hardship or inconvenience or material loss which brings about the principle of frustration into play. There must be a change in the significance of obligation that the thing undertaken would, if performed, be a different thing from that which was contracted for."*

6. *These theories have been evolved in the main to adopt a realistic approach to the problem of performance of*

[50] **[(1951) 1 KB 190**
[51] **(1956) AC 166**

contract when it is found that owing to causes unforeseen and beyond the control of the parties intervening between the date of the contract and the date of its performance it would be both unreasonable and unjust to exact its performance in the changed circumstances. Though none of them was fully accepted and the court construed the contracts coming before them applying one or the other of them as appearing to be more rational than the other, the conclusions arrived at were the same. The necessity of evolving one or the other theory was due to the common law rule that courts have no power to absolve a party to the contract from his obligation. On the one hand, they were anxious to preserve intact the sanctity of contract while on the other the courts could not shut their eyes to the harshness of the situation in cases where performance became impossible by causes which could not have been foreseen and which were beyond the control of parties.

7. Such a difficulty has, however, not to be faced by the courts in this country. In ***Ganga Saran v. Ram Charan***[52] this Court emphasized that so far as the courts in this country are concerned they must look primarily to the law as embodied in Section 32 and 56 of the Contract Act. In ***Satyabrata Ghose* v. *Mugneeram***[53] also, Mukherjee, J. (as he then was) stated that Section 56 laid down a rule of positive law and did not leave the matter to be determined according to the intention of the parties. *Since under the Contract Act a promise may be expressed or implied, in cases where the court gathers as a matter of construction that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56*. Although in English law such cases would be treated as cases of frustration, *in India they would be dealt with under Section 32*. In a majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from performance of the contract. *The Court can grant relief on the ground of subsequent impossibility when it finds that the whole purpose*

[52] **(1952) SCR 36**
[53] **(1954) SCR 310**

or the basis of the contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract. There would in such a case be no question of finding out an implied term agreed to by the parties embodying a provision for discharge because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs, it is the court which can pronounce the contract to be frustrated and at an end. This is really a positive rule enacted in Section 56 which governs such situations.

8. The question then is, was there a change in the policy of the Government of India of a total prohibition of import of Pakistan jute as contended by the appellants which was not foreseen by the parties and which intervened at the time of performance and which made the performance of their stipulation to obtain a licence impossible? It is clear from the circulars produced during the trial that as early as March 1958 the Government of India had issued warnings that import of Pakistan jute would be permitted to the absolute minimum and that the jute mills should satisfy their needs by purchasing Indian jute. It appears that at the time when the parties entered into the contract the policy was to grant licences in the ratio of 5 : 1, that is, if an importer had bought 500 maunds of Indian jute he would be allowed a licence to import 100 maunds of Pakistani jute. This policy is indicated by the circular dated July 17, 1958 issued by the Indian Jute Mills Association to its members. Such licences would be issued to mills who had stock of less than two months consumption. As already stated, the appellants applied on August 8, 1958 for an import licence for 14,900 maunds and the Jute Commissioner declined to certify that application on the ground that they held stock sufficient to last them for some months. In November 1958, they applied again, this time stating that their stock had been reduced and in December 1958 they were told to buy Indian jute. The said Circular appears to show that the Government had not placed a total embargo on import of Pakistan jute. At any rate, such an embargo was not proved by the appellants. It appears, on the contrary, from the documents on record that the policy of the Government was that the licensing authorities would scrutinize the case of each applicant on its

own merit.

9. *What is however important in cases such as the one before us is to ascertain what the parties themselves contemplated at the time of entering the contract*. That the appellants were aware that licences were not issued freely is evident by the provisions of the contract themselves which provide that if the appellants failed to furnish to the respondents the import licence in November 1958, the period of shipment was to be extended upto December 1958 and the price in that event would be enhanced by 50 np. The contract further provided that if the appellants were not able to furnish the licence by December 1958 they would pay damages at the market rate prevailing on January 2, 1959 for January-February shipment goods. *These clauses clearly indicate that the appellants were conscious of the difficulty of getting the licence in time and had therefore provided in the contract for excusing delay from November to December 1958 and for the appellants' liability to pay damages if they failed to procure it even in December 1958. The contract, no doubt, contained the printed term that the buyers would not be responsible for delay in delivering the licence but such delay as therein provided was to be excused only if it occurred by such reasons as an act of God, war, mobilization etc. and other force majeure. It is nobody's case that the performance became impossible by reason of such force majeure*. As already stated when the appellants applied for the licence, the authorities refused to certify their application because they held at that time stock for more than 2 months. *It is therefore manifest that their application was refused because of a personal disqualification and not by reason of any force majeure. Since this was the position there is no question of the performance becoming impossible by reason of any change in the Government's policy which could not be foreseen by the parties. No question also would arise of importing an implied term into the contract.*

10. Assuming, however, that there was a change of policy and that the Government in the intervening period had decided to place an embargo on import of Pakistani jute, the question would still be whether the appellants were relieved from liability for their failure to deliver the licence. *A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to*

*absolve a party from the performance of his part of the contract merely because its performance has become onerous on account of an unforeseen turn of events. [**Alopi Parshad & Sons v. Union of India**[54], at p. 808] The question would depend upon whether the contract which the appellants entered into was that they would make their best endeavors to get the licence or whether the contract was that they would obtain it or else be liable for breach of that stipulation*. In a case falling under the former category, Lord Reading C.J. in ***Anglo-Russian Merchants-Traders* v. *John Batt & Co.***[55] observed *that there was no reason why the law should imply an absolute obligation to do that which the law forbids*. It was so said because the Court construed the contract to mean only that the sellers there were to make their best efforts to obtain the requisite permits. As a contrast to such a case there are the cases of ***Pattahmull Rajeshwar* v. *K.C. Sethia***[56] and ***Peter Cassidy Seed Co.* v. *Osuustickaanppa***[57] where the courts have observed that *there is nothing improper or illegal for a party to take upon himself an absolute obligation to obtain a permit or a licence and in such a case if he took the risk he must be held bound to his stipulation*. As Lord Sumner in ***Bank Lime Ltd.* v. *Capel (A) Co. Ltd***[58]**.** [at p 455] said:

> "*Where the contract makes provision (that is, full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other different provisions for the same contingency called by different name."*

In such a case the doctrine of discharge by frustration cannot be available, nor that of an implied term that the existing state of affairs would continue at the date of performance. The reason is that where there is an express term the court cannot find on construction of the contract an implied term inconsistent with such express term.

11. *In our view, the provision in the contract that whereas the delay to provide a licence in November 1958 was to be excused but that the contract was to be settled at the market*

[54] **[1960] 2 SCR 793**
[55] **(1917) 2 KB 679**
[56] **(1951) 2 All ER 352**
[57] **(1957) WLR 273**
[58] **(1919) AC 435**

rate prevailing on January 2, 1959 if the appellants failed to deliver the licence in December 1958 clearly meant that the appellants had taken upon themselves absolutely the burden of furnishing the licence latest by the end of December 1958 and had stipulated that in default they would pay damages on the basis of price prevailing on January 2, 1959. That being the position the defence of impossibility of performance or of the contract being void for that reason or that the court should spell out an implied term in the contract would not be available to them.

12. *In the view that we take that the said contract cannot be said to be or to have been void and that in any event the stipulation as to obtaining the import licence was absolute, the question that the arbitration clause perished along with the contract and consequently the arbitrators had no jurisdiction cannot arise. But assuming that the appellants had established frustration even then it would not be as if the contract was ab initio void and therefore not in existence. In cases of frustration it is the performance of the contract which comes to an end but the contract would still be in existence for purposes such as the resolution of disputes arising under or in connection with it. The question as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes.* (***Union of India* v. *Kishorilal*[59]).**

(Emphasis supplied)

111. Where, therefore, the contract, as worded, requires absolute compliance with its terms, and provides for the consequences of non-compliance, it is not open to a court or an arbitral tribunal to excuse a defaulter from such consequences by invoking the concept of frustration of contract or impossibility of performance, unless such a covenant is to be found in the contract itself. In the present case, the consequences of default, on the part of the Bawris, in complying with

[59] **(1960) 1 SCR 514**

the Project Conditions as required by Clause 9.1 of the SHA, were to be found in other covenants both of the SHA as well as other agreements executed among the parties. These consequences, therefore, had inexorably to follow, and the learned Arbitral Tribunal could not have indemnified the Bawris of said consequences on the ground that the Project Conditions had become impossible of compliance. For this reason, too, the findings of the learned Arbitral Tribunal cannot sustain.

112. Compliance with the Project Conditions, under Clause 9.1 of the SHA, resulted in certain benefits to the Bawris. Failure of such compliance, on the other, resulted in benefits to Dalmia. The SHA could not be so construed so as to extend, to the Bawris, the benefit of compliance, but to deny, to Dalmia, the benefits of non-compliance. The impugned Arbitral Award goes a step further, by allowing the Bawris the benefits to which compliance with the Project Conditions alone would entitle them, even though they are, admittedly, in default thereof.

