In the High Court of Judicature at Madras

Reserved on	Delivered on:
18.11.2025	**26.11.2025**

Coram :

The Honourable Mr.Justice N.ANAND VENKATESH

Arbitration O.P.(Com.Div.) No.10 of 2021

M/S.Sugesan Transport Pvt.
Ltd., rep.by its Director
Mr.Rajendra K.Sheth,
No.340, 1st South Main Road,
Kapaleeswarar Nagar,
Neelangarai, Chennai-115. ...Petitioner

Vs

M/S.E.C.Bose & Company Pvt. Ltd.,
ECB Towers, No.13A,
St George Terrace, P.S.Hastings,
Kolkata-700022 ...Respondent

PETITION under Section 34(2)(b)(ii) (2A) of the Arbitration and Conciliation Act, 1996 praying to set aside the award dated 01.12.2020 passed by the Arbitral Tribunal and for costs.

For Petitioner : Mr.Nithyaesh Natraj for
M/s.Nithyaesh & Vaibhav

For Respondent : Mr.J.Ravikumar

ORDER

This is a petition filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the Act) challenging the award dated 01.12.2020 passed by the learned Arbitrator.

2. Heard both.

3. The facts leading to filing of the above petition are as follows:

(i) The petitioner entered into a Memorandum of Understanding (MoU) dated 11.12.2015 with the respondent for providing financial assistance to the tune of Rs.2.50 Crores to be utilised by the respondent to meet their obligations for providing a performance bank guarantee of Rs.3.52 Crores in respect of a work order issued by the Kolkata Port Trust (KOPT). This money was agreed to be utilised as a margin money and the same would have to be returned to the petitioner within 30 days, but not later than 89 days at any cost from the date of the MoU. A promissory note was executed and a post dated cheque was given as a security towards the financial assistance that was extended to the respondent.

(ii) The grievance of the petitioner is that the said amount was not repaid back by the respondent as agreed under the MoU and the cheque that was deposited was also dishonoured. Hence, the petitioner initiated arbitration proceedings against the respondent as provided under Clause 3.6 of the MoU and for a direction to the respondent to pay a sum of Rs.2.50 Crores along with interest at the rate of 24% per annum.

(iii) Before the learned Arbitrator, the respondent filed a statement of defence and also made a counter claim. The defence taken by the respondent was as follows:

(a) The respondent was awarded with a handling agency licence by the KOPT and the respondent had to submit a performance bank guarantee to the tune of Rs.3.52 Crores to the KOPT in terms of the tender. Therefore, the respondent approached the petitioner for financial assistance and for executing the work together. It was also agreed between the parties that they would share the profit and loss in equal ratio.

(b) According to the respondent, the petitioner had to contribute a sum of Rs.2.5 Crores in order to enable the respondent to execute a performance bank guarantee to the tune of Rs.3.52 Crores in favour of

the KOPT. Apart from that, the petitioner was also supposed to arrange for the equipment in order to enable the respondent to carry out the work.

(c) The petitioner did not fulfil their duties and responsibilities provided under the MoU and as a result, the respondent lost the tender and the performance bank guarantee amount to the tune of Rs.3.52 Crores was forfeited by the KOPT. In view of the same, the respondent alleged that a breach of the MoU was committed by the petitioner and as a consequence, the respondent sought for a counter claim to the tune of Rs.75 Crores along with interest.

(iv) Before the learned Arbitrator, The petitioner examined C.W.1 besides marking Ex.C.1 to Ex.C.59. The respondent examined R.W.1 and marked Ex.R.1 to Ex.R.30. Based on the pleadings, the learned Arbitrator framed the following issues:

> *"(1) Whether the clause of bank guarantee of the MoU dated 11.12.2015 would constitute an independent short term financial arrangement/ agreement between the parties de hors rest of the terms of the said MoU ?*
>
> *(2) Whether the claimant is entitled to a sum of Rs.2,50,00,000/- from the respondent along with interest at the rate of 24%?*

(3) Whether the claimant/respondent has committed material breach of the MoU dated 11.12.2015?

