**In the High Court at Calcutta**
**Ordinary Original Civil Jurisdiction**
**Original Side**
**(Commercial Division)**

**The Hon'ble Justice Sabyasachi Bhattacharyya**

**EC 335 of 2023**
**IA NO: GA-COM/2/2024**
**MINTECH GLOBAL PRIVATE LIMITED**
**VS**
**KESORAM INDUSTRIES LIMITED – CEMENTDIVISION**

**With**

**AP-COM 334 of 2024**
**KESORAM INDUSTRIES LIMITED**
**VS**
**MINTECH GLOBAL PRIVATE LIMITED**

**With**

**AP-COM 335 of 2024**
**MINTECH GLOBAL PRIVATE LIMITED**
**VS**
**KESORAM INDUSTRIES LIMITED –CEMENT DIVISION**

**With**

**AP-COM 563 of 2024**
**KESORAM INDUSTRIES LIMITED**
**VS**
**MINTECH GLOBAL PRIVATE LIMITED**

For the claimant/award-holder : Mr. Kalyan Bandopadhyaya, Sr. Adv.,
Mr. Sirsanya Bandopahyaya, Adv.,
Mr. Avishek Guha, Adv.,
Mr. Rahul Kr. Singh, Adv.,
Mr. Subhajit Das, Adv.

For the
award-debtor/
Kesoram Industries Ltd. : Mr. S. N. Mookherjee, Sr. Adv.,
Mr. Mainak Bose, Adv.,
Mr. Arvind Jhunjhunwala, Adv.,
Mr. Debjyoti Saha, Adv.,
Mr. Anirud Goyal, Adv.,
Mr. S. J. Mookherjee, Adv

Hearing concluded on : 05.10.2024

Judgment on : 08.11.2024

**Sabyasachi Bhattacharyya, J:-**

**1.** AP-COM No. 334 of 2024 has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act"), by Kesoram Industry Limited, the respondent in the Arbitral Proceedings (hereinafter referred to as the "respondent") whereas Mintech Global Private Limited has filed AP-COM No.335 of 2024 challenging a different portion of the same award, being the claimant in the Arbitral Proceeding (hereinafter referred to as the "claimant"). Both the said challenges have been preferred against the same award whereby some of the claims and counter claims have been allowed by the Arbitral Tribunal (AT) comprised of three members.

**2.** The short backdrop of the case is that an agreement was entered into in writing on January 27, 2016 between the parties, whereby the claimant was to set up and commission a manufacturing unit to make and produce the end products of cement ready mix mortar, AAC blocks, fly ash bricks and allied products as per requirement of the respondent and to manufacture, make and deliver such end products to the respondent.

**3.** A dispute having arisen between the parties following the issuance of two letters dated March 7, 2017 and March 8, 2017 by the respondent to the claimant asking the latter to stop further manufacture and production of the end products, the arbitral proceeding was initiated by the claimant alleging that the termination was invalid and making

several claims, *inter alia* towards outstanding sum and interest, future commitment charges, loss of future earning and ancillary reliefs. The respondent, on the other hand, took out a counter claim with the statement of defence, praying for recovery of mobilization advance and interests, damage to reputation, recovery of commitment charges allegedly paid under mistaken belief and fraudulent inducement and damages due to breach.

**4.** By the impugned arbitral award dated March 20, 2023, the majority members of the AT granted the claims towards outstanding sum and interest at the rate of 9 per cent per annum from March 2017 till the date of the award, future commitment charges and costs to the tune of Rs.3.50 Crore. On the other hand, the counter claims of recovery of mobilisation advance and interest thereon at the same rate of 9 per cent per annum were also granted. Being aggrieved by the respective portions of the award affecting them, both the parties have preferred the present challenges.

**5.** Learned senior counsel for the respondent seeks to defend the termination of contract on the ground that the AT failed to advert to several subsequent communications between the parties dated April 24, 2017, May 10, 2017 and August 7, 2017, which according to the respondent disclosed the discussions between the parties regarding the terms of exiting the contract in terms of the contractual clauses. The AT placed stressed only on the March 7, 2017 communication and held that the termination was invalid. It is argued that the clauses of the agreement indicate that the same could be determined

at will with prior six months' notice. It is contended that the communications between the parties clearly show that the parties chose to exit the contract, rendering the requirement of prior notice academic.

