IN THE HIGH COURT AT CALCUTTA

ORIGINAL SIDE

COMMERCIAL DIVISION

Present:

The Hon'ble Justice Krishna Rao

A.P. (COM) 28 of 2023

With

IA No. G.A. (COM) 1 of 2024

Government of West Bengal & Anr.

Versus

Essex Development Investments (Mauritius) Ltd.

Mr. Kishore Dutta, Advocate General
Mr. Jishnu Saha, Sr. Adv.
Mr. Sidharth Sethi
Mr. Manoj Kumar Tiwari
Mr. Ragvendra Pratap Singh
Mr. Kunal Shahini
Ms. Mini Agarwal

..... For the petitioners.

Mr. Sudipto Sarkar, Sr. Adv.
Mr. Rantanko Banerjee, Sr. Av.
Mr. Arunabha Deb
Mr. Deepan Kr. Sarkar

Ms. Ashika Daga
Mr. Samriddha Sen
Mr. Raunak Das Sharma
Ms. Ananya Sinha
Ms. Sampurna Mukherjee

.....For the respondent.

Heard On : 10.05.2024, 10.06.2024 & 21.06.2024

Judgment on : 12.07.2024

Krishna Rao, J.:

1. This is an application filed by the Government of West Bengal and West Bengal Industrial Development Corporation Limited (hereinafter referred to as "WBIDC") under Section 36(2) of the Arbitration and Conciliation Act, 1996, praying for unconditional stay of operation of the Arbitral Award dated 18th September, 2023, passed by the Arbitral Tribunal.

2. On 11th September, 2014, a Share Purchase Agreement was entered between the Government of West Bengal, West Bengal Industrial Development Corporation Limited (hereinafter referred to as "WBIDC"), Chatterjee Petrochem (Mauritius) Company (hereinafter referred to as "CPMC"), Essex Development investments (Mauritius) Limited (hereinafter referred to as "Essex") and Haldia Petrochemicals Limited (hereinafter referred to as "HPL"). In the said Share Purchase Agreement, the Government of West Bengal agreed to transfer 520 million equity shares held by it in HPL, through WBIDC to Essex "on as–is-where–is" basis at a price of Rs.25.10/- per equity share. As per

the Share Purchase Agreement, the entire 520 million equity shares have been transferred to Essex and the agreed consideration received by Government of West Bengal.

3. As per Essex, Government of West Bengal/WBIDC were to grant HPL certain Tax Incentives as provided in Schedule 5 of the SPA. The Essex alleged that after introduction of GST regime on and from 1st July, 2017, HPL had not been disbursed such Tax Incentives and thus the Essex initiated arbitration for refund of SGST deposited by HPL. The Government of West Bengal/WBIDC has objected with regard to the claim of Essex on the ground of maintainability as well as on merit.

4. After hearing of the parties, the Arbitral Tribunal has passed Award in favour of the Essex on 18th September, 2023:

"Award

121. Based on the consideration recorded above, the Arbitral Tribunal, is satisfied in recording the following summary of conclusions:

(i). The prayer made in the 'Statement of Claim/Amended Statement of Claim', seeking the relief of 'specific performance' is allowed, in the manner expressed at (iii), below.

(ii). All objections raised by the Respondents - GoWB and WBIDC, contesting the prayers/claims raised in the 'Statement of Claim',/Amended Statement of Claim', are disallowed.

(iii). The Company - HPL was promised a consolidated amount of Rs. 3285.47/- crores, towards financial incentives/benefits (-under Schedule 5, of the SPA, dated 11.09.2014). The

Company - HPL had already received an amount of Rs. 317,13,40,934/- (-payable upto 30.06.2017). Thereafter, the Company - HPL is still entitled to avail further financial incentives/benefits of Rs. 2968,33,59,066/- (- subject to the provisions of Schedule 5, of the SPA, dated 11.09.2014). From 01.07.2017 to 31.05.2020, the Company HPL has paid a sum of Rs. 604,85,29,435/- towards State GST, to the State of West Bengal. The Company HPL is therefore held to be entitled to the payment of the above amount of Rs. 604,85,29,435/- towards financial incentives/benefits under Clause 1(A) (c) of Schedule 5, of the SPA dated 11.09.2014 Furthermore, from 01.06.2020 to 31.03.2022, the Company HPL has paid a further amount of Rs.479,89,00,544/- as State GST, to the State of West Bengal. The Company - HPL is therefore also held to be entitled to a further payment of the above amount of Rs.479,89,00,544/- towards financial incentives/benefits under Clause 1 (A) (c) of Schedule 5, of the SPA, dated 11.09.2014, The contention raised on behalf of me Respondents, disputing the amounts (-noted above), is declined, for reasons af Schedule recorded in paragraph 77, above. It is also the case of the Claimant-Essex, that even after 31.03.2022, the Company HPL has been paying State GST to the State of West Bengal. If that is so, the Company-HPL is also held to be entitled to all amount(s) paid by it as State GST to the State of West Bengal, till the Company HPL has received financial incentives/benefits adding up to Rs. 3285.47/- crores, or till HPL has received a lesser amount of financial incentives/benefits- but the period for the receipt of the same under Clause 1 (A) (a) has expired, whichever eventuality arises first.

(iv). The Claimant - Essex, has claimed interest on the withheld financial incentives/benefits. Since all the claims raised by the Claimant - Essex have been allowed, the Company - HPL is held to be entitled interest at the rate 6% per annum, from the date the financial incentives/benefits became due,

at the end of every successive quarter, commencing from 01.07.2017, till the dispersal of the amounts due.

(v). The Claimant - Essex has also claimed costs incurred by it, towards, the present arbitral proceedings. The Claimant - Essex, is held to be entitled to the reimbursement of the costs incurred by it towards the present arbitral proceed, adding up to Rs. 6,55,21,914.50/-.

(vi). The claim of costs, incurred by the Respondents GoWB and WBIDC, towards the defence of the arbitral proceedings, is declined."

5. Mr. Kishore Dutta, Learned Advocate General submits that the Essex could not maintain a prayer for refund of tax deposited by HPL, in the face of a clear statutory bar contained in the GST regime as well as in view of the law settled by the Hon'ble Supreme Court under Article 141 of the Constitution of India. He submits that HPL was promised tax incentives by the Government of West Bengal under Schedule 5 of the SPA and there is no disagreement on this aspect of the matter and this also reflected the contemporaneous intension and understanding of the parties as articulated under the Share Purchase Agreement. He submits that the parties were also ad idem the Essex's claim in the arbitration was for refund of the State GST deposited by HPL.