113. The findings of the learned Arbitral Tribunal on Issues 5, 6, 8 and 13, as framed by it cannot, therefore, sustain.

Re. Issue No. 7 – Whether Dalmia had waived Clauses 9.1 and 9.2 of the SHA dated 16th January 2012

114. Clauses 22.1 and 22.9 of the SHA dated 16th January 2012 and Clause 9.6.1 of the amendment to Share Holders Agreement dated 30th November 2012 required waiver of any of the provisions of the SHA

to be in writing, duly signed by the parties, in order for it to be effective. Having noted this fact, the learned Arbitral Tribunal holds that Clause 3.20 of the amendment to the SHA amounted to waiver, in writing, of the obligations and liabilities contained in Clauses 9.1 and 9.2 of the SHA, within the meaning of Clause 22.1 to 22.9 of the SHA and Clause 9.6.1 of the amendment to the SHA. The relevant passage, from the impugned award, which so holds, reads as under:

> "On behalf of the Claimants, it was contended and in our opinion, rightly so that there is no particular form in which such waiver could be made. All that was required was that waiver ought to be in writing and signed by the parties. *That requirement stipulated under the Clauses 22.1 and 22.9 (Supra) is in our opinion satisfied by Clause 3.20 of Share Holders Agreement dated 30th November 2012.* Clause 3.20 extracted earlier records an agreement between the Parties that Clause 9. 1 shall be suitably amended within a period of 60 days to provide for amended Project Conditions and other matters incidental thereto. We have referred to the said stipulation at some length while dealing with Issue No. 6. *What is however evident from a plain reading of Clause 3. 20 is that the Project Conditions as stipulated in Clause 9.1 of Share Holders Agreement dated 16th January, 2012 in the form in which they were stipulated stood waived. It is further evident from a reading of Clause 3.20 that only amended Project Conditions would be a part of the Agreement and not conditions that were stipulated in Clause 9.1. That being the case, Clause 9.1 stood clearly waived by the Dalmias.* The fact that amended Project Conditions were not stipulated for whatever reasons is beside the point. If the parties had indeed agreed upon the amended Project Conditions also, such Project Conditions would then have become a part of the Agreement which would also identify the parties responsible for completion of the same. The very fact that the parties did not arrive at a consensus as to the amended Project Conditions would not mean that there was no waiver of Clause 9.1 as argued by Mr. Virmani. Clause 3.20, in our opinion, constitutes a valid waiver of Clause 9.1 of the Share Holders Agreement dated 16th January 2012. Issue No. 7 is answered

accordingly."

115. The findings of the learned Arbitral Tribunal in the afore-extracted passages, from the impugned award, are, again, contrary to the contractual covenants. The combined effect of Clause 22.1 and 22.9 of the SHA and Clause 9.6.1 of the amendment to the SHA is, quite clearly, that a waiver of the terms of the SHA, in order for it to be effective, has not only to be in writing and signed by the parties, but has to be specific in terms. Clause 22.9 clarifies the position by ordaining that a waiver of consent shall be effective only for the purpose for which it is given. To the same effect is stipulation (ii) in Clause 9.6.1 of the amendment to the SHA, which specifies that "no waiver that may be given by a party will be applicable except in the specific instance for which it is given".

116. Apropos waiver, the Supreme Court has, in ***State of Punjab v. Davinder Pal Singh Bhullar,***[60] , relying on several earlier decisions, held, in para 41 of the report, as under:

> "41. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide ***Dawson's Bank, Ltd. v. Nippon Menkwa Kabushiki Kaisha,***[61], ***Basheshar Nath v. CIT***[62], ***Mademsetty Satyanarayana v. G. Yelloji Rao***[63], ***Associated***

[60] **(2011) 14 SCC 770**
[61] **(1934-35) 62 IA 100**
[62] **AIR 1959 SC 149**
[63] **AIR 1965 SC 1405**

> ***Hotels of India Ltd. v. S.B. Sardar Ranjit Singh***[64], ***Jaswantsingh Mathurasingh v. Ahmedabad Municipal Corpn***[65] , ***Sikkim Subba Associates v. State of Sikkim***[66] and ***Krishna Bahadur v. Purna Theatre***[67].)"

Intentional abandonment of a known right is, therefore, the *sine qua non* for waiver, in the law of contract. Thus viewed, Clause 3.20 of the Amendment to the SHA, which merely records the agreement of the parties to agree, at some future point of time, to the amendments to be carried out to the SHA, cannot, howsoever widely construed, amount to a waiver either of the obligations of the Bawris under Clause 9.1, or of the rights of Dalmia under Clause 9.2, of the SHA.

117. No intention to abandon the effect of Clause 9.1 and 9.2 is forthcoming from Clause 3.20 of the Amendment to the SHA, even if the clause were to be stretched to breaking point. I am, with respect, unable to concur, either, with the observation, of the learned Arbitral Tribunal, that it was "beside the point" that amended Project Conditions had not been stipulated. By acknowledging that amended Project Conditions had not been stipulated, the learned Arbitral Tribunal has acknowledged the fact that the original Project Conditions continued to operate in their original and unamended form. The sequitur would be, therefore, that there was no waiver of the original Project Conditions as contained in Clause 9.1, or of the consequence of non-compliance as envisaged by Clause 9.2 of other clauses of the agreements between the parties. To that extent, therefore, the finding, in the afore-extracted passage from the

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[64] **AIR 1968 SC 933**
[65] **1992 Supp (1) SCC 5**
[66] **(2001) 5 SCC 629**

impugned award is also contradictory in terms. For the same reason, the concluding observation, in the said passage, that the "fact that the parties did not arrive at a consensus as to the amended Project Conditions would not mean that there was no waiver of Clause 9.1" is also unsustainable. The finding is inherently contradictory in terms.

118. Even if the reasoning of the learned Arbitral Tribunal, as reflected in the afore-extracted passage has to be treated as correct, waiver of the Project Conditions enumerated in Clause 9.1, and of the liability of the Bawris to ensure completion thereof, was conditional on amendment of Clause 9.1. Absent amendment of Clause 9.1, even as per the reasoning of the learned Arbitral Tribunal, there could be no waiver thereof. As such, it is inherently contradictory on the part of the learned Arbitral Tribunal to hold that, even in the absence of any consensus as to the amended Project Conditions there would, nonetheless, be waiver of Clause 9.1 of the SHA.

119. The decision of the learned Arbitral Tribunal, apropos Issue no. 7, as framed by it, is also, therefore, patently illegal within the meaning of Section 34(2A)[17] of the 1996 Act.

Re: Issues 2 and 4 – Whether the Bawris were coerced, under undue influence and inducement to hand over control and management of Calcom to Dalmia? Whether the amendment agreements dated 30th November 2012 had been signed and executed by Bawris under undue influence, duress and threat ?

120. The Bawris sought to contend that the Dalmia had vitiated the

[67] **(2004) 8 SCC 229**

financial atmosphere to such an extent that the Bawris were compelled to cede control of Calcom, to Dalmia. It was alleged, *inter alia*, that (i) Dalmia had, instead of providing ₹ 150 crores as funding to Calcom, released paltry amounts of money which were inadequate even for its working capital needs, (ii) these amounts were also lent at exorbitant rates of interest, (iii) as the working capital requirement of Calcom, at that time, was approximately ₹ 5 crores per month, the funds actually infused by Dalmia into Calcom as secured loans/ICDs, had to be used entirely for meeting such working capital requirements, (iv) as such, these infusions did not result in any benefit either to Calcom or to the Bawris, (v) for these reasons, the work of Calcom had virtually come to a standstill, with Dalmia continuously pressurizing the Bawris to hand over control of Calcom to Dalmia. It was further alleged that Dalmia had threatened that, if control over Calcom was not ceded to it, it would obstruct release of funds by the banks.

121. As against this, Dalmia contended that it had lost confidence in the Bawris and their ability to manage Calcom on account of, *inter alia*, "gross misrepresentation regarding the real financial position of Calcom and its subsidiaries apart from several financial irregularities in the working of Calcom, alleged siphoning of money and material by or at the instance of Bawri group besides questionable relatable third party transactions thereby causing a drain on Calcom's already limited resources". "Discovery of a shortfall of 38006 MT of clinker, discovery of shortage of TMT bars and coal, concealment of non-recoverable debts in Calcom and its subsidiaries and falsification of

books of account" were also cited as considerations which led to loss of confidence, by Dalmia, in the Bawris. Between January and November 2012, contended Dalmia, it had invested ₹ 174.5 crores in Calcom with no prospect of recovery of the said amount from the Bawris.

122. The learned Arbitral Tribunal held that it was not necessary for it to enter into the afore-noted factual thicket of allegations and counter-allegations between the Bawris and Dalmia. The learned Arbitral Tribunal noted that there had been extensive discussions and deliberations regarding possible restructuring of the arrangement between them, in connection with which as many as seven draft agreements had been exchanged between the parties. These discussions, deliberations and exchange of draft agreements, it was noted, had taken place in a cordial and congenial atmosphere. The learned Arbitral Tribunal noted that there was no evidence of undue influence or duress, as alleged by the Bawris. In view thereof, the allegation that the Bawris had been compelled, under duress and undue influence, to cede control, to Dalmia, over Calcom and to execute the Amendment Agreements dated 30th November 2012, was negatived and Issues 2 and 4 were, therefore, answered in favour of Dalmia and against the Bawris.