**6.** Secondly, it is argued that the commitment charges could at best be granted till the expiry of six months after the notice since the contract, by its very nature, was determinable at will. The AT went beyond its jurisdiction and re-wrote the contract by granting future commitment charges for a period of ten years from the respective dates of commencement in respect of the different end products which, in any event, would take such award beyond the date of expiry of the agreement itself.

**7.** It is further argued that the claimant failed to produce sufficient documents in support of its claim of damages and in the absence of any proof in that regard, the provisions of Sections 73 and 74 of the Contract Act come into play and the claim ought to have been dismissed.

**8.** Further, learned senior counsel appearing for the respondent submits that it was the claimant's duty to mitigate the loss. In the absence of any pleading of proof as to mitigation of loss by the claimant, no compensation could be granted under any of the heads of claims.

**9.** It is next argued by the respondent that the Minimum Assured Production (MAP) as per Clause 1.7 of the contract was not met by the claimant and as such, there was no scope of the claimant seeking future commitment charges. The commitment charges would be

conditional upon the claimant producing the minimum assured quantity and making the same available for consumption by the respondent. Having not done so and having not proved the commencement date of commercial production, none of the claims in that regard ought to have been granted.

**10.** Learned senior counsel for the respondent further argues that the contractual rate on interest on mobilisation advance was 14.50 per cent per annum but only 9 per cent was granted, which is also contrary to the agreement between the parties.

**11.** Moreover, since both the parties' claims were partially granted, the burden of entire costs ought not to have been imposed on the respondent alone.

**12.** Learned senior counsel cites *Associate Builders v. Delhi Development Authority* reported at *(2015) 3 SCC 49* and *Ssangyong Engineering and Construction Co. Ltd. v. National Highway Authority of India (NHAI)* reported at *(2019) 15 SCC 131* in support of the proposition that an unreasoned award violates the fundamental policy of Indian law and amounts to patent illegality under Section 34 of the 1996 Act. Non consideration of vital evidence tantamounts to perversity, on which ground the award ought to be set aside insofar as the claimant's claims are concerned.

**13.** Learned senior counsel next cites *Kailash Nath Associates v. Delhi Development Authority and another* reported at *(2015) 4 SCC 136* for the proposition that if the contract specifies a sum for the breach or as

a penalty clause, reasonable compensation can be granted, irrespective of actual damage, not exceeding the stipulated amount.

**14.** *Mahanagar Telephone Nigam Limited v. Tata Communications Ltd.,* reported at *(2019) 5 SCC 341,* is next cited for the contention that under Section 74 of the Contract Act, compensation for breach is limited to liquidated amount or stipulated penalty and genuine pre-estimate of damages with proof of actual damage is required for grant of such damage, unless such proof is difficult or impossible. Here, the clauses of the contract specifies liquidated damages for delays in delivery, installation and commissioning with penalties, which ought to have been adhered to by the AT.

**15.** Learned senior counsel cites *Unibros v. All India Radio* reported at (*2023) SCC OnLine SC 1366* where the Supreme Court laid down the requirements for grant of claims relating to profit, opportunities and the like. Delay in completion of contract which is not attributable to the claimant, the claimant's status as an established contractor handling substantial projects and credible evidence to substantiate the claim of loss of profitability are prerequisites for such ground.

**16.** Learned counsel next cites *Cargill International SA v. Bangladesh Sugar and Food Industries Corp.*, a Queen's Bench decision of England reported at *(1996) 4 AllER 563*, and the judgment of the court of appeal from the same, reported at (*1998) 1 WLR 461*, for the proposition that performance bonds in contracts do not represent estimate of damages; rather, those guarantee due performance. Additional damages beyond the bond cannot be granted. Additional

damages, if any, in respect of recovery of overpayments can be pursued separately.