6. Learned Advocate General submits that there being no pleadings by the parties, the Tribunal ventured to decide on its own aspect "whether the incentives extended to HPL were tax incentives or was it a mere contractual obligation to provide financial incentives/benefits". He

submits that in fact no issue was framed on the point and the parties were not invited to address the Tribunal on such crucial point which formed the fulcrum of the Award.

7. Learned Advocate General submitted that if these are Tax Incentives, then they have to be in consonance with the prevailing/relevant tax legislation as well as the law settled by the Hon'ble Supreme Court of India in the case of ***Amirt Banaspati Co. Ltd. & Anr. –vs- State of Punjab & Anr.*** reported in ***1992 (2) SCC 411*** and submitted that any agreement for refund of tax is contrary to the public policy and void under Section 23 of Indian Contract Act, 1872.

8. Learned Advocate General submits that the Learned Arbitral Tribunal wrongly concluded that the 'Incentives' extended to HPL were not 'tax' incentives but Government of West Bengal had promised financial incentives/benefits to HPL through a contractual agreement. He submits that on the basis of the erroneous conclusion, the Tribunal held that it will treat the incentives granted to HPL as contractual obligations, mutually agreed to by the parties, and not as tax incentives promised by the Government of West Bengal to HPL.

9. Learned Advocate General submits that the Learned Arbitral Tribunal could not have unilaterally determined that it will treat the incentives granted to HPL as contractual obligations and not as tax incentives. He submits that the present GST regime contains a statutory bar on refund of tax. The Essex did not dispute or distinguish the case of

Amrit Banaspati (Supra) and also did not join issue with the settled legal principles laid down in the said judgment.

10. Learned Advocate General submitted that under the amended Section 36(2) and (3) of the Arbitration and Conciliation Act, 1996, this Court has the power and discretion to pass an order to grant an unconditional stay of the operation of the Award and in support of his contention, he has relied upon the judgment in the case of ***Ecopack India Paper Cup Private Limited –vs- Sphere International*** reported in ***2018 SCC OnLine Bom 540*** and submitted that when the Court considers an application for stay of the Arbitral Award for payment of money, there cannot be a straight jacket formula that in every case, the court could impose conditions and necessarily there has to be a deposit of the decretal amount.

11. Learned Advocate General relied upon the judgment in the case of ***Gazal Taneja & Ors. –vs- Mahanagar Telephone Nigam Limited and Another*** reported in ***(2013) 7 SCC 543*** and submitted that this Court has the power to grant an unconditional stay of the operation of the award.

12. Learned Advocate General submits that fraud can be of infinite varieties, and the expression fraud in the making an award, cannot be narrowly construed. He submits that in the present matter, the making of Award is effected by fraud and as such, even on this ground, the Award required to be stayed unconditionally. In support of his

submission, he has relied upon the judgment in the case of ***Union of India & Anr. –vs- Reshmi Metaliks Limited,*** reported in ***2023 SCC OnLine Cal 2272*** and submitted that Oxford's English Dictionary defines fraud as - (1) Criminal deception; the use of false misrepresentations to gain an unjust advantage (2) A dishonest article of trick (3) A person or thing not fulfilling what is claimed or expected of him, her, or it.

13. He further relied upon the judgment in the case of ***Associated Engineering Co. –vs- Government of Andhra Pradesh & Anr.*** reported in ***(*1991) 4 SCC 93** and submitted that an arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialized branch of the law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may also tantamount to a malafide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the awards.

14. Learned Advocate General relied upon the judgment in the case of ***Venture Global Engineering –vs- Satyam Computer Services Limited and Anr.*** reported in ***(2010) 8 SCC 660*** and submitted that it is well known that fraud cannot be put in a straitjacket and it has a very wide connotation in legal parlance. He submits that in the decision

of House of Lords in ***Reddaway (Frank) & Company Limited –vs- George Banham & Company Limited***, Lord Macnaghten explained the multifarious aspects of fraud very lucidly, and which we quote :

> *"But fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honestly itself if it could only afford it. But fraud is a fraud if all the same, and it is the fraud, not the manner of it, which calls for the interposition of the Court."*

15. Learned Advocate General submits that by creating a new case for Essex, an unfair and undeserved benefit has been given to Essex. He submits that in the name of 'legal determination', the Tribunal could not have knowingly and deliberately disregarded the contract, the expressed intension of the parties, their pleaded cases and evidence adduced, their contemporaneous and subsequent conduct regarding the manner in which they understood the contract and the extent GST regime. He submitted that knowingly creating a new case, and also brazenly acknowledging in the Award that it is creating a new case, the Tribunal has exceeded its jurisdiction and regarded and ignored all settled principles that clothe an Arbitral Tribunal with jurisdiction. He submits that the Tribunal clearly did not fulfil what was expected of it and its tantamounts to fraud in making of the award.

16. *Per contra,* Mr. Sudipto Sarkar, Learned Senior Advocate representing the Essex submits that HPL was set up as a joint venture project in 1985 in public interest for the resurgence of industries in the West Bengal which was languishing. He submits that HPL is the flagship

investment in West Bengal and a source of employment for thousands of people. In 1994, TCG came in as a joint venture partner to set up the project which has not materialized by then. However, dispute arose between TCG and the Government of West Bengal concerning the management and control of HPL leading up to extensive litigation. HPL became sick, necessitating further infusion of funds for survival. The lenders insisted on the joint venture partners settling their disputes. The West Bengal Government sought to settle such dispute with TCG in public interest in order to revive HPL and accepted the proposal dated 1st March, 2014 of TCG where the following essential conditions were made : (i) TCG would purchased 520 million shares of HPL from WBIDC at the rate of Rs. 25.10 share (ii) The payment would be subject to further details to be worked out as part of rejuvenation effort by all stakeholders of HPL , (iii) The entire rejuvenation procedure would require reinstating utilized incentives in a suitable manner, (iv) Government of West Bengal could ensure that not less than 75% of the unutilized incentives will be restored and details would be worked out for the restructuring package in such a manner so as to ensure cash flow of HPL from the incentives for meeting the liabilities of the lenders on prudential norms.

17. Mr. Sarkar submits that the object of change in control and management of HPL through share purchase was to ensure was HPL did not become a Non-Performing Asset and was not subjected to action

under the Scrutinization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

18. Mr. Sarkar submits that Share Purchase Agreement was entered into on the part of the petitioners in overwhelming public interest and was a comprehensive contract which contemplated revival of HPL in the following manner :

i. Handing over management and control of HPL by WBIDC to TCG through purchase of shares of HPL by Essex; and

ii. Disbursal of financial benefits to HPL by Government of West Bengal.