123. Though a faint challenge to the findings of the learned Arbitral Tribunal on Issues 2 and 4 has been made in OMP (Comm) 279/2021 filed by the Bawris, no such challenge was articulated during arguments at the Bar by Mr. Aman Sinha, learned Senior Counsel, nor

do the written submissions dated 8th May 2022, placed on record by the Bawris, contained any challenge to the afore-noted findings. Even otherwise, it is trite, in law, that duress or undue influence, if alleged, has to be established by clear and cogent factual material.[68]

124. There is no reason, within the parameters of Section 34 of the 1996 Act, to interfere with the findings of the learned Arbitral Tribunal on issues 2 and 4, to the extent they hold that the takeover of control of Calcom by Dalmia, from the Bawris, was coercive, or that the agreements dated 30th November 2012 were executed by the Bawris under pressure or undue influence. The findings of fact, of the learned Arbitral Tribunal, to the extent that as many as seven attempts at finalising draft agreements had taken place among the parties in a cordial and congenial atmosphere and that, therefore, no undue influence or duress could be alleged, not having been traversed by the Bawris, are required to be accepted.

125. The findings of the learned Arbitral Tribunal on Issues 2 and 4, as framed by it, are upheld.

Re: Issues 9, 10 and 11

126. The learned Arbitral Tribunal has not returned any finding on these issues. Issue 9 was not pressed by Dalmia, Issue 10 was held as not surviving for consideration and Issue 11 was answered in the negative based on the contention of the Bawris that they would urge

[68] Refer **Bishundeo Narain v Seogeni Rai and Jagernath,** ***1951 SCR 548*****; Subhas Chandra Das v. Ganga Prosad,** ***1967 (1) SCR 331*****; Raja Ram v. Jai Prakash Singh,** ***(2019) 8 SCC 701***

the said issue in the proceedings under Sections 397 and 398 of the Companies Act, 2013. The findings on these issues are not under challenge in these proceedings.

Re: Issue 12 – Whether the Bawris were entitled to the claims raised by them in their statement of claims ?

Re: Claim 1

127. The Bawris' claim, in Claim 1 in their Statement of Claim, ₹ 30 crores, was predicated on Clause 3.2.2 of the new SPA dated 30th November 2012 which, for ready reference, may be reproduced, once again, as under:

> "**3.2.2** Tranche 2 Payment: *Within 10 (ten) Business Days from the date of issue of the Project CP Satisfaction notice* (as defined in the Shareholders' Agreement) by the Purchaser under the Shareholders' Agreement, the Purchaser shall pay an amount of 30,00,00,000 (Rupees Thirty Crore) ("Tranche 2 Payment") to the Sellers as per the details set out in Annexure 1."

Dalmia contested the aforesaid claim of the Bawris on the ground that Dalmia's liability under Clause 3.2.2 of the new SPA, was conditional on fulfilment, by the Bawris, of the Project Conditions in terms of Clause 9.1 of the SHA and that, as the Bawris had failed to fulfil the Project Conditions, Clause 3.2.2 of the new SPA did not apply.

128. The learned Arbitral Tribunal has rejected the contention of Dalmia, in view of its findings, in respect of issues 5, 6 and 13, that the Bawris were not in default of Clause 9.1 of the SHA. That being

so, the learned Arbitral Tribunal has held, in the impugned award, that "the inexorable consequence of that finding" was that the Bawris were entitled to recover the Tranche 2 payment from Dalmia, of ₹ 30 crores. The said amount was accordingly awarded in favour of the Bawris along with interest.

129. There are two reasons why the said finding of the learned Arbitral Tribunal cannot sustain the scrutiny of Section 34[17] of the 1996 Act. The first is, obviously, that the finding, of the learned Arbitral Tribunal, that the Bawris were not required to fulfil the Project Conditions in terms of Clause 9.1 of the SHA, is patently illegal, as has already been observed by this Court hereinabove. The second is that, even otherwise, Clause 3.2.2 required issuance of a Project CP satisfaction notice in terms of the SHA.

130. Issuance of Project CP satisfaction Notice was contemplated by Clause 9.1 of the SHA. Clause 9.1 required Dalmia to issue a Project CP Satisfaction Notice to the Bawris, within 10 days of a notice from the Bawris to Dalmia, stating that the Project Conditions had been completed. Neither were the Project Conditions completed, nor was any such notice, regarding completion of the Project Conditions, had been issued by the Bawris to Dalmia at any point of time. No occasion, therefore, arose for Dalmia to issue the Project CP Satisfaction Notice in terms of Clause 9.1 of the SHA. Per sequitur, Clause 3.2.2 of the new SPA would also not apply, as it was conditional upon issuance, by Dalmia, of a Project CP Satisfaction Notice.

131. For both these reasons, the decision of the learned Arbitral Tribunal to allow Claim 1 of the Bawris and to award, to the Bawris, ₹ 30 crores along with interest cannot sustain.

Re: Claim 2 – Refund of ICDs

132. *Vide* this claim, the Bawris sought refund, from Dalmia, ₹ 7.41 crores towards repayment of ICDs for which purpose various clauses of the agreements between the parties were cited. Dalmia, in response, submitted that repayment of the ICDs was also conditional on fulfilment of the Project Conditions. The learned Arbitral Tribunal has dealt with the issue by briefly noting that, as it had already held that the Bawris were not required to fulfil the Project Conditions enumerated in Clause 9.1 of the SHA, they were, resultantly, entitled to refund of the ICDs.

133. It is not necessary to advert to the various clauses invoked by the Bawris in this regard. Suffice it to state that Clause 14.14.2 of the amended SHA, as amended by Clause 4.11 of the Amendment to the SHA, read thus:

> "14.14.2 *After the completion of the Project Conditions*, the Dalmia Group and the BW Group shall mutually agree on the time and manner of repayment of the inter corporate deposits given by the BW Group to Company (details whereof are set out at Annexure 4)."

134. Completion of the Project Conditions was, therefore, the *sine*

qua non for Clause 14.14.2 to apply and, consequently, for Bawris to be entitled to refund of the ICDs. The Project Conditions never having been completed by the Bawris, no occasion would arise for the Bawris to claim, from Dalmia, refund of the ICDs. The award of the learned Arbitral Tribunal is also liable to be set aside.

Re: Claim 3

135. Clauses 20, 20.1, 20.2 and 20.2.1 and 20.2.2 of the SHA dated 16th January 2012, at the cost of repetition, read thus:

> "**20. Event of Default**
>
> 20.1 In the event of a material breach of any provisions of the Definitive Agreements by one Party **("Defaulting Party"),** (the remedy for which has not been specifically provided in any of the respective Definitive Agreement), and which breach is remediable and the same is not cured within 90 (ninety) days **("Cure Period")** of notification of the same by the other party **("Non-defaulting Party"),** then such event shall constitute an event of default **("Event of Default")** for the purpose of this Agreement.
>
> 20.2 Consequences of an Event of Default.
>
> 20.2.1 Upon the occurrence of an Event of Default, the Non-Defaulting Party shall have the right but not the obligation to issue a notice **("Default Notice")** to the Defaulting Party, to sell to the Non-Defaulting Party or any nominee or Affiliate of such Non-Defaulting Party **("Default Purchaser'),** the entire Shareholding of the Defaulting Party **("Default Shares")** on the terms and conditions set out in this Clause 20.2 at the Default Price. Such Default Notice shall specify the date on which such Transfer shall take place **("Default Date"),** which shall not be more than 6 (six) months

> from the issuance of the Default Notice, the identity of the Default Purchaser, the Default Price.
>
> 20.2.2 The Default Price shall be 75% (Seventy-five percent) of the Fair Market Value; provided that the Fair Market Value shall be determined as on the date of issuance of the Default Notice."

136. Predicated on the above clauses, the Bawris in Claim 3 of their statement of claim, alleged that, on account of various actions of Dalmia, which amounted to breach of the Definitive Agreements executed among the parties (the SHA, SPAs, Pledge Agreements and the Escrow Agreements), the Bawris had become entitled to purchase the entire shareholding of Dalmia in Calcom at the Default Price, which was 75% of the Fair Market Value of the said shares. Claim 3, therefore, claimed the said shares of Dalmia at the Default Price.

137. The learned Arbitral Tribunal preferred not to enter into the aspect of whether the Dalmia was, or was not, guilty of an Event of Default within the meaning of Clause 20.1 of the SHA. The reason adduced, in the impugned award, is that even if Dalmia were to be regarded as having committed an Event of Default, the Bawris could raise a claim for transfer of the shares held by Dalmia at the Default Price only if, in the first instance, the Bawris had issued a Default Notice. If such a Default Notice had been issued by the Bawris, and the breaches notified by the Bawris in the said notice were not remedied by Dalmia within 90 days thereof, the Bawris may have been able to raise their claim under Clause 20.2.1 of the SHA. As no such Default Notice had been issued by the Bawris to Dalmia, the learned Arbitral Tribunal held that Dalmia could not, correspondingly,

be regarded as having failed to cure the default within 90 days of such notice, entitling the Bawris to raise a claim under Clause 20.2.1 and 20.2.2.