**17.** Learned senior counsel also relies on *Murlidhar Chiranjilal v. Harishchandra Dwarkadas and another* reported at *(1961) SCC OnLine SC 100* and argues that the damages for breach place the injured party in a position as if the contract was performed. However, the injured party must also mitigate its losses. In a Bombay High Court decision in the matter of *M/s Auto Craft Engineers v. Akshar Automobiles Agencies Private Limited,* it was also reiterated that mitigation efforts are to be demonstrated by the claimant.

**18.** In *Indian Oil Corporation Ltd. v. Amritsar Gas Service and others*, reported at *(1991) 1 SCC 533*, it was held by the Supreme Court that if the agreement is revocable, the only relief if there is an invalid termination is compensation for the period of notice.

**19.** *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies Private Limited* reported at *(2021) 7 SCC 657* is cited for the proposition that the grounds in a dissenting opinion can be set up as good grounds for challenging an award.

**20.** Learned counsel next cites *Union of India v. Bright Power Projects (India) Pvt. Ltd.* reported at *(2015) 9 SCC 695* and argues that the AT may award interest from the date of cause of action commencement till the date of award, subject only to agreement by parties. *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation* reported at *(2022) 9 SCC 286* is relied on to argue that it is the discretion of the AT under Section 31(7) of the 1996 Act whether to grant interest or

not and, if so, for what period and what amount, subject to the agreement.

**21.** Learned counsel next argues that the proposition that the AT cannot re-write a contract is a fundamental principle of justice and the AT cannot interpret beyond the scope of the contract. In support of such contention, the following judgments are cited:

*i)* *PSA SICAL Terminals Private Limited v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others)*, reported at *2021 SCC OnLine SC 508;*

*ii)* *South East Asia Marine Engineering & Constructions Limited (SEAMEC LTD.) v. Oil India Limited*, reported at (*2020) 5 SCC 164;*

*iii)* *Indian Oil Corporation Limited v. Shree Ganesh Petroleum,* reported at *(2022) 4 SCC 463.*

**22.** Refuting the arguments of the respondent, learned senior counsel appearing for the claimant contends that the termination itself being invalid, the provision in the contract for repayment of mobilisation advance and interest thereon were automatically scrapped and hence, unlawfully granted in the award.

**23.** It is contended that the claimant was in no way responsible for less production, if any, as the respondent could not market the minimum assured quantity in terms of contract. It is argued that the respondent paid the commitment charges without demur till June, 2017 without any denial of liability and as such, cannot now claim a refund of the same.

**24.** Learned senior counsel relies on the views of the third Arbitrator, who authored the dissenting opinion, to argue that there were sufficient materials on record to grant future earnings as claimed by the claimant.

**25.** It is argued that the termination being illegal, the claimant was very much entitled to future commitment charges as well.

**26.** Learned senior counsel for the claimant then takes the court elaborately through the materials on record and the evidence in support of his contention that there was strong material basis to justify the grant of future commitment charges and the outstanding payments as well as the interest claims of the claimant.

**27.** It is contended that there were four components of commitment charges, being salary and wages, interest on capital (including working capital), depreciation and sixteen per cent of franchise manufacture's margin, all of which were quantifiable amounts and sufficiently substantiated by evidence. The commitment charges were granted on the basis of the revised cost sheets for calculation provided by the respondent itself to the claimant on May 5, 2017 post-termination of the contract and were granted on the basis of the input of material consumption as stated by the respondent's witness no.1 (RW1).

**28.** No reason was attributed by the respondent at any point of time for asking the claimant to stop production, nor was any clear termination intended to be conveyed.

**29.** Learned senior counsel appearing for the claimant *cites UHL Power Company Ltd. v. State of Himachal Pradesh* reported at *(2022) 4 SCC 116* and *Associate Builders v. Delhi Development Authority* reported at *(2015) 3 SCC 49* for the proposition that the AT is the final authority to interpret a contract.