He submits that the proposal was to purchase the shares of HPL in two tranches. Pursuant to the completion of first tranche of shares, several undertakings were made by the Government of West Bengal. He submits that the said undertakings were made specifically to Essex and no one else. He submits that the fundamental basis of Share Purchase Agreement was revival of HPL through, inter alia, extension of financial benefits contractually through incentives to ensure cash flow to HPL.

19. Mr. Sarkar submits that the Government of West Bengal and WBIDC had jointly and severally undertook to Essex in the Share Purchase Agreement that to ensure the revival of HPL, unutilized benefits which has been granted under the West Bengal Incentive Scheme (hereinafter referred to as "WBIS"), which had expired in 2012 would be extended to HPL under the Share Purchase Agreement since HPL did not have any

right to receive the expired benefits under the WBIS which had expired in 2004. He submits that it was agreed by and between the parties under the Share Purchase Agreement that:

> *(i) HPL would be allowed to carry forward and utilize 75% of the unutilized benefit of incentives under WBIS over a period of 19 years. [75% of Rs.4380.62 crores (unutilized benefit) amounted to Rs.3285.47 crores approximately]. Significantly, it is only a part of such unutilized expired incentives which has agreed to be paid contractually under the SPA and not the whole of it, which would have been the case if the incentives, which had expired, were being sought to be restored by the SPA.*
>
> *(ii) Input tax was to be refunded quarterly by way of State support at the applicable discount of 25%.*
>
> *(iii) The financial benefit was to continue even if there was a change in law (such as GST) with the exception that incentive would be **payable** to HPL only to the extent the tax accrues to the State so as to not cause any loss to the State.*

20. Mr. Sarkar submits that the Government of West Bengal and WBIDC had unequivocally represented to Essex that they had the requisite capacity to perform all obligations which constituted legal, valid and binding obligations enforceable against them. He submits that there is a cap on the quantum and the period within which the benefit has to be earned, but the earning would be dependent on the performance and the tax payable by HPL during such period.

21. Mr. Sarkar submits that declared object of the Share Purchase Agreement was to salvage HPL and to grant financial assistance to HPL

to enable it to use the assistance for its business and growth in whatever manner is possible. He submits that after purchase of the first tranche of shares of HPL by Essex, the Assistant Secretary to the Government of West Bengal circulated an internal letter dated 15th March, 2016, directing that HPL be granted unutilized incentives for the period of 17 years 11 months and that the certificate be revalidated in favour of HPL with effect from 1st January, 2016.

22. Mr. Sarkar submits that on and from 1st January, 2016 to 30th June, 2016, the financial benefits were disbursed to HPL by the Government of West Bengal but such benefits were stopped from 1st July, 2017 i.e. coming into force of the Goods and Services Tax (herein after referred to as "GST" regime). The claim of the Essex before the Arbitral Tribunal was for disbursement of incentives promised to HPL under the Share Purchase Agreement. He submits that it was not the case before the Tribunal for refund of tax paid.

23. Mr. Sarkar submits that for grant of unconditional stay of an Arbitral Award under Section 36(2) of Arbitration and Conciliation Act, 1996, unless the case is made out falls under either the heads of fraud or corruption as provided in the second proviso of Section 36(3) of the 1996 Act. He submits that as per second proviso of Section 36(3) permits unconditional stay of an arbitral award only when there is an irrefutable case of fraud of corruption is made out but in the present case, the petitioners have not made out any such case.

24. Mr. Sarkar relied upon the judgment in the case of ***SRMB Srijan Limited –vs- Great Eastern Energy Corporation Limited*** reported in ***2024 SCC OnLine Cal 2089*** and submitted that prima facie case under Section 36(3) of the Arbitration and Conciliation Act, 1996 must mean a finding of fraud on the face of the record or from a first-blush look at the award. It would mean that the fraudulent inducement or effectuation *qua* the making of the award must be plain and ready to be discovered even without going into the merits or a detailed enquiry into the facts.

25. Mr. Sarkar submits that no case of inducement or effectuation of fraud by Essex has been alleged or made out or pleaded by the petitioners in their application. He submits that findings arrived upon by the Arbitral Tribunal in the said award was based on matters of undisputed record to the knowledge and notice of all parties and submissions made before the Arbitral Tribunal in openly conducted proceedings. He submits that the submissions made by all the parties are recorded and dealt with by the Arbitral Tribunal.

26. Mr. Sarkar relied upon the judgment in the case of ***WBSIDC –vs- Kitco*** recorded in ***2023 SCC OnLine Cal 2142*** and submitted that the words making of award qua inducement and effectuation of fraud mean that an award must be obtained by the fraud of a party to the Arbitration or by the fraud of another to which the party to the Arbitration was privy. He submits that a Court or Tribunal cannot become fraudulent or act

fraudulently on its own i.e. without being induced or affected by any litigating or third party.

27. Mr. Sarkar relied upon the case reported in ***(2009) 5 SCC 313 (Bank of India & Anr. –vs- K. Mohandas & Ors.)*** and submitted that the true construction of a contract must depend upon the import of the words used and not upon what parties choose to say afterwards. Nor does subsequent conduct of the parties in performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and object the contract. The nature and purpose of the contrast is an important guide in ascertaining the intention of the parties.

28. On conclusion of hearing, both the parties have filed their respective written arguments on 10th May, 2024. Subsequent to filing of written arguments, the Learned Counsel for the respondent has mentioned the matter through virtual mode on 15th May, 2024 as this Court was holding Circuit Bench at Jalpaiguri stating that there is some discrepancies in the written notes of argument filed by the petitioners and the respondent intents to clarify the same, this Court has fixed the matter as to be mentioned on 10th June, 2024 as in between there was summer vacation of the Court till 9th June, 2024.

29. On 10th June, 2024, learned Counsel for the respondent submitted that in the written argument of the petitioners, the petitioners have made some submissions which the Learned Counsel for the respondent did not submit the same. It was also submitted that the petitioners have casted aspersion on the Learned Senior Advocate of the respondent. Learned Counsel for the respondent pointed out the paragraph 35(ii), paragraph 40(i), (ii) and (iii) and paragraph 41 of the written notes of argument of the petitioners. This Court by an order dated 10th May, 2024, recorded the submissions of both the parties and reserved for judgment.

30. Subsequently again the matter was mentioned before this Court by the Learned Counsel for the petitioners on 21st June, 2024, and submitted that the petitioners have filed an interlocutory application being G.A. (Com) 1 of 2024 by incorporating excerpts from the arguments of the respondent dated 5th March, 2024 from the recording of the Court proceedings available on YouTube. In the application, Learned Counsel for the petitioners have quoted the arguments of the Learned Counsel for the respondent on 5th March, 2024 at Time Stamp – 25:51 to 26:17, 28:26 to 29:36 and 1:08:59 to 1:09:17.