138. The only contention advanced by the Bawris, before this Court, which was advanced before the learned Arbitral Tribunal and rightly rejected, was that the Bawris were unable to issue the requisite notice under Clause 22.2.1 only because they had been prevented from doing so by Dalmia, *vide* letters dated 15th May 2015 and 27th May 2015, wherein Dalmia alleged default, on the part of the Bawris, in completing the Project Conditions. Dalmia having thus taken a stand that the Bawris had no right under the SHA, the Bawris sought to contend that they were inhibited in issuing the requisite notice under Clause 22.2.1.

139. Thus, while seeking to explain away their default in issuing the requisite notice under Clause 20.1 of the SHA, the Bawris admitted that, if they had actually failed to complete the Project Conditions as required by Clause 9.1 of the SHA, they would not be entitled to any benefit under the SHA. This position, in fact, is also reflected by a conjoint reading of Clauses 9.2 and 19.1 of the SHA. Failure, on the part of the Bawris, to complete the Project Conditions, as required by Clause 9.1 entitled Dalmia under Clause 9.2, to purchase the entire shareholding of the Bawris in Calcom for ₹ 1, and obligated the Bawris, correspondingly, to sell its shareholding in Calcom to Dalmia for ₹ 1. Acquisition, by Dalmia, of the entire shareholding of the Bawris in Calcom would result, by operation of Clause 19.1(i) of the SHA, in its termination, with the specific clauses envisaged in the

proviso to Clause 19.1, i.e. Clauses 12, 13, 16, 17, 18, 22.2 and 22.3 alone surviving such termination. Clause 20 of the SHA, therefore, would not survive termination of the SHA, which would, by operation of Clause 19.1(i), be an inexorable contractual sequitur to the exercise, by Dalmia, of its rights under Clause 9.2.

140. Inasmuch as this Court has already held, hereinbefore, that the Bawris were, in fact, in default of their obligation to complete the Project Conditions as required by Clause 9.1 of the SHA, Dalmia would be entitled to enforce its rights under Clause 9.2, which would include purchase of the entire shareholding of the Bawris in Calcom for ₹ 1. This right, if sought to be enforced, would denude the Bawris of all rights under the SHA, which would include the rights emanating from Clause 20 thereof. Even for this reason, therefore, Claim 3 of the Bawris, in their statement of claim, could not succeed, given the findings, hereinabove, with respect to Clauses 9.1 and 9.2 of the SHA.

141. In that view of the matter, the question of whether the Bawris had, or had not, issued the requisite notice under Clause 20.1 of the SHA, becomes redundant, as, even if the Bawris were to have issued the said notice, they could not enforce their right under Clause 20.2.1, being in default of the requirement of fulfilling the Project Conditions under Clause 9.1 of the SHA.

142. That said, the learned Arbitral Tribunal was correct in its finding that the letters dated 15th May 2015 and 27th May 2015 from Dalmia to the Bawris could not have acted as an inhibitor to the

Bawris issuing a notice to Dalmia under Clause 20.1. Even if, therefore, the Bawris were not to be treated as in default of Clause 9.1 of the SHA, there was no reasonable explanation as to why they had failed to issue the requisite notice under Clause 20.1, which was an essential precursor to the Bawris being entitled to enforce their right under Clause 20.2.1. To that extent, therefore, this Court is in agreement with the findings of the learned Arbitral Tribunal that the Bawris were not entitled to advance any claims under Clause 20.2.1, as they had not issued the requisite notice under Clause 20.1, and there was no reasonable explanation as to why they did not do so.

143. To avoid confusion, however, it is clarified that even if the Bawris had issued the requisite notice under Clause 20.1, they would, nonetheless, have not been able to enforce any claim under Clause 20.2.1, as they were in default of requirement of the completion of Project Conditions under Clause 9.1 of the SHA.

144. The learned Arbitral Tribunal, thereafter, proceeds to examine the alternative contention, advanced by the Bawris, to the effect that, even if they were not entitled to seek transfer, to them, of the shareholding of Dalmia in Calcum under Clause 20.2.1, they could, nonetheless, seek release of the shares pledged to the lenders, and release of the personal guarantees furnished by the Bawris under Clause 14.14.4 and 15.1(i) of the SHA. Learned Counsel for Dalmia agreed, before the learned Arbitral Tribunal, to release of the pledged shares in accordance with Clause 14.14.4 and release of the personal guarantees of Bawris, but contended that the released shares and

guarantees had to be deposited in the Escrow Account. The learned Arbitral Tribunal has, however, proceeded to reject this contention and has directed release of the pledged shares and personal guarantee of the Bawris to the Bawris themselves.

145. In my considered opinion, this decision of the learned Arbitral Tribunal is contrary even to the immediately preceding observations and findings itself in the impugned Award. While Clause 14.14.4 of the SHA required Dalmia to ensure release of the pledged shares within 180 days of the effective date, Clause 14.14.5 of the SHA went on to require the Bawris, to ensure that the pledged shares were deposited in the Escrow Account-2 within four days of such release. In that view of the matter, the learned Arbitral Tribunal could not have directed release of the pledged shares directly to Bawris.

146. The learned Arbitral Tribunal has sought to justify this direction on the basis of a tabular statement, contained in the impugned award, which sets out the manner in which the pledged shares once released and deposited in the Escrow Account-2, would be dealt with. This tabular statement reads thus"

Event	**Party to whom shares in Escrow Account-2 would be released (Dalmia/Bawri)**	**Clause No.**
In case PCs are not completed by BG by Project CP Satisfaction Date (i.e.31.03.2014)	Dalmia	2.5.1
Upon determination of BW	Dalmia	2.5.2

Group Put Option Price/Dalmia Group Call Option Price and in the event of a Disagreement, upon notice of resolution of the Disagreement in the manner provided.		
Upon payment of Put Option Price/Call Option Price and issuance of Joint Release Instructions by Dalmia and BG to Escrow Agent	Dalmia	2.5.3
Upon determination of the Secondary Put Option Price/Secondary Call Option Price and in the event of a Disagreement, upon notice of resolution of the Disagreement in the manner provided. Secondary Put Option is in Cl. 6.6 of SHA/p. 399/CC-2/Pt-II. Secondary Call Option is in Cl. 6.8 of SHA/p.401/CC-2/Pt-II.	Dalmia	2.5.4
On exercise of Specific Default Call Option by Dalmia (as defined in Cl. 20.4.2 (b) of Amended SHA at p.492/CC-2/Pt-II).	Dalmia	2.5.5
In case of non-exercise of Default Call Option by BG (as defined in Cl. 20.3.2 of Amended SHA at p. 490/CC-02/Pt-II).	BG	2.5.6
Upon exercise of Default Call Option by BG (as defined in Cl. 20.3.2 of Amended SHA at p. 490/CC-2/Pt-II).	BG	2.5.8

147. The very first row in the afore-extracted tabular statement,

which forms part of the impugned award, indicates that, in the event of non-completion, by the Bawris, of the Project Conditions on or before 31st March 2014, the pledged shares were required to be released to Dalmia. This is also reflected from Clause 2.5.1 of the Escrow Agreement-2. As such, the pledged shares were required to be released, not to the Bawris, but to Dalmia.

148. The direction, by the learned Arbitral Tribunal, to release the pledged shares, in terms of Clause 14.14.4 of the SHA, to the Bawris is, therefore, contrary to Clause 2.5.1 of the Escrow Agreement-2 as well as the tabular statement contained in the impugned award itself, reproduced hereinabove. As the Bawris were in default of completion of the Project Conditions as required by Clause 9.1 of the SHA, the pledged shares were required to be released to Dalmia and not to the Bawris.

149. Insofar as the release of the personal guarantees of the Bawris were concerned, Dalmia made a categorical statement, recorded in the impugned award, to the effect that, if the pledged shares, released in terms of Clause 14.14.4 of the SHA, were deposited in the Escrow Account in terms of Clause 14.14.5 thereof, they would have no objection to the personal guarantee of the Bawris being released to them. Subject, therefore, to the pledged shares release in terms of Clause 14.14.4 of the SHA and deposited in the Escrow Account-2 being released to Dalmia, the direction, of the learned Arbitral Tribunal, for release of the personal guarantees of the Bawris, is required to be upheld.

Re: Claim 4

150. Claim 4 of the Bawris was predicated on Clause 11 of the SHA dated 16th January 2012, which entitled the Bawris to be assigned the brand names of Calcom which the Dalmia group had decided to completely phase out. Before the learned Arbitral Tribunal, Dalmia contended that it was phasing out the brand names (1) 4K (label), (2) The Finer Choice, (3) 5K, (4) 6K, (5) 7K, (6) VEER, (7) VERAT CEMENT & Device and retaining the seven other brand names of Calcom. The learned Arbitral Tribunal, in the circumstances, held the Bawris to be entitled to transfer, in their favour, of the afore-noted brand names which Dalmia was phasing out, but not to transfer of the seven brand names which Dalmia was retaining.

151. Neither Dalmia nor Calcom has challenged the decision of the learned Arbitral Tribunal with respect to Claim 4 of the Bawris. However, the Bawris have, in OMP (Comm) 279/2021, challenged the said decision to the extent it holds the Bawris not to be entitled to the seven brand names which Dalmia was seeking to retain.

152. Though, in the pleadings in OMP (Comm) 279/2021, the Bawris have sought to assert their right even in respect of seven brand names which Dalmia was not willing to phase out, no arguments to that effect were advanced either at the Bar or in the written submissions tendered by the Bawris to support OMP (Comm) 279/2021.