**30.** *Konkan Railway Corporation Ltd. v. Chenab Bridge Project undertaking* reported at (*2023) 9 SCC 85* and *Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.* reported at *(2019) 7 SCC 236* are relied on for the proposition that a possible view of the AT in respect of quantity and quality of evidence cannot be interfered with under Section 34 of the 1996 Act.

**31.** It is argued that if compensation is not by way of penalty or unreasonable, the same can be awarded if there is a genuine pre-estimate by the parties, for which contention learned senior counsel cites *Oil & Natural Gas Corporation Limited v. Saw Pipes Ltd.,* reported at *(2003) 5 SCC 705.*

**32.** In *Tarapore & Company v. Cochin Shipyard Ltd., Cochin and Another* reported at *(1984) 2 SCC 680,* the Supreme Court held that if an agreement is predicated upon an agreed fact situation, it becomes irrelevant or otiose to the extent that it ceases.

**33.** The claimant cites *A.T. Brij Paul Singh and others v. State of Gujarat*, reported at *(1984) 4 SCC 59* in support of the contention that the expectation of profit is implicit in works contracts and the margin of profits depends on facts. In the present case, Annexure-I to the

agreement stipulates 16% as the manufacturer's margin and thus, future earnings ought to have been granted.

**34.** Mitigation of loss is a question of fact and was not raised before the AT. Hence, the same cannot be raised for the first time in the present challenge under Section 34, for which proposition learned senior counsel cites *MMTC Ltd. v. H.J. Baker& Bros. Inc.*, reported at *2009 SCC OnLine Del 2143*.

**35.** Learned senior counsel for the claimant also relies on *Bombay Housing Board (Now The Maharashtra Housing Board) v. Karbhase Naik & Co., Sholapur*, reported at *(1975) 1 SCC 828* for the argument that if a written notice is agreed upon for the purpose of termination, failure to issue the same entitles the other party to compensation.

**36.** *Radhey Shyam Pandey v. Union of India,* reported at *2022 SCC OnLine Cal 683* is cited for the contention that if a notice is required by the agreement, non-service of the same renders the letter of termination fall foul of the contract.

**37.** The claimant relies on *Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited*, reported at *(2024) 6 SCC 357* for the proposition that conclusions based on no evidence or ignoring vital evidence are perverse, amounting to patent illegality under Section 34(2)(b)(ii) and violate Section 28(3) of the 1996 Act.

**38.** *Ssangyong Engineering (supra)* is also relied on for the proposition that an addition or alteration of contract cannot be imposed on an unwilling party by the AT; if so, it would be contrary to fundamental

principles of justice as understood in India and would shock the conscience of the court.

**39.** *Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd.,* reported at *(2020) 7 SCC 167* is relied on by the claimant for the proposition that if the respondent is held liable to pay commitment charges, future commitment charges cannot also be refused.

**40.** It is, thus, argued that the award should be set aside to the extent that future earnings were not awarded to the claimant and sustained in respect of the rest.

**41.** Having heard the parties, the court comes to the following conclusions:

**42.** The scope of interference under Section 34 of the 1996 Act has been quite clearly settled by the Supreme Court, as also reflected in the judgments cited by both parties. *Associate Builders (supra)* and *UHL Power Co. Ltd. (supra)* make it abundantly clear that the AT is the final authority to interpret a contract and *Konkan Railway Corpn. Ltd. (supra)* and *Parsa Kante (supra)* also lay down that a possible view of the AT regarding quantity and quality of evidence cannot be interfered with.

**43.** *Ssangyong Engineering (supra)* and *Associate Builders (supra)* have been relied on by both parties. In fact, there cannot be any quarrel with the proposition that if there is a perversity in the award insofar as the non-consideration of vital evidence is concerned, the same tantamounts to violation of the fundamental policy of Indian Law as

well as gives rise to a patent illegality, which is a sufficient ground for interference under Section 34 of the 1996 Act.

**44.** Considered in the above backdrop, certain crucial aspects emerge as determinants in the present case, the first of which is whether the termination of contract was valid. Although Clause 5 of the agreement has been relied on by the claimant, the same merely provides that the respondent could not have the right to the manufacturing unit or material stock, etc., in the event of termination. The said clause, thus, has no bearing on the actual termination or its pre-conditions.