31. On the other hand, the Counsel for the respondent has filed written notes of argument to the application being G.A. (Com) 1 of 2024 by reverting the contents made in the said application.

32. The petitioners in the said application have also submitted pen drive of recordings of the Court proceedings of the present matter dated 5th March, 2024.

33. This Court has perused the application, written argument and also gone through the YouTube proceeding of the present case dated 5th March, 2024. Submissions of the Learned Counsel for the respondent on 5th March, 2024 at Time Stamp reads as follows:

- *Time stamp – 25:51 to 26:17*

  ".....Lets say mylord- I am arguing before your lordship – I make an impossible argument – mylord cannot be sustained at all – lordship, for some reason mylord, maybe mylord (with respect lordship does not mind) gets confused mylord and accepts it – that is not a fraud. It is mylord, lordship mylord, not being able to exercise jurisdiction properly, not being able to appreciate the law or the pleadings mylord and coming to an erroneous finding....."

34. After going through the argument of the Learned Counsel for the respondent, this Court finds that Mr. Sarkar, Learned Senior Advocate submitted that if this Court get confused and not able to exercise jurisdiction properly and not appreciated the law and the pleadings and came to an erroneous finding, whether it can be said that this Court committed fraud or corruption.

35. Argument of the learned counsel for the respondent at Time Stamp 28:26 to 29:36 on 5th March, 2024 reads as follows:

- *Time stamp – 28:26 to 29:36*

> *".....Now mylord, the question is – arguments have been advanced, tribunal has accepted a view, taken a view and accepts some arguments – that can never mylord, amount to fraud of any kind and that's the only allegation, subject to correction mylord. No other allegation has been made. Then mylord, then mylord kindly see 20 now – the last paragraph which is relevant – paragraph 20 at page 23. "It is also relevant to mention herein that what Essex sought in arbitration is not simplicitor money award but one which sought refund of tax already deposited, to be deposited by HPL.... pith and substance Essex prayed and granted so and so..." Very well mylord, this is granted. So an error has taken place....*
>
> *Look at 21, "For all the above reasons amongst others....Unconditionally"". No ground mylord has been made out, with respect.*
>
> *And mylod now, kindly mylod, I believe mylord para 26 has some mention somewhere of fraud- Mr. Banerjee mylord reminds me. 26 mylord, now mylord – 26 says that Award is contrary to law of mylord – Amrit Banaspati. Now mylord, the award..arbitrators have gone wrong.....Now see the next sentence, "As held in this case, the relief granted to Essex is a fraud on the consti and breach on the faith of the people" So mylord, where is the inducement? Amrit Banaspati, mylord, was cited by them – arbitrators could not follow what they had cited according to them – so there was no inducement from our side.....*

36. Mr. Sarkar, Senior Advocate while making the above submissions has referred to paragraphs 20, 21 and 26 of the application filed by the petitioners under Section 36(2) of the Arbitration and Conciliation Act, 1996. As per the submissions of Mr. Sarkar that if the Arbitral Tribunal has accepted the submissions of the petitioners, can it amount to any

fraud. Para 20 and 26 of the application under Section 36(2) of the Arbitration and Conciliation Act, 1996 reads as follows:

> ***"20.*** *It is also relevant to mention herein that what Essex sought in the arbitration was not a simpliciter money award but one which sought refund of tax already deposited/ to be deposited by HPL. In pith and substance, what Essex prayed and has been granted is a refund of tax to HPL.*
>
> ***26.*** *Since the impugned Award prima facie suffers from various blatant irregularities and illegalities, any proceeding arising out of the same for enforcement will be highly detrimental to the interest of the Petitioners. As mentioned above, the prayer granted in favour of Essex is statutory barred by the extant GST regime, and it is in any event, also contrary to the law laid down by the Hon'ble Supreme Court in the case Amrit Banaspati. v. State of Punjab, (1992) 2 SCC 411. As held in this case, the relief granted to Essex is a fraud on the Constitution and a breach of faith of the people."*

37. Mr. Sarkar by referring the averments of the application of the petitioners and submitted that only in paragraph 26 of the application, the petitioners have contended that the prayer granted in favour of the respondent is statutorily barred by the extent of GST regime and contrary to the judgment of the Hon'ble Supreme Court in the case of ***Amrit Banaspati (Supra)*** thus the relief granted to the respondent is fraud on the constitution and breach of faith of the people. Mr. Sarkar submitted that the arbitrators could not follow what they had cited to them. Mr. Sarkar submitted that there is no inducement on the side of the respondent and there is no evidence that the respondents have induced fraud upon the arbitrators. Merely, the arbitrators have not

followed the citation cannot be said to be fraud. This Court perused the Award and finds that the Arbitral Tribunal has considered the judgement of ***Amrit Banaspati*** and distinguished the same from the facts of this case.

38. In the time stamp 1:08:59 to 1:09:17 the argument of Mr. Sarkar as follows:

- *Time stamp – 1:08:59 to 1:09:17*

  ".....Now mylord, I come on the contract, Lordship's question. Now mylord, Assuming that your lordship is – thinks that it can't be done, I submit there is no fraud or corruption, it is an error of law. Assuming it can't be done....."

39. In the said argument, Mr. Sarakar has submitted that if this Court is not agree with the findings of the Arbitral Tribunal, can it be said to be fraud or corruption. He submitted that if this Court will not accept the findings of the Arbitral Tribunal, it is an error of law. Mr. Sarkar to buttress his submission has referred the Share Purchase Agreement wherein Clauses A and B reads as follows:

> ***A.*** *The company is a public limited company incorporated in India and is, inter alia, engaged in the business of manufacture and sale of various petrochemical related polymers and other value added chemical products* ***("Business")****. The company was incorporated in 1985 as a vehicle for implementation of the 'Haldia Petrochemical Project', which was intended to drive the industrial resurgence in the State of West Bengal.*
>
> ***B.*** *The company is the flagship investment in West Bengal. The Company has played a*

> *significant role in economic development of the State of West Bengal and has spurred development of related downstream petrochemical industry in the last decade in the eastern region of India, Significant downstream industries have spawned which utilize the Company's products as feed to manufacture a variety of products. These downstream units have created enormous job opportunities in the state."*

40. Considering the above facts and circumstances, this Court finds that the respondents have neither acknowledged nor have admitted in unequivocal terms that the Arbitral Tribunal has ignored the pleading of the parties, contemporaneous letters and committed an error.