153. The finding of the learned Arbitral Tribunal is in sync with the evidence, as it emerges from the cross-examination of CW-1 Ritesh Bawri, who referred to the brand names which were being given up by Dalmia and the brand names which were continuing to be in use.

154. The finding being purely one of fact, which has not been traversed by the Bawris in their written submissions or in arguments across the Bar, I do not find that any case is made out to interfere with the decision of the learned Arbitral Tribunal. The rejection by the learned Arbitral Tribunal, of Claim 4 of the Bawris, is, therefore, upheld.

Re: Claim 5

155. Claim 5 of the Bawris was rejected by the learned Arbitral Tribunal. There is no challenge to the said decision either in the appeal filed by the Bawris or in the written submissions tendered across the Bar. The decision of the learned Arbitral Tribunal, qua Claim 5 of the Bawris, is therefore, upheld.

Re: Claim 6

156. The Bawris, *vide* Claim 6, claimed ₹ 20,30,75,853/- from Calcom, towards salaries/remuneration for their directors, for the period April to November 2012, along with reimbursement of expenditure incurred by them during the said period with interest thereon. The learned Arbitral Tribunal has allowed the said claim to

the extent of ₹ 1.5 crores with interest @ 18% per annum with effect from 1st December 2012 till the date of annual payment. Calcom has assailed the impugned Award to the said extent, *vide* prayer (vi) in OMP (Comm) 152/2021.

157. One of the preliminary objections advanced by Dalmia and Calcom, to this claim of the Bawris, was that the remuneration payable to directors of the Bawris, on the Board of Calcom, was not subject matter of any of the Definitive Agreements, whereunder the arbitration had been initiated and was continuing. The learned Arbitral Tribunal has dismissed this submission as "specious", holding that, in so submitting, Dalmia ignored the fact that the appointment of directors from the Bawri Group was a part of the transaction between the parties. This, according to the learned Arbitral Tribunal, made the legitimate dues payable to the directors, and the claim of the directors consequent to non-payment thereof, amenable to adjudication by arbitration.

158. With great respect to the learned Arbitral Tribunal, I am unable to subscribe to this line of reasoning. It has been contended by Dalmia and Calcom, and has not been denied by the Bawris, that the remuneration payable to the directors of the Bawris, on the Board of Calcom, was not indicated in any of the Definitive Agreements. The salary payable to the directors of the Bawris, on the Board of Calcom, was fixed on the basis of a Board Resolution dated 14th August 2012, which was neither part of any of the Definitive Agreements nor incorporated into the Definitive Agreements by reference. If any salary of the directors remain unpaid, therefore, the dispute would

relate to the Board Resolution dated 14th August 2012, whereunder the salaries were fixed. Any dispute relating to the salaries of the directors of the Bawris, on the Board of Calcom, could not, therefore, be regarded as a dispute relatable to any of the Definitive Agreements, as could be resolved by arbitration.

159. The learned Arbitral Tribunal was, therefore, *coram non judice*, insofar as this claim of the Bawris was concerned. It is not necessary, therefore, for this Court to enter into the correctness of the claim, to the extent it was awarded by the learned Arbitral Tribunal. The claim having been awarded without jurisdiction, the impugned Award, to that extent, cannot sustain in law.

Re: Claim 7

160. Bawris claimed, in Claim 7 of their Statement of Claim, ₹ 200 crores as damages, towards loss suffered by the Bawris on account of deterioration in their reputation and goodwill, arising from wrongful acts of omission and commission by Dalmia. The learned Arbitral Tribunal has rejected the claim holding that there was no evidence to indicate either that Calcom had suffered any loss on account of any act of omission or commission by Dalmia or that Bawris' shareholding in Calcom had eroded to any extent on account of any such act of Dalmia. This claim was not urged before the Court during argument by learned Senior Counsel for the Bawris. Nor do the written submissions of the Bawris apropos OMP (Comm) 279/2021 advanced any submission on this score.

161. However, in OMP (Comm) 279/2021, the Bawris have challenged the findings of the learned Arbitral Tribunal qua Claim No.7. In doing so, however, Bawris have merely referred to Ex. CW-1/154, which reflected the value of the total shareholding in Calcom as ₹ 2100 crores.

162. Bawris seek to contend, in OMP (Comm) 279/2021, that the learned Arbitral Tribunal failed to take stock of Exhibit CW-1/154. The Bawris have not chosen to traverse the findings, of the learned Arbitral Tribunal, that there was no evidence to indicate either that, owing to the acts of omission or commission alleged to have committed by Dalmia, Calcom had either suffered any loss, or that the shareholding of the Bawris in Calcom had been eroded to any extent.

163. No contest having been made by the Bawris, in OMP (Comm) 279/2021, to these findings of the learned Arbitral Tribunal, no occasion arises for this Court to interfere with the decision of the learned Arbitral Tribunal with respect to Claim 7 of the Bawris. The decision is, accordingly, upheld.

Re: Issue 14 – Counter-claims of Dalmia and Calcom

164. The counter-claims of Dalmia and Calcom were clubbed together, by the learned Arbitral Tribunal, in Issues 14, 17 and 18.

Re: Issue 14(i) to 14(v)

165. The learned Arbitral Tribunal dismissed all counter claims of Dalmia, in respect of which Issues 14 (i) to 14(v) had been framed, with the omnibus finding that, as Issue No. 13 had been answered in the negative, Issues 14(i) to 14 (iv) were also required to be answered in the negative and in favour of the Bawris. Specifically in respect of the claim of Dalmia against SSPL for ₹ 62,32,77,414/-, towards the redemption of 5900 debentures, the learned Arbitral Tribunal held Dalmia to be entitled only to 0.01% equity in SSPL in terms of Clause 6 of the DSA.

166. Issue No. 14, as drawn up by the learned Arbitral Tribunal, arose for consideration only if Issue No. 13 was held in the affirmative. Dalmia contends that, as Issue No. 13 was decided by the learned Arbitral Tribunal in the negative, Issue No. 14 never arose for consideration and that, therefore, the learned Arbitral Tribunal acted beyond its jurisdiction in adjudicating the Issue No. 14.

167. I have, however, held, hereinabove, that Issue No. 13 was required to be answered in the affirmative. The sequitur would be that Issue no. 14, and the various sub-issues thereof, would have to be decided.

168. Inasmuch as the learned Arbitral Tribunal has chosen not to return any finding on the various sub-issues in Issue No. 14, on the ground that Issue No. 13 had been decided in negative, but has chosen to, rather, pass specific orders with respect to the various sub-issues in Issue No. 14, the duty is cast upon this Court as well, in exercise of its

jurisdiction under Section 34 of the 1996 Act, to examine the said issues, at least tentatively.

Re: Issue 14(i)

169. Issue No. 14(i) dealt with the claim of Dalmia to 73642742 equity shares of Calcom, held by the Bawris, for ₹ 1, part of which stood deposited in the Escrow-II Account. The claim is founded on Clause 9.2(i) of the SHA, the manner in which the number of shares has been worked out on the basis of Clause 1.2(x) of the SHA and the modality for release and transfer of the shares has been worked out on the basis of Clause 6.10.3 of the amendment to the SHA.

170. The failure, on the part of the Bawris, to fulfil and complete the project conditions as required by Clause 9.1 of the SHA would entitle Dalmia, *ipso facto*, under Clause 9.2(i) of the SHA, to purchase the entire shareholding of the Bawris in Calcom for ₹ 1, and would obligate the Bawris to sell, and to cause Calcom to sell, its entire shareholding, as held by the Bawris, to Dalmia, for ₹ 1. The entitlement of Dalmia, to all of the equity shares of Calcom, held by Bawris, for ₹ 1, cannot, therefore be denied.

171. Clause 6.10.3 deals with release of Escrow Shares-II on non-completion of the Project Conditions. To the extent the share of Calcom, held by Bawris, stand deposited in the Escrow Account-II, there release would clearly be governed by Clause 6.10.3 of the SHA.

172. Insofar as the number of shares to which Dalmia could stake claim under Clause 9.2(i) is concerned, that would have to be worked out on the basis of Clause 1.2(x). The learned Arbitral Tribunal not having undertaken this exercise, it would not be permissible for this Court, exercise Section 34 jurisdiction, to do so. The entitlement of Dalmia, to Counter Claim- I, has, therefore, to be decided in *de novo* arbitral proceedings.

Re: Issue 14(ii)

173. Issue No. 14(ii) pertains to Counter Claim-II of Dalmia to 6412590 equity shares of Calcom held by the persons enumerated in Schedule-XII to the SHA. This clause, too, is predicated on Clause 9.2(i).

174. Dalmia has restricted its relief, in OMP (Comm) 153/2021, to Counter Claims I, III, IV and V. Accordingly, Counter Claim-II of Dalmia, which was rejected by the learned Arbitral Tribunal, does not fall for consideration in these proceedings.