**45.** Rather, Clause 1.11 of the agreement is the exit clause which provides that whichever party withdraws from its respective contractual obligations under the agreement within the lock-in period [10+6 years, as provided in Clause 1.10(A)], such party shall fully indemnify the other party as per the considerations set out in Annexure-III to the agreement. Thus, Clause 1.11 permits both parties to withdraw from the agreement at will, which overrides the default tenure of 10 years (with a possible extension of another 6 years, if agreed mutually).

**46.** However, Clause 1.11 subjects such exit to the conditions stipulated in Annexure-III to the agreement. Annexure-III provides two separate situations, respectively where the first and the second party to the contract so exits.

**47.** In the present case, since the respondent (first party) chose to withdraw from the contract, Clause 2 of Annexure-III applies. Sub-clause (a) of Clause 2 provides that if the second party (here, the claimant) agrees to retain manufacturing facility, it will have to return

the balance mobilization advances along with any pending interest within 1 month from the end of the notice period. Sub-clause (b) stipulates that if it does not so wish, the facility shall be dispose of and the mobilization advance settled as per the illustrations therein.

**48.** Since the claimant opted for the first option of retaining the manufacturing facility, which is abundantly clear from the materials on record, there cannot arise any question of disposal of the facility.

**49.** The exit mechanism and compensation scheme in Annexure-III also stipulates that if any party wishes to terminate the contract during its pendency, it has to give the other party six months' notice in writing. The notice period would be deemed to start from the date of acknowledgment.

**50.** Thus, it is seen that a prior notice of six months is a mandate qualifying the determination of contract at will by either party. Admittedly, there has not been issued any such prior notice, since the respondent proceeds on the premise that the communication dated March 7, 2017, asking the claimant to stop production was the termination notice.

**51.** Although the AT has observed that the communications dated March 7, 2017 and March 8, 2017 do not clearly disclose the intention to terminate, the subsequent discussions between the parties, as elicited from the subsequent correspondence between the parties which are also part of the record, go on to show that both parties proceeded on the premise that it was a termination nonetheless.

**52.** Also, the AT itself directed refund of mobilization advance and interest thereon, thereby assuming that the agreement between the parties stood terminated.

**53.** However, although the modalities of the exit process might have been discussed between the parties, the claimant, at no point of time, waived the mandatory contractual requirement of a prior notice of six months. Hence, it cannot but be said that the termination of the agreement, in the absence of such a prior notice, was invalid to such extent.

**54.** The next question which follows necessarily is whether future commitment charges could be granted beyond the six months' notice period.

**55.** Such aspect has been discussed elaborately by the Supreme Court in the *Amritsar Gas* case. As per the said judgment, if an agreement is otherwise revocable, in the event of an invalid termination, the compensation can be granted only for the period of notice.

**56.** Such logic is self-evident in the context of the instant *lis*, since it was always open for both parties to exit from the contract at will by issuing a termination letter at any point of time during the pendency of the contract. No separate reasons were to be assigned for doing so, making the contract determinable at will. The only rider was to issue a six months' prior notice, which has not been done by the respondent in the present case. The AT could not look beyond the said mandatory notice period to assess any entitlement of the claimant beyond the

said period since in any event, it was always open for the respondent to exit the contract at will.

**57.** Even if a prior notice was given, the agreement would come to an end within six months from the same. In the present case, such six months commenced from March 7, 2017, which was the date construed to be the date of stoppage of production, never to be resumed again. In fact the parties, by their subsequent conduct, made it evident that both of them proceeded on the premise that the March 7, 2017 communication tantamounted to the expression of interest by the respondent to exit the contract in terms of Clause 1.11.

**58.** Even if a notice was given on the date of termination, after the lapse of six months therefrom, the claimant could not have any further entitlement on the strength of the contract since all contractual rights would have come to a dead-end then.