41. In view of the above, **G.A. (Com) 1 of 2024** is **rejected**.

42. Heard the Learned Counsel for the respective parties, perused the materials on record and the judgments relied by the parties. The petitioners have prayed for an unconditional stay of operation of the Award dated 18th September, 2023, passed by the Arbitral Tribunal. The petitioners have also filed an application under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the impugned award but the petitioners have at present prays for unconditional stay.

43. Section 36 (2) and (3) of the Arbitration and Conciliation Act, 1996, reads as follows:

> *"(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of*

sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

[Provided further that where the Court is satisfied that a prima facie case is made out that, -

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation. - For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016).]"

44. Section 36 of the Arbitration and Conciliation Act, 1996 is under Chapter VII of the said Act. Chapter VII of the Act has dealt with finality and enforcement of arbitral awards. Section 36 of the Act has provided for the enforcement of the arbitral awards. Under Sub-Section (1) of Section 36, an arbitral award can be enforced in accordance with the

provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of a court where the time for making an application for arbitration award under Section 34 of the Act of 1996 has expired and subject to the provisions of Sub-Section (2) of Section 36. Sub-Section (2) of Section 36 has recognized that, an application for setting aside of the arbitral award by itself shall not render the award unenforceable, unless the Courts grant an order of stay of operation of such award for reasons could be recorded in writing. Prior to the Arbitration and Conciliation (Amendment) Ordinance, 2020, sub-section (3) of Section 36 of the Act of 1996 had a proviso. The proviso to such sub- section has stipulated that, the court shall, while considering the application for grant of stay in the case of an award for payment of money, have due regard to the provisions for grant of money in decree under the provisions of Code of Civil Procedure, 1908. The Arbitration and Conciliation (Amendment) Ordinance, 2020, has added one more proviso of sub-section 3 of Section 36 of the Act of 1996. It has added the following proviso:

> *"Prided further that were the court is satisfied that a prima facie case is made out:-*
>
> *a) That the arbitration agreement or contract which is the basis of the award; or*
>
> *b) The making of the award was induced or affected by fraud or corruption; it shall stay the award unconditionally pending disposal of the challenge under Section 34 of the award."*
>
> *Explanation: For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to a arbitral*

proceedings, irrespective of whether the arbitral of court proceedings were commenced prior to or after the commencement of Arbitration and Conciliation (Amendment) Act, 2015.

The second proviso to sub-section (3) of the Section 36 of the Act of 1996 has stipulated that, the court on prima facie finding that the arbitration agreement or the contract which is the basis of the award, or the making of award had been induced or affected by fraud or corruption, stay such award unconditionally pending disposal of challenge under section 34 of the Arbitration and Conciliation Act, 1996."

45. The Advocate General has relied upon the judgment reported in ***2018 SCC OnLine Bom 540 (Ecopack India Paper Cup Private Limited – vs- Sphere International),*** wherein the Bombay High Court held that:

> ***"10.*** *A bare perusal of the provisions of Section 36 shows that the jurisdiction so conferred on the Court is a discretionary jurisdiction. The proviso to Sub-section (3) further makes it implicit that the provisions of Order 41 Rule 1 Sub-Rule 3 and Rule 5 would become relevant. In exercising powers under Order 41 Rule 5 the Court exercises its discretion and may grant a stay to the execution of a decree if "sufficient cause" is made out and the party seeking stay satisfies the Court that it will sustain substantial loss and inter-alia satisfies the condition as stipulated in sub-Rule 3 of Rule 5. Thus, the under scheme of the provisions of Section 36 read with Order 41 Rules 1 and 5 of the C.PC, the party opposing grant of a stay cannot assert a proposition that it would be mandatory for the Court to impose a condition for a stay to the execution proceedings. It is for the Court to consider the facts and circumstances of the case and exercise its discretion either to grant a stay to the execution of the decree or impose or not impose any other condition, as the Court may deem appropriate. The above position in law has been clearly recognized by the Supreme Court in Malwa Strips Private Limited v. Jyoti Limited. The discretion so vested in the Court is required to be*

> *exercised judicially and not arbitrarily and in the interest of justice. (see Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai & Co.. (supra). Adverting to these principles of law, the learned Single Judge in the facts of the case, has appropriately exercised discretion as vested with the court under the provisions of Section 36(3) of the Act read with provisions of Order 41 Rule 5 in passing the impugned order."*

46. Learned Advocate General has also relied pon the judgment reported in ***(2013) 7 SCC 543 (Gazal Taneja & Ors. –vs- Mahanagar Telephone Nigam Limited & Anr.),*** wherein the Hon'ble Supreme Court has stayed the operation of the impugned Judgment and Decree.

47. Mr. Sarkar, Learned Senior Advocate, representing the respondent has relied upon the judgment reported in ***(2019) 8 SCC 112 (Pam Developments Private Limited –vs- State of West Bengal),*** wherein the Hon'ble Supreme Court has considered the provisions of Section 36(3) in the contract of an Arbitral Award against the State Government for payment of money. It has considered the interplay of the provisions of Section 36(3) of the Act of 1996, Order 27 Rule 8-A of the Code of Civil Procedure, 1908 and Order 41 Rule 5 (3) of the Code of Civil Procedure, 1908. It has held that:

> ***"19.*** *In this backdrop, we have now to consider the effect of Section 36 of the Arbitration Act, vis-à-vis the provisions of Order 27 Rule 8-A CPC. Sub-section (3) of Section 36 of the Arbitration Act mandates that while considering an application for stay filed along with or after filing of objection under Section 34 of the Arbitration Act, if stay is to be granted then it shall be subject to such conditions as may be deemed fit. The said sub-section clearly mandates that the grant of stay of*

the operation of the award is to be for reasons to be recorded in writing "subject to such conditions as it may deem fit". The proviso makes it clear that the Court has to "have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure". The phrase "have due regard to" would only mean that the provisions of CPC are to be taken into consideration, and not that they are mandatory. While considering the phrase "having regard to", this Court in Shri Sitaram Sugar Co. Ltd. v. Union of India [Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223] has held that : (SCC p. 245, para 30)

> *"30. The words "having regard to" in sub-section are the legislative instruction for the general guidance of the Government in determining the price of sugar. They are not strictly mandatory, but in essence directory".*

20. *In our view, in the present context, the phrase used is "having regard to" the provisions of CPC and not "in accordance with" the provisions of CPC. In the latter case, it would have been mandatory, but in the form as mentioned in Rule 36(3) of the Arbitration Act, it would only be directory or as a guiding factor. Mere reference to CPC in the said Section 36 cannot be construed in such a manner that it takes away the power conferred in the main statute (i.e. the Arbitration Act) itself. It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of CPC are to be followed as a guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is a self-contained Act, the provisions of CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act.*

29. *Although we are of the firm view that the archaic Rule 8-A of Order 27 CPC has no application or reference in the present times, we may only add that even if it is assumed that the provisions of Order 27 Rule 8-A CPC are to be applied, the same would only exempt the Government from furnishing security, whereas*

under Order 41 Rule 5 CPC, the Court has the power to direct for full or part deposit and/or to furnish security of the decretal amount. Rule 8-A only provides exemption from furnishing security, which would not restrict the Court from directing deposit of the awarded amount and part thereof.