Re: Issue 14(iii)

175. Issue No. 14(iii) pertains to Counter Claim III of Dalmia, whereunder Dalmia has claimed 57405837 equity shares of Calcom, deposited with the Escrow Agent, and has sought a direction to the Bawris to execute all such documents as are necessary for transfer of the said shares to Dalmia. Clause 7.3.1 of the new SPA also envisages one of the consequences of failure, on the part of the Bawris, in

completing the Project Conditions as required by Clause 9.1 of the SHA. It contemplates, in such an eventuality, written instructions being given by Dalmia ("as the purchaser" under the new SPA) to the Escrow Agent for release of the escrow shares to Dalmia. Dalmia has, in fact, issued the said instructions to the Escrow Agent on 15th May 2015. The right of Dalmia to release of the said shares, as claimed by it in Counter Claim-III, cannot, therefore, be gainsaid.

176. "Escrow Shares" is also specifically defined in the new SPA as meaning 57405837 equity shares of Calcom. Consequent on the finding of failure, by the Bawris, in complying with Project Conditions as required by Clause 9.1 of the SHA, the Dalmia appears, *prima facie*, to be entitled to Counter Claim-III. Nonetheless, this aspect would also have to be adjudicated by the learned Arbitral Tribunal *de novo*.

Re: Issue 14(iv)

177. Issue 14(iv) deals with Counter Claim-IV of Dalmia, for refund of an amount of ₹ 32 crores along with interest of ₹ 35,40,89,732/-, totalling ₹ 67,40,89,732/-. This claim is predicated on Clause 7.3.2 of the new SPA. Clause 7.3.2 of the new SPA envisages, apart from transfer of the Escrow shares to the Demat Account of Dalmia in terms of Clause 7.3.1, payment, by the "sellers" (encompassing all individuals and entities in Part B of Annexure 1 to the new SPA) of the "refund amount" to Dalmia. In the event of Dalmia having only made the Tranche-1 payment of ₹ 32 crores, the "refund amount" as

defined in the new SPA is calculated as the said Tranche-I payment of ₹ 32 crores along with interest @ 18% compounded annually.

178. As in the case of Counter Claim-III, consequent on the finding, hereinabove, of the Bawris having in fact defaulted in fulfilling and completing the Project Conditions as required by Clause 9.1 of the SHA, the Dalmia would, *ipso facto*, be entitled, *prima facie*, to Counter Claim-IV, as the Counter Claim is clearly covered by Clause 7.3.2 read with the definition "refund amount" as contained in the new SPA. This aspect would also, however, have to form subject of *de novo* arbitral proceedings, as it has not been addressed in the impugned award, which proceeds on the premise that the Bawris were not required to fulfil the Project Conditions in terms of Clause 9.1 of the SHA, consequent to control over Calcom having been assumed by Dalmia.

Re: Issue 14(v)

179. This issue encompasses Counter Claim-V of Dalmia, whereunder Dalmia sought a direction to SSR to pay, to Dalmia, a sum of ₹ 62,32,77,414/-, representing the amount to which it was entitled consequent on redemption of 5900 debentures of SSPL, held by it, along with interest thereon. The claim is directly predicated on Clause 10.2(i) of the DSA and squarely covered thereby. The said clause entitles Dalmia, consequent on occurrence of an event of default, to require SSPL to redeem the debentures issued to Dalmia for ₹ 59 crores along with interest. The total amount would thus work out to ₹ 62,32,77,414/-.

180. Consequent to the finding that the Bawris are in default of Clause 9.1 of the SHA, Dalmia would appear to be entitled to this claim. However, this aspect would also have to be examined in *de novo* arbitral proceedings, as the learned Arbitral Tribunal has not applied its mind thereto.

181. The learned Arbitral Tribunal has, on the other hand, invoked Clause 6.1 of the DSA, to hold Dalmia to be entitled only to 0.01% of the fully paid up equity share capital of SSPL. In view of the findings already returned earlier in this judgment, Clause 6.1 of the DSA which applies only in the event of completion of Project Conditions in accordance with Clause 9.1 of the SHA, would obviously not apply. The finding, in the learned Arbitral Tribunal, to the said effect has, therefore, necessarily to be set aside.

182. Insofar as the Issue 14(i) to (v) in the impugned award are concerned, therefore, the findings in the impugned award have to be set aside. Though, *prima facie*, this Court is of the view that the Dalmia's may be entitled to the said claims, this aspect would have to be examined in *de novo* arbitral proceedings, in view of law laid down in ***M. Hakeem***[34], which proscribes the Court, under Section 34 of the 1996 Act, allowing claims which have been rejected by the learned Arbitral Tribunal, or have not been considered by it on merits.

Re: Issues 14(vi) to (viii)

183. These issues pertain to Counter Claims Nos. VI, VII and VIII of Dalmia, as urged before the learned Arbitral Tribunal, which are not pressed, by Dalmia in its OMP (Comm) 153/2021, which seek relief only with respect to Counter Claims I, III, IV and V. As such, no occasion arises for this Court to examine the finding of the learned Arbitral Tribunal with respect to Issues 14(vi) to (viii). The findings of learned Arbitral Tribunal in that regard are, therefore, upheld.

Counter Claims of Calcom

Re: Issues 15, 17 and 18

184. Issues 17 and 18, as formulated in the impugned arbitral award, deal with Counter Claim-IV of Calcom before the learned Arbitral Tribunal. Calcom has, however, in OMP (Comm) 152/2021, restricted its relief to Counter Claims I and II.

185. The learned Arbitral Tribunal has partly allowed Counter Claims I and II of Calcom. Counter Claim I was for a total of ₹ 36,74,06,872/-. Out of this claim, the learned Arbitral Tribunal has allowed a claim of ₹ 8,76,96,493/-. Calcom, in OMP (Comm) 152/2021, challenges the impugned arbitral award to the extent it rejects the counter claim of Calcom for (i) service tax relating to guarantee fees to Guarantco of ₹ 25,24,826/-, (ii) sales tax claim against M/s Vinay Cements Ltd (VCL) under certificate proceedings, under clause 14.15.2 of the SHA for ₹ 3,49,77,290/- and (iii) excise duty on clinker written-off including interest under Clause 14.15.2 of the SHA amounting to ₹ 1,86,32,743/-. The findings of the learned

Arbitral Tribunal, qua these elements of Counter Claim-I of Calcom are fundamental findings of fact which do not invite interference under Section 34 of the 1996 Act.

186. Apropos the Counter Claim for ₹ 25,24,826/- towards interest and penalty paid to the Service Tax authorities on account of delay in payment of service tax, Calcom predicated its claim on the amount paid to the service tax authorities between May and July 2012. The Bawris disputed the claim on the ground that the challans, relied upon by Calcom did not establish any connection between the amounts paid and the account on which the payments were made. The Bawris also pointed out discrepancy between the total amount paid under the challans and the claim of Calcom.

187. The learned Arbitral Tribunal has upheld the objections of the Bawris relating to this counter claim of Calcom. The impugned award holds that the challans did not clearly indicate the manner in which Calcom had worked out ₹ 25,24,826/- or as to why the said amount was relatable to delay in depositing the service tax.

188. This finding is a pure finding of fact based on an appreciation of material placed on record by Calcom, and does not call for interference.

Re: Claim for ₹ 3,49,77,290/-

189. The amount of ₹ 3,49,77,290/-, claimed by Calcom under this head of its Counter Claims pertains to outstanding sales tax liability of

VCL for the years 1996-97 to 2006-07. In its Counter Claim, Calcom referred to recovery notices dated 5th March 2011 and 5th April 2011, issued by the Certificate Officer (Taxation) to VCL, against which VCL was permitted to make payment of VAT and CST in installments *vide* letter dated 6th April 2011 of the Certificate officer. Default on the part of VCL in making the said payments resulted in initiation, by the Certificate Officer, against VCL, of criminal proceedings. The proceedings were compounded by order dated 3rd September 2014, consequent on VCL paying an amount of ₹ 69.05 lakhs. Calcom claimed reimbursement of the said amount under Clause 14.15.2 of the amendment to the SHA.

190. Clause 14.15.2, on its plain reading, applies only to statutory liabilities which are not disclosed in the disclosure under the SPA-1. The learned Arbitral Tribunal has held in the impugned Award that, as the Bawris had, in their disclosure letter dated 16th January 2012 addressed to Dalmia, informed Dalmia about the want of compliance, by Calcom, of Calcom and its subsidiaries including VCL of the aforesaid liabilities, Clause 14.15.2 could not be invoked to raise a claim in that regard by Calcom against the Bawris. The learned Arbitral Tribunal has held, in the impugned Award, that Calcom's right to seek reimbursement under Clause 14.15.2, would depend upon disclosure or non-disclosure, by the Bawris, of the said claimed amount in its disclosure letter dated 16th January 2012. In view of the expressed wordings of Clause 14.15.2 of the amendment to the SHA, this finding is obviously unexceptionable.

191. The Bawris had, in their disclosure letter dated 16th January 2012, referred to a sales tax criminal case pending before the Chief Judicial Magistrate, Kamrup, Guwahati, which included the outstanding unpaid liability of VCL. In that view of the matter, the learned Arbitral Tribunal held that the claim of Calcom was relating to a disclosed liability and not an undisclosed liability, as it was part of the total amount of ₹ 8,79,83,102/-, in respect of which the aforesaid criminal case had been instituted. That being so, the learned Arbitral Tribunal has rejected Calcom's claim for reimbursement of the said amount.