**59.** Hence, the AT committed patent illegality in acting contrary to the proposition laid down in *Amritsar Gas (supra)* to grant future commitment charges much beyond the said six-months period.

**60.** The proposition of *Patel Engineering (supra)* is not applicable in the present case in view of the agreement here being determinable at will by either of the parties. Thus, although the respondent could be held liable for commitment charges during the six months' notice period subsequent to the termination, there was no scope of grant of future earning or future commitment charges.

**61.** The Supreme Court has repeatedly held, as reflected in *Ssangyong Engineering (supra)* as well, that the AT cannot deviate from the terms

of the contract. In fact, such proposition is premised on Section 28(3) of the 1996 Act which provides that 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 transactions.

**62.** Moving on to the issue of refund of mobilization advance, the same is clearly governed by Annexure-III of the agreement.

**63.** Annexure-II clearly provides in respect of all the end products that interest would be charged on the mobilization advance repayment at the rate of 14.50% on the reducing balance of the principal. Notably, the Tribunal held at Page No.120 of the award that the claimant was contractually liable to return the mobilization advance to the respondent with interest at the rate of 14.50% on reducing balance on principal and further concluded that accordingly, the claimant was held liable to pay to the respondent the said amount on account of mobilization advance with interest "at the said rate" from March 7, 2017 till repayment. However, all on a sudden the AT deviated from its own finding in the concluding portion and granted interest at the rate of 9% per annum on the outstanding amount awarded from March, 2017 till the date of award. The direction to pay interest till the date of the award and not till the repayment, however, is understandable, since it is covered by Section 31(7), sub-clauses (a) and (b) of the 1996 Act.

**64.** The AT, under Sections 31(7)(a), has the discretion to impose interest at such rate as it deems reasonable only when there is no agreement otherwise between the parties. Hence, in the present case, the AT was

denuded of such discretion to reduce the rate interest to 9% per annum on mobilization advance in the teeth of the specific agreement between the parties, as evidenced in Annexure-III, stipulating the rate of interest to be 14.5% per annum. Thus, the same tantamounted to a deviation from the contract, which is violative of the principle laid down in *Ssangyong Engineering (supra)* as well as Section 28(3) of the 1996 Act. In addition, the said reduction is also contrary to Section 31(7)(a) of the 1996 Act, thus, rendering such reduction patently illegal on the face of it and accordingly amenable to interference under Section 34 of the 1996 Act.

**65.** Additionally, the conclusion of 9% rate of interest is contrary to the A.T.'s own immediately earlier finding that the claimant was liable to pay interest at the contractual rate of 14.50% per annum. This amounts to perversity, which comes within the purview of 'patent illegality', amenable to interference under Section 34 of the 1996 Act as well.

**66.** Insofar as the commitment charges already paid by the respondent are concerned, the Tribunal did not direct refund of the same. Such decision on the part of the AT was justified. The respondent based its claim of refund on alleged mistaken belief and fraudulent inducement, none of which were specifically pleaded or proved by the respondent. That apart, the respondent, with its eyes open, participated in the business transaction and paid commitment charges during the notice period upon bills being raised by the claimant, much after the

termination, and is thus estopped from challenging the same, having not raised any demur at the relevant point of time.

**67.** Insofar as the allegations and counter allegations regarding not meeting the Minimum Assured Production is concerned, Clause 1.7 of the agreement has to be looked into. Notably, the caption of the said Clause is “Minimum Assured Production” and not ‘Minimum Assured Consumption/Purchase’. Thus, the minimum assured production is seen from the end of the manufacturer/claimant, who has to meet the said requirement, and not the respondent.

**68.** Also, the language of Clause 1.5 defines the scope of work as “manufacture, making and delivering the end products” to the respondent as per the latter’s requirement. Since Clause 1.7 defines minimum assured production as the minimum assured quantity of end products, such assurance is not linked to the consumption by the respondent but to the manufacture and delivery of the end product.

**69.** Hence, it was incumbent upon the claimant to meet the minimum assured production. The claimant, however, has virtually admitted that such requirement was not met, although seeking to shift the blame to the respondent.