48. Mr. Sarkar relied upon the judgment reported in ***2023 SCC OnLine Cal 2142 (West Bengal Small Industries Development Corporation Limited WBSIDC –vs- Kaushalya Infrastructure Development Corporation Limited KIDCO),*** wherein the Coordinate Bench of this Court held that:

> ***"10.*** *Since the Act does not provide any clarity or explanation on the circumstances which would escalate matters to the level of fraud or corruption in the making of the award, it would be profitable to refer to a few decisions where the concepts of fraud and corruption were considered and dealt with.*
> *Fraud*
>
> ***11.*** *Kerr on the Law of Fraud and Mistake, Seventh Edition, describes fraud as understood by Civil Courts of Justice, to include all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed and are injurious to another or by which an undue or unconscientious advantage is taken of another. The description proceeds to include:*
>
> > *"All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered as fraud.*
> > *Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to."*
>
> ***12.*** *In Venture Global Engineering v. Satyam Computer Services Ltd., (2010) 8 SCC 660, the Supreme Court considered a case for setting aside of an award under Explanation 1 to section*

34(2)(b)(ii) which provides for the circumstances when an award would be in conflict with the public policy of India and includes the making of the award being induced or affected by fraud or corruption in one of the three sub-clauses under Explanation 1(i). The Supreme Court held that fraud cannot be put in a straitjacket as it has wide connotation in legal parlance and referred to a decision of the House of Lords in Reddaway (Frank) & Co. Ltd. v. George Banham & Co. Ltd., [1896] A.C. 199 where "fraud" was described in the words of Lord Macnaghten as:

> *"But fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court."*

13. *Directing the gaze to India, section 17 of the Indian Contract Act, 1872, defines fraud as-*

> *"17.- "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract-*
>
> *(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*
>
> *(2) the active concealment of a fact by one having knowledge or belief of the fact;*
>
> *(3) a promise made without any intention of performing it;*
>
> *(4) any other act fitted to deceive;*
>
> *(5) any such act or omission as the law specially declares to be fraudulent.*
>
> *Explanation.- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that,*

regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech"

15. *Considering the legal and factual position, the Supreme Court in Venture Global held that concealment of relevant and material facts, which should have been disclosed before the arbitrator, would amount to an act of fraud. Russell on Arbitration, 23rd Edition, reiterates the position that an award will be obtained by fraud if the consequence of deliberate concealment is an award in favour of the concealing party.*

18. *The words "making of the award" was also considered by the Court in Elektrim SA v. Vivendi Universal SA, (2007) 2 All ER 365 (Comm), which held that an award must be obtained by the fraud of a party to the arbitration or by the fraud of another to which the party to the arbitration was privy. The Court in Vivendi Universal SA elaborated the concept further in the following words:*

> *"an award will only be obtained by fraud if the party which has deliberately concealed the document has, as a consequence of that concealment, obtained an award in its favour. The party relying on Section 68(2)(g) must therefore also prove a causative link between the deliberate concealment of the document and a decision in the award in favour of the other successful party"*

19. *The definition of fraud, as settled in the decisions referred to above, substantially point to a consensus that the facts concealed or suppressed must have a causative link with the facts constituting/culminating in the award or inducing the making of the award. The Supreme Court in Venture Global was of the view that disclosure of the concealed facts post-award would become relevant for setting aside of the award on a causal connection being found between the concealment and the award.*

23. *The above discussion on the definition of fraud and corruption makes it evident that an award-debtor, who seeks unconditional stay of an*

> *award, must discharge the onus of establishing a case, prima facie, that the procedure resulting in the making of the award warrants undoing of the award altogether on grounds of fraud or corruption. The burden on the party is onerous; it is simply not enough to show that the party was kept in the dark on the appointment of the arbitrator or of the proceedings thereafter, that the party was not given adequate or effective hearing or even that there has been a breach of the principles of natural justice."*

49. As per the case of the petitioners, in the present case, the impugned award is affected by fraud and as such the award is to be stayed unconditionally. The petitioners say that by creating a new case for Essex, an unfair and undeserved benefit has been given to Essex. They say that in the name of legal determination, the Tribunal could not have knowingly and deliberately disregarded the contract, the expressed intension of the parties, their pleaded cases and evidence and their contemporaneous and subsequent conduct regarding the manner in which the Tribunal understood the contract and the extent of GST regime. It is also the case of the petitioners that the Tribunal has exceeded its jurisdiction and disregarded and ignored all settled principles that clothe an Arbitral Tribunal with jurisdiction. As per the case of the petitioners, the same could tantamount to fraud in making the award.

50. It is not the case of the petitioners that the Essex had committed any fraud of corruption. The Arbitral Tribunal has arrived upon the findings after considering the materials placed before the Tribunal and the

submissions made by the respective parties before the Tribunal. The Tribunal has recorded all the submissions of the parties in the Award. Considering the case of the petitioners, the judgments relied by the parties and the Award passed by the Arbitral Tribunal, this Court finds that the no case is made out by the petitioners with respect to fraud and corruption while passing the Award by the Tribunal.