192. The only ground on which Calcom has sought to challenge this finding is that there was no specific disclosure, in the disclosure letter dated 16th January 2012, of the claimed amount of ₹ 3,49,77,290/-. However, there is no specific challenge to the finding of the learned Arbitral Tribunal that the said amount was part of the amount of ₹ 8,79,83,102/- which stood disclosed in the disclosure letter. That being so, the finding of fact at which the learned Arbitral Tribunal has arrived does not call for any interference.

Re: Rejection of Counter Claim to the extent of ₹ 1,86,32,743/-

193. The decision of the learned Arbitral Tribunal *qua* Counter Claim I of Calcom is also sought to be challenged by Calcom, to the extent it rejects Calcom's claim for ₹ 1,86,32,743/-, representing excise duty on clinker written off, also invoking Clause 14.15.2 of the SHA. The learned Arbitral Tribunal, in this regard, relied on the fact that the said amount was disclosed to the Dalmias prayer to execution

of the Definitive Agreements and that the Dalmia's, with their eyes open did not choose to include, in the Definitive Agreements, or even in the amendments to the definitive amendments, any clause, requiring reimbursement of the excise duty payable on the clinker stock. Reliance has also been placed in this context, on the admission by RW-2 Dharmendra Tuteja in his deposition before the learned Arbitral Tribunal. In these circumstances, the learned Arbitral Tribunal held that this claim must be regarded as having been sorted out prior to the execution of the amendment agreements on 30th November 2012. The learned Arbitral Tribunal has also relied, in arriving at this conclusion, on the fact that, in its financial statement for the FY 2011-12, VCL had accounted for the said liability. In that view of the matter, the learned Arbitral Tribunal holds that, as the amendments to the Definitive Agreements did not provide for reimbursement of the said amount, the claim in that regard must be regarded as having stood settled.

194. This, again, is a finding of the learned Arbitral Tribunal which does not merit interference under Section 34 of the 1996 Act.

195. Prayer (ii) in the OMP (Comm) 152/2021, instituted by Calcom is, therefore, rejected.

196. Prayer (iii) assails direction (ii) of the learned Arbitral Tribunal, while dealing with the Counter Claims of Calcom. *Vide* the said direction, the learned Arbitral Tribunal has set off/adjusted the amount of ₹ 8,76,96,493/- awarded to Calcom against its Counter Claims,

against refund of entry tax and excise duty due to Calcom and/or its subsidiaries, under Clause 14.15.3 of the amendment to the SHA.

197. The finding of the learned Arbitral Tribunal does not appear to be in sync with Clause 14.15.3. Clause 14.15.3, notes the fact that Calcom was expected to receive entry tax refund and excise duty refund, alongwith interest thereon, for the period prior to 16th January 2012. Having noted this expectation of receipt, by Calcom, Clause 14.15.3, proceeds to stipulate that, "if such amounts are received" by Calcom from the relevant authorities, then the Bawris would be eligible for refund of the amount paid by the Bawris towards the statutory liabilities under Clause 14.15.1 (i) and (iiii), to the extent of the amount received by Calcom.

198. The entitlement of the Bawris to such refund, therefore, would be dependent on prior receipt of refund by Calcom, from the statutory authorities, of the excise duty and entry tax. The Bawris cannot, therefore, be indemnified against the amount of ₹ 8,76,96,493/- awarded to Calcom and against the Bawris by the learned Arbitral Tribunal, against future expectations of receipt by Calcom. Nor can the right of Calcom, to payment of the awarded amount by the Bawris, be kept pending awaiting clearance of the claim for refund of entry tax and excise duty of Calcom.

199. For that reason, the decision (ii) of the learned Arbitral Tribunal, on the counter claims of Calcom is appears to be contrary to Clause 14.15.3 of the amendment to the SHA and cannot, therefore,

sustain. Prayer (iii) in OMP (Comm) 152/2021, filed by Calcom, therefore, would be required to be allowed.

Remaining prayers of Calcom

200. Resultantly, prayer (iv), which direct payment of interest by the Bawris on the amount awarded to Calcom, only from the date of such set off, would also have to be allowed.

201. Prayer (v) in OMP (Comm) 152/2021 challenges direction (ii) in the Award of the learned Arbitral Tribunal with respect to Counter Claim-II of Calcom. Out of the total amount of ₹ 2,84,49,162/- awarded by the learned Arbitral Tribunal to Calcom against Counter-Claim-II, the learned Arbitral Tribunal has restricted the amount payable by the Bawris to Calcom to 50% of the said awarded claim, i.e. to ₹ 42,24,581/-. In doing so, the learned Arbitral Tribunal has invoked Clause 14.15.7 of the SHA.

202. Clause 14.15.7 of the SHA ordains that, with respect to any amounts payable by the Bawri Group under Clause 14.15, the Bawri Group could either pay the amount to Calcom or pay 50% thereof to Dalmia.

203. Clause 14.15.7, by its very nature, is a clause which is invocable at option by the Bawris. It could not legitimately have, therefore, been invoked *suo motu* by the learned Arbitral Tribunal, especially where no claim, based on the said clause, is to be found in the claims of the Bawris before the learned Arbitral Tribunal.

204. That apart, the learned Arbitral Tribunal has, applying the said clause, directed 50% of the amount awarded to Calcom against Counter Claim-II, i.e. ₹ 1,42,24,581/- to be set off against the amount of ₹ 30 crores awarded to the Bawris against claim no.1 preferred by them before the learned Arbitral Tribunal. Inasmuch as this judgment holds the Bawris not entitled to the amounts claimed by them, this set off is obviously not permissible.

205. For that reason, there is substance in the challenge, by Calcom, to the decision to set-off 50% of the amount of ₹ 2,84,49,162/- awarded by the learned Arbitral Tribunal to Calcom against Counter Claim-II preferred by it.

Summary

206. Having thus examined the record and perused the impugned award in the backdrop of the statutory scenario and the law enunciated by various judicial authorities in this regard, I am unable to subscribe to the view adopted by the learned Arbitral Tribunal. The rationale that has prevailed with me, which stands explained *in extenso* hereinabove, may be crystallised, in brief, thus:

(i) Clause 9.1 of the SHA specifically required the Bawri Group to fulfil the Project Conditions. The said Clause was, admittedly, never amended.

(ii) The AOA of Calcom, both before and after the taking over of effective control over Calcom by Dalmia, required the

Bawri Group to comply with the Project Conditions. Even after the execution of the new/amended agreements in October 2012, the AOA of Calcom continued to require the Bawri Group to fulfil the Project Conditions. The AOA has precedence over the SHA, as per the law laid down in ***Tata Consultancy Services***[4] and ***Vodafone International Holdings BV***[18].

(iii) The learned Arbitral Tribunal has effectively rewritten Clause 9.1, on two counts. Firstly, the learned Arbitral Tribunal holds that, consequent to transfer of effective control over Calcom by Dalmia, the Bawri group was no longer required to comply with Clause 9.1 of the SHA. Secondly, the learned Arbitral Tribunal holds that, after taking over of effective control of Calcom, the requirement of complying with Clause 9.1 of the SHA was on Dalmia.

(iv) Rewriting of a contract is not permissible in law, and if done, vitiates an arbitral award as held in ***Bumihiway***[6]**.**

(v) Moreover, Clause 22.1 of the SHA specifically required any amendment of the SHA to be made only in writing with the consent of all the parties thereto. There could not, therefore, be any "deemed amendment" of the SHA.

(vi) Section 56 of the Contract Act, too, would not justify the findings of the learned Arbitral Tribunal, in view of law down in ***Naihati Jute Mills Ltd.***[15].

(vii) No written agreement, amending Clause 9.1 of the SHA, was ever executed among the parties. In this context, the interpretation, by the learned Arbitral Tribunal, on Clause 3.20 of the amendment to the SHA is completely flawed and is contrary to the clause itself. In its interpretation of Clause 3.20, the learned Arbitral Tribunal falls on two major scores, which tantamount to "patent illegality" within the meaning of Section 34(2A) of the 1996 Act.

(viii) The first fatal error committed by the learned Arbitral Tribunal is in its finding that Clause 3.20 was not an "agreement to agree". This is contrary to the very wordings of the clause, which manifest the fact that the clause was indeed in the nature of an "agreement to agree".

(ix) An "agreement to agree" is not enforceable at law as held in ***Speech & Software Technologies***[41].

(x) The learned Arbitral Tribunal has erred, secondly, in holding that, Clause 3.20 altered Clause 9.1 of the SHA. The learned Arbitral Tribunal has further erred in holding that the fact that, in fact, no agreement regarding the amendments to the SHA was ever arrived at, was inconsequential. Clause 3.20 merely envisaged the future agreement as to the amendments to the SHA. No such further agreement was ever arrived at.

(xi) The findings of the learned Arbitral Tribunal are contradictory in terms. The learned Arbitral Tribunal, even while holding that Clause 3.20 did not amend Clause 9.1, nonetheless, holds that Clause 3.20 altered Clause 9.1 There is no distinction between "amendment" and "alternation" as held by the Supreme Court in ***All India Power Engineer Federation***[42].

(xii) This interpretation of Clause 3.20, as accorded by the learned Arbitral Tribunal, is again contrary to Clause 22.1 of the SHA which required all amendments to be in writing and signed by parties.