**70.** Seen from the opposite perspective, as per Clause 1.10(B) of the contract, the respondent, in order to be liable to pay commitment charges, must utilize the claimant’s manufacturing unit capacity to 100% before looking at third parties for the same or similar products.

**71.** Hence, the “commitment”, which is the essential component and pre-requisite of “commitment charges”, can arise only when the Minimum

Assured Production is met by the claimant and made available for being utilized by the respondent. Hence, there was no scope of grant of future commitment charges, since no present basis for enforcing such commitment on the part of the respondent and the associated charges has been made out by the claimant at any point of time.

**72.** Accordingly, there was no conceivable reason for the AT to grant future commitment charges.

**73.** On such count, the decision of the AT is perverse, having overlooked the lack of evidence in that regard, the composite effect of the clauses of the contract insofar as the MAP is concerned (from which contractual clauses the AT thus deviated), as well as the factor that no future commitment charges or future earnings could be granted at all beyond the notice period.

**74.** In addition, mitigation of loss, contrary to the argument of the claimant, need not have been pleaded or proved by the respondent in the first place. A composite reading of Sections 73 and 74 of the Contract Act implicitly imposes the burden of proof on the claimant in respect of mitigation of loss, making it a pre-requisite and an inseparable component of a claim for damages. In the present case, the claimant has not pleaded any such mitigation of loss, nor is there any clear finding in the impugned award to that extent. In fact, for a prolonged period, by virtue of the interim order passed by the Court, the claimant was permitted to sell its end products without using the brand name of the respondent, thus impliedly releasing the respondent from the reciprocal commitment to be bound to the

products manufactured by the claimant. The principle laid down by the Supreme Court in *M/s Murlidhar Chiranjilal (supra)* and the Bombay High Court in *M/s Auto Craft Engineers (supra)* are thus fully applicable in such context.

**75.** Hence, in the absence of consideration of such factors, the grant of future commitment charges by the AT was patently illegal and ought to be set aside as well.

**76.** Insofar as future earnings is concerned, the same logic as that which applies to future commitment charges is applicable, and the AT was justified in not granting future earnings to the claimant.

**77.** The Supreme Court has clearly set out the contours of interference with an arbitral award, holding time and again that the AT cannot lend an interpretation beyond the scope of the contract and cannot re-write the contract itself. In *PAC SICAL Terminals (supra)*, *South-East Asia Marine Engineering (supra)* and *M/s Shree Ganesh Petroleum (supra)*, such proposition has been reiterated repeatedly, apart from the same proposition being echoed in *Ssangyong Engineering (supra)*.

**78.** Lastly, insofar as the grant of costs is concerned, the AT has reduced the claim of the claimant in that regard and granted Rs.3.50 crore instead of Rs.4,38,12,647/- as claimed originally, which claim was based on a schedule of costs, which the respondent failed to offer. Such reduction itself shifts the cost partially to the claimant. In any event, it was well within the discretion of the AT to grant costs and no patent illegality or element sufficient to shock the conscience of court is found in such imposition of costs. As such, the cost component

ought not to be interfered with under Section 34 of the 1996 Act merely because a different view than that of the AT is possible.

**79.** In view of the above discussions, the impugned award is liable to be set aside partially.

**80.** Accordingly, AP-COM 334 of 2024, AP-COM 335 of 2024 and AP-COM 563 of 2024 are disposed of, thereby setting aside the impugned award to the extent of Claim No.(iii) to the tune of Rs. 127,12,64,892/- towards future commitment charges and also modifying the award to the extent of Counter Claim No.(ii) inasmuch as the interest payable on the mobilization advance from March, 2017 till the date of award is to be calculated not at the rate of 9% per annum but at the rate of 14.50% per annum. The said award accordingly stands modified to such extent.

**81.** EC No.335 of 2023 along with GA-COM 2 of 2024 shall now be placed before the regular Bench having determination to take up such matters. Liberty is granted to the parties to mention the matter before such Bench.

**82.** There will be no order as to costs.

**83.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

**( Sabyasachi Bhattacharyya, J. )**