51. The petitioners have relied upon the judgment ***Amrit Banaspati (supra),*** wherein the Hon'ble Supreme Court has held that:

> ***"11.*** *Exemption from tax to encourage industrialisation should not be confused with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason. For instance tax holiday or concession to new or expanding industries is well known to be one of the methods to grant incentive to encourage industrialisation. Avowed objective is to enable the industry to stand up and compete in the market. Sales tax is an indirect tax which is ultimately passed on to the consumer. If an industry is exempt from tax the ultimate beneficiary is the consumer. The industry is allowed to overcome its teething period by selling its products at comparatively cheaper rate as compared to others. Therefore, both the manufacturer and consumer gain, one by concession of non-levy and other by non-payment. Such provisions in an Act or Notification or orders issued by Government are neither illegal nor against public policy.*
>
> ***12.*** *But refund of tax is made in consequence of excess payment of it or its realisation illegally or contrary to the provisions of law. A provision or agreement to refund tax due or realised in accordance with law cannot be comprehended. No law can be made to refund tax to a manufacturer*

realised under a statute. It would be invalid and ultra vires. The Punjab Sales Tax Act provided for refund of sales tax and grant of exemption in circumstances specified in Sections 12 and 30 respectively. Neither empowered the Government to refund sales tax realised by a manufacturer on sales of its finished product. Refund could be allowed if tax paid was in excess of amount due. An agreement or even a notification or order permitting refund of sales tax which was due shall be contrary to the statute. To illustrate it the appellant claimed refund of sales tax paid by it to the State Government on sale made by it of its finished products. But the tax paid is not an amount spent by the appellant but realised on sale by it. What is deposited under this head is tax which is otherwise due under the provisions of the Act. Return or refund of it or its equivalent, irrespective of form is repayment or refund of sales tax. This would be contrary to Constitution. Any agreement for such refund being contrary to public policy was void under Section 23 of the Contract Act. The constitutional requirements of levy of tax being for the welfare of the society and not for a specific individual the agreement or promise made by the government was in contravention of public purpose thus violative of public policy. No legal relationship could have arisen by operation of promissory estoppel as it was contrary both to the Constitution and the law. Realisation of tax through State mechanism for the sake of paying it to a private person directly or indirectly is impermissible under constitutional scheme. The law does not permit it nor equity can countenance it. The scheme of refund of sales tax was thus incapable of being enforced in a court of law."

On and from 1st July, 2017, as per the representation, HPL is entitled to receive further incentives being remission or refund or exemption as the case may be, of GST accruing to the Government of West Bengal to the extent of Rs.2968,33,59,066/- within any time before 1st December, 2033. Upon coming into force of the GST regime,

HPL has not been given remission or exemption for payment of GST but HPL has been making payment of GST to the Government of West Bengal.

52. At the time of execution of the Share Purchase Agreement, the parties had expressly contemplated change in law i.e. implementation of GST. Clause 1(B)(c) of Schedule 5 of the Share Purchase Agreement was incorporated and agreed to by the parties which provides that in the event of any change in law, as a result of which tax does not accrue to the Government of West Bengal, incentives would be suitably adjusted so as not to cause of any loss to the State Government on such account and incentives would be payable only to the extent the tax accrue to the State Government. The onus on the Government of West Bengal to show that any loss has been caused to them which they have failed to discharge. The Government of West Bengal has not provided any particulars in relation to any hardship or loss or unfair advantage. It is agreed by and between the parties that pursuant to the GST, the incentives are payable to HPL only to the extent the tax accrued to the Government of West Bengal. The Government of West Bengal has not made out any case that the Share Purchase Agreement became frustrated after the change in law.

The Learned Arbitral Tribunal has categorically come to the conclusion that the claim of Essex is a contractual claim under the Share Purchase Agreement and the Government West Bengal has promised to disburse financial benefits to HPL which were previously

granted to HPL under the WBIS which expired in 2004 and the benefits granted under the WBIS to HPL expired in 2012. The claim of the Essex is for payment of promised financial assistance under the contract. The amount of tax paid to the Government of West Bengal is merely used as standard to ascertain the quantum of financial benefit payable to HPL. The Share Purchase Agreement does not specify the mode and manner in which the financial assistance is to be rendered to the HPL. The Share Purchase Agreement contemplates monetary payment of expired incentives. It is for the State of West Bengal to decide the mode of such disbursal.

53. In the case of ***Commissioner of Sales Tax, Orissa –vs- Crown Re-Roller (P) Ltd. and Others*** reported in ***(2007) 3 SCC 659,*** the Hon'ble Supreme Court considered the judgment of ***Amrit Banaspati (Supra)*** and held that:

> ***"18.*** *In that case, the issue was as to whether the manufacturer of Banaspati had set up an industry in the State of Punjab, on the assurance that the sales tax amount actually collected by it from the ultimate purchasers, would be refunded to it by way of incentive, can be enforced by a court of law. Such a prayer was declined on the ground that refund of tax is made in consequence of excess payment of it. This case, however, deals with completely different situation as despite the exemption notification issued in terms of a statute, the respondent was compelled to pay tax through its purchase price when it purchased the scrap material from subsequent sellers. The State cannot resile itself from the statutory provisions of exemption made by it. In our opinion, in equity, the State in a situation of this nature, must act in letters and spirit of the Act. However, the State can only refund what it actually collected and not any amount which it had not collected. We, therefore,*

are of the opinion that the interest of justice would be subserved if an opportunity is given to the respondent to produce evidence before the assessing authority in regard to existence of the legal requirements, as noticed hereinbefore, for maintaining its claim of refund. The assessing authority shall give an opportunity to the respondent to place all materials in connection therewith or in relation thereto. It would also be open to the assessing authority, if any situation arises therefor, to call for any record from the Rourkela Steel Plant or any other "dealer". We, furthermore, are of the opinion that the respondent would not be entitled to any interest on the refund amount for the present as the quantum thereof is yet to be determined."

In the case of ***Hero Motocorp Limited –vs- Union of India and Others*** reported in ***(2023) 1 SCC 386,*** the Hon'ble Supreme Court held that:

"68. *However, a common thread in all these judgments that could be noticed is that all these judgments consistently hold that there can be no estoppel against the legislature in the exercise of its legislative functions. The Constitution Bench in M. Ramanatha Pillai [M. Ramanatha Pillai v. State of Kerala, (1973) 2 SCC 650 : 1973 SCC (L&S) 560] has approved the view in American Jurisprudence that the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity. It further held that the only exception with regard to applicability of the doctrine of estoppel is where it is necessary to prevent fraud or manifest injustice. The analysis of all the judgments of this Court on the issue would reveal that it is a consistent view of this Court, reiterated again in Godfrey Philips , that there can be no promissory estoppel against the legislature in the exercise of its legislative functions.*

69. *Undisputedly, the Notification dated 18-7-2017 withdrawing the exemption notifications was issued in pursuance of the statutory mandate as provided under Section 174(2)(c) of the CGST Act. If*

the contention as raised by the appellants is to be accepted, it would make the provisions under the proviso to Section 174(2)(c) of the CGST Act redundant and otiose. The legislature in its wisdom has specifically incorporated the proviso to Section 174(2)(c) providing therein that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded. If the contention is accepted, it will amount to enforcing a representation made in the said OM of 2003 and the 2003 Notification contrary to the legislative incorporation in the proviso to Section 174(2)(c) of the CGST Act. In other words, it will permit an estoppel to be operated against the legislative functions of Parliament. We are, therefore, of the considered view that the claim of the appellants on estoppel is without merit and deserves to be rejected.