(xiii) The learned Arbitral Tribunal has further erred in holding that Clause 3.20 amounted to a waiver of Clause 9.1, by the Dalmias.

(xiv) Clause 22.1 and 22.9 of the SHA required any waiver of the terms thereof, again, to be in writing and signed by the parties. No concept of "implied waiver" was, therefore, permissible. This is also contrary to the law laid down by the Supreme Court in ***Davinder Pal Singh Bhullar***[60].

(xv) Resultantly, the learned Arbitral Tribunal has seriously erred in holding that the Bawri group was not in default of Clause 9.1 of the SHA. The entire award being predicated on this fundamentally erroneous premise, the award cannot sustain in law.

(xvi) The remaining findings in this judgment are only sequelae to the above. Non-compliance, by the Bawris, with Clause 9.1 of the SHA resulted in the Bawris being disentitled to its claims and the Dalmia, *per contra*, being entitled to its counter claims.

(xvii) The inevitable sequitur is that the impugned award cannot sustain. The claims of the Bawris would be required to be set aside and, correspondently, the counter claims of Dalmia would be required to be allowed.

Prayers

207. The prayers sought in the petitions under adjudication before this court have been reproduced hereunder:

207.1 O.M.P. (COMM) 153 od 2021**:**

"In view of the aforesaid facts and circumstances, this Hon'ble Court may be pleased to:

(i) Set aside the Award dated 20.03.2021 in the matter of disputes between "Mr. Binod Kumar Bawri and Ors. v. Calcom Cement India Ltd. and Another passed by the Ld. Arbitral Tribunal in respect of Claim 1 and Claim 2 of the Bawri Group granted against the Petitioner at pages 271 and 272 of the Impugned Award;

(ii) Set aside the Award dated 20.03.2021 in the matter of disputes between "Mr. Binod Kumar Bawri and Ors. v. Calcom Cement India Ltd. and Another passed by the Ld. Arbitral Tribunal in respect of Counter Claim Nos. 1, 3, 4 and 5 of the Petitioner that are rejected at pages

274 to 276 of the Impugned Award with liberty to the Petitioner to proceed in accordance with the Arbitration Act in respect of the said Counter Claims;

(iii) Set aside the grant of interest compounded 6 monthly at 18% to the Bawri Group against the Petitioner at page 271 of the Impugned Award dated 20.03.2021;

(iv) Set aside the costs imposed on the Petitioner at page 277 and 278 of the Impugned Award dated 20.03.2021;

(v) Direct the Respondent Nos. 1 to 13 to pay costs of the present petition;

(vi) Pass any such other order(s) as this Hon'ble Court may deem fit and proper in the facts of the present case."

207.2 O.M.P. (COMM) 152 of 2021:

"In view of the aforesaid facts and circumstances, this Hon'ble Court may be pleased to:

(i) Call for the record of the Ld. Arbitral Tribunal in the matter of disputes between "Mr. Binod Kumar Bawri and Ors. v. Calcom Cement India Ltd. and Another";

(ii) Set aside the Award dated 20.03.2021 in the matter of disputes between "Mr. Binod Kumar Bawri and Ors. v. Calcom Cement India Ltd. and Another" passed by the Ld. Arbitral Tribunal in respect of Counter Claim No. 1 of the Petitioner to the extent it deals with Tag A-6 (Interest and Penalty on account of service tax relating to services tax payable on guarantee fee amounting to Rs. 25,24,826/-), Tag C-2 (Sales Tax Claim against VCL under Certificate Proceedings amounting toRs. 3,49, 77,290/-) and Tag C-3 (Excise Duty on Clinker Written Off including interest amounting to Rs. 1,86,32,743/-) as stated in the Arbitral Award (being part of Counter Claim (a) in the Statement of Counter Claim filed by the Petitioner);

(iii) Set aside the direction (ii) of the Ld. Arbitral Tribunal at Pg. 276 in respect of Counter Claim No.1 of the Petitioner for "setting off' the amounts held to be payable by the Bawri Group to the Petitioner against refund of Entry Tax and Excise Duty due to the Petitioner and/or its subsidiaries;

(iv) Set aside the direction (iv) of the Ld. Arbitral Tribunal at Pg. 276 in respect of Counter Claim No. 1 of the Petitioner directing the payment of interest by the Bawri Group only from the date of "set off' at 18% per annum;

(v) Set aside the direction (ii) of the Ld. Arbitral Tribunal at Pg. 277 in respect of Counter Claim No.2 of the Petitioner to the extent of reducing the liability of Bawri Group to 50% in favour of Dalmia Group instead of 100% in favour of the Petitioner along with interest @ 18% per annum with effect from 01.06.2017 i.e. the date of filing of the Statement of Counter Claim by the Petitioner;

(vi) Set aside the Award dated 20.03.2021 in the matter of disputes between "Mr. Binod Kumar Bawri and Drs. v. Calcom Cement India Ltd. and Another" passed by the Ld. Arbitral Tribunal in respect of Claim No.2 (Refund of Inter Corporate Deposits amounting to Rs. 14,72,94,209/- along with interest) and Claim No. 6 (Salary of Respondent Nos. 1 to 3 amounting toRs. 1.50 crores plus interest) to the extent it deals with prayers (b) and (f) in the Statement of Claim filed by Bawri Group and;

(vii) Pass any such other order(s) as this Hon'ble Court may deem fit and proper in the facts of the present case."

207.3 O.M.P. (COMM) 279 of 2021:

"In light of the abovementioned petition and grounds advanced on behalf of the Petitioners, the Petitioners humbly pray that this Hon'ble Court be pleased to allow the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 and:

(a) Adjudge and declare that with respect to Claim 2, the Petitioners are further entitled to interest on the amount awarded under Claim 2, at the interest rate of 18% compounded half yearly from 1.4.2017 till the date of payment.

(b) Adjudge and declare that with respect to Claim 3 that the dissenting award is liable to be upheld thereby Petitioners are entitled to have the Shares of Respondent No. 1 Company held by Respondent No. 2 at a price be calculated in accordance with the tenns of the contract between the parties.

(c) Adjudge and declare that with respect to Claim 4, the Petitioners are entitled to have transferred to the Petitioners the remaining brand names also.

(d) Adjudge and declare that with respect to Claim 7, the Petitioners are entitled to damages of Rs 2100 Crores for the loss suffered.

(e) Adjudge and declare that all the Counterclaims of Respondent 1 for reimbursement of pre-existing and undisclosed liabilities etc are without merit in its entirety and the same be rejected.

(f) Adjudge and declare that refunds of excise duty of Rs 119.21 lakhs and entry tax of Rs 171.07 to the Respondent 1, be also included in amounts to be set off against liabilities of the Petitioner group to the Respondents, if any.

(g) Subject to prayer "e" the Impugned Award be reduced with respect to counter claim No. i of Respondent no. 1 to extent of Rs. 25,24,826/-

(h) Direct that the impugned arbitral award be modified to the extent specified in prayers (a) to (g).

(i) Direct that costs of present petition be borne by the Respondents herein

(j) Allow the Petitioners to alter/amend the Petition/prayers if any need arise.

(k) Pass such further orders as this Hon'ble Court may deem fit and proper in favour of the Petitioners."

Conclusion

208 As a result, these petitions stand disposed of in the following terms:

(i) All claims of Bawris, before the learned Arbitral Tribunal, stand rejected.

(ii) Counter Claims I, III, IV and V of Dalmia before the learned Arbitral Tribunal would have to be reconsidered *de novo* in arbitral proceedings in the light of the observations hereinabove, for which liberty is reserved with the parties.

(iii) Calcom has challenged the impugned Award only to the extent it rejects, in part, Counter Claims I and II of Calcom. The said challenge is rejected and Counter Claims I and II of Calcom are allowed only to the extent they have been allowed by the learned Arbitral Tribunal.

(iv) Prayers (iii) and (iv) in OMP(Comm) 152/2021, instituted by Calcom are allowed and the decision of the learned Arbitral Tribunal to set-off the amounts awarded to Calcom against Counter Claim- I and to direct payment of interest by the Bawris on the amounts so awarded only from the date of such set-off are quashed and set aside.

(v) Prayer (v) in OMP(Comm) 152/2021, to the extent it directs the Bawris to pay only 50% of the amount awarded to Calcom is set aside. Calcom is therefore held to be entitled to 100% of the amount awarded by the learned Arbitral Tribunal.

(vi) Prayer (vi) in OMP(Comm) 152/2021 stand subsumed in direction (i) *supra*.

(vii) The direction for payment of costs in the impugned Award is quashed and set aside. The aspect of costs is also remanded for consideration in *de novo* arbitral proceedings.

209 There shall be no separate order for costs in the present proceedings.

210 Resultantly,

(i) OMP (Comm) 152/2021 stands disposed of in terms of sub-paras (iii), (iv), (v) and (vi) in para 208 *supra*,

(ii) Prayers (i) to (iv) in OMP(Comm) 153/2021 are allowed. Prayer (v), which seeks costs of the present petition, is dismissed and

(iii) OMP(Comm) 279/2021 is dismissed in toto.

C.HARI SHANKAR, J

OCTOBER 17th , 2022/*rb/dsn*