70. *It is further to be noted that this Court has also consistently held that when an exemption granted earlier is withdrawn by a subsequent notification based on a change in policy, even in such cases, the doctrine of promissory estoppel could not be invoked. It has been consistently held that where the change of policy is in the larger public interest, the State cannot be prevented from withdrawing an incentive which it had granted through an earlier notification. Reliance in this respect could be placed on the judgments of this Court in Kasinka Trading v. Union of India, Shrijee Sales Corpn. v. Union of India , State of Rajasthan v. Mahaveer Oil Industries , Shree Sidhbali Steels Ltd. v. State of U.P. [Shree Sidhbali Steels Ltd. v. State of U.P., and DG of Foreign Trade v. Kanak Exports.*

71. *Recently, this Court, in Unicorn Industries, after surveying the earlier judgments of this Court on the issue has observed thus : (SCC p. 589, para 26)*

"26. It could thus be seen that, it is more than well settled that the exemption granted, even when the notification granting exemption prescribes a particular period till which it is available, can be withdrawn by the State, if it is found that such a withdrawal is in the public interest. In such a case,

the larger public interest would outweigh the individual interest, if any. In such a case, even the doctrine of promissory estoppel would not come to the rescue of the persons claiming exemptions and compel the State not to resile from its promise, if the act of the State is found to be in public interest to do so."

Schedule-5 reads as follows:

"SCHEDULE 5

Tax incentives to be granted by GoWB an and effective from the First Completion

1) The company has unavailed incentives under The West Bengal Incentive Scheme, 1999, benefits of which will be made available by extension of the same as hereunder:

A. Benefits with respect to Unutilized Incentives granted under 1999 Scheme

a) HPL will be allowed to carry forward and utilise 75 per cent of the unutilised benefit of incentives under WBIS 1999 over a period of 19 years. "The unutilised benefit being Rs.4380.62 crore and 75 percent thereof works out to Rs.3285.47 crore, approximately.

b) Input Tax paid would be refunded quarterly by way of State Support at the applicable discount of 25%.

B. Conditions:

a. This benefit would be effective on and from the date of receipt of First Tranche of Payment (First Completion) and withdrawal of legal proceedings in terms of Clause 5.7 hereinabove and no benefit pertaining to period prior to that would be applicable.

b. There shall be no benefits on Motor Spirit and the parties shall not press for the same.

c. In the event of any change in law (such as GST), as a result of which the tax does not

accrue to the State Government, the incentives would be suitably adjusted so as not to cause any loss to the State Government on that account and the incentives would be payable only to the extent the tax accrues to the State Government,

d. The total period of the incentives would stand reduced to 10 years and no further incentives would be applicable to HPL, in case:

i. the entire second tranche with interest for the remaining 260 million shares (Additional Sale Shares) is not received within the ? Years during which the amount is payable, or

ii. Based on the award of ICC, Paris, If amounts become payable to GoWB/WBIDC against the ICC Shares and the said amounts are not received within the stipulated time frame."

54. The incentives provided to HPL did not arise out of the West Bengal Incentive Scheme, 1999. The West Bengal Incentive Scheme, 1999 had expired on 19th May, 2012 well before the Share Purchase Agreement was executed between the parties. The tax incentives granted to HPL under the West Bengal Incentive Scheme, 1999, are concerned, the same could be availed by HPL till 2014 but under the Share Purchase Agreement, the validity period extended till 2033 as per Clause 1(A) (a) of the Schedule-5 of the Share Purchase Agreement. It is, therefore, evident that the incentives was not extended to HPL under the West Bengal Incentive Scheme, 1999. The Government of West Bengal allowed the incentives to HPL under the Schedule-5 of the Share Purchase Agreement were not a tax incentives, the only inference can be drawn that the same would be contractual obligations as agreed by

the Government of West Bengal. Clause 1(B) (c) of the Schedule-5 of the Share Purchase Agreement become operational in the event of change in the law. The said situation arose with effect from 1st July, 2017, on the implementation of West Bengal Goods and Services Tax Act, 2017. Clause 1(B)(c) provides that in the event of any change in law (such as GST), the incentives would be payable only to the extent the tax accrued to the State Government. In view of the same, it is not an exemption, remission or refund of tax.

Under Clause 1(A)(b) of Schedule-5 of the Share Purchase Agreement, the mode and method of the payment of incentives to the HPL was consciously guaranteed to the HPL by way of State Support. Clause 1(A)(b) ensures that the payment of the promised incentives to the HPL would be made under change circumstances out of all the available sources available with the State of West Bengal.

Clause 1(B)(c) of Schedule-5 of the Share Purchase Agreement provided an assurance on behalf of the State of West Bengal that the incentives extended to the HPL would not get reduced or wiped out even in the event of introduction of the GST regime, in place of the prevailing tax regime. In the said clause, it is made clear that the Government of West Bengal would extend the incentives to HPL irrespective of any change in the tax regime.

55. In Clause 11.1(a) of the Share Purchase Agreement, the Government of West Bengal confirms and undertakes that Government of West Bengal

shall not impose any new State taxes (whether direct or indirect) on the Company in any manner whatsoever and in Clause 11.1(d) of the Agreement, it is was also agreed that the Government of West Bengal/ WBIDC shall grant to the company, tax incentives as detailed in Schedule-5.

56. In the month of October, 2017, the HPL requested the Government of West Bengal to continue with the incentives in a suitable form from July, 2017, so as to honour its promise and support to the two flagship companies of the State, which together directly and indirectly provide employment to more than 2,00,000 people. The contents of the said communication reveal that it was never the case of HPL for refund of tax.

57. Considering the above, this Court is not satisfied that the petitioners have made out any prima facie case for grant of unconditional stay of the operation of the Award dated 18th September, 2023. The petitioners are directed to secure the entire awarded amount with the Registrar, Original Side within a period of six weeks from date. 50% of the awarded amount shall be transferred through bank in the account of the Registrar, Original Side of this Court and the Registrar, Original Side on receipt of the said amount shall invest in an interest bearing fixed deposit with the nationalised bank and remaining 50% of the awarded amount by way of Bank Guarantee within the time period mentioned above. The Award dated 18th September, 2023, shall be stayed from the date of securing of the total awarded amount as

mentioned above. If the petitioners fail to secure the awarded amount, the award holder shall be at liberty to take steps for enforcement of the Award in accordance with law

58. A.P. (Com) No. 28 of 2023 is **disposed of**.

Parties shall be entitled to act on the basis of a server copy of the Judgment placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)