(4) Whether the breach of obligation under the MoU dated 11.12.2015 has caused the termination of the work order by Haldia Port Trust? And

(5) Whether the respondent is entitled to counter claim of Rs.75 lakhs along with interest at the rate of 24%?"

(v) The learned Arbitrator, based on the facts and circumstances of the case and the evidence that was let in by both parties, passed the following award on 01.12.2020:

"(a) The claim is partly allowed and the respondent shall pay to the claimant Rs.2,50,00,000/- (Rupees two crores fifty lakhs only) without any interest;

(b) The counter claim is partly allowed and claimant shall pay to the respondent Rs.3,52,00,000/- (Rupees three crores fifty two lakhs only) with interest at 18% from the date of termination of the work order i.e. 10.2.2016 till the date of the award;

(c) The cost of these proceedings (excluding the respective advocates fees) shall be borne by the claimant;

(d) 3 months' time from today (till 1.3.2021) is given for making the payment as per the claim and the counter claim, in default whereof;

(e) the amount of Rs.2,50,00,000/- (Rupees two crores fifty lakhs only) awarded as per Para 22(a) above shall be paid to the claimant along with the respondent with interest @ 12% from 1.3.2021 till date of payment; and

(f) the amount of Rs.6,51,20,000/- (being the aggregate of Rs.3,52,00,000/- together with interest on the said sum at 18% p.a. from 10.2.2016 till date of award) (Rupees six crores fifty one lakhs twenty thousand only) awarded as per Para 22(b) above shall be paid by the claimant to the respondent with interest @ 12% p.a. from 1.3.2021 till date of payment."

(vi) The petitioner was aggrieved by the non award of the interest component and the award towards damages that was fixed and made payable by the petitioner to the respondent to the tune of Rs.6,51,20,000/- along with interest at the rate of 12% per annum on the principal amount from 01.3.2021 till the date of actual payment. Hence, the above original petition has been filed before this Court.

(vii) The respondent was also aggrieved with that portion of the award directing the respondent to pay to the petitioner a sum of Rs.2.50 Crores. Hence, the respondent filed Arb.O.P.(Com.Div.) No.

102 of 2021 before this Court. However, vide separate order, in view of the endorsement made by the learned counsel on record, ***Arb.O.P.(Com.Div.) No. 102 of 2021 was dismissed as not pressed vide order dated 18.11.2025***.

4. This Court has carefully considered the submissions of the learned counsel on either side and perused the materials available on record and more particularly the impugned award.

5. The main ground that was taken by the learned counsel for the petitioner was that the MoU entered into between the parties only pertained to the financial assistance given by the petitioner, that there was absolutely no mention in the MoU about providing of any equipment and assisting the respondent in the work and that such finding was rendered by the learned Arbitrator in total disregard to the terms of the MoU entered into between the parties. The other ground raised was that the learned Arbitrator exercised the jurisdiction of lifting the corporate veil, which power was not available to an Arbitrator.

6. It was further submitted on the side of the petitioner that the learned Arbitrator fixed an unliquidated sum without any pleading or evidence let in by the respondent, that the same was in violation of Section 73 of the Indian Contract Act, 1872, that the transaction between the parties was a pure and simple financial transaction and that when a direction was issued to the respondent to pay a sum of Rs.2.50 Crores to the petitioner, the learned Arbitrator ought to have awarded interest along with the principal amount whereas no interest was awarded by the learned Arbitrator.

7. On the contrary, the main defence that was taken on the side of the respondent was as follows:

The learned Arbitrator considered the entire evidence let in by both sides and came to the conclusion that there was a clear breach of the MoU on the part of the petitioner. That apart, it was not a case of mere financial assistance and the MoU itself was also entered into between the parties in order to complete the work order awarded by the KOPT in favour of the respondent. For this purpose, the petitioner was supposed to deliver the equipment and machinery, which was never done and as a result, the contract that was given in favour of

the respondent by the KOPT was cancelled. Since there was a breach of the MoU, the learned Arbitrator rightly awarded damages and while quantifying the sum, the performance bank guarantee that was forfeited by the KOPT was taken as the basis for fixing the compensation towards damages. Therefore, the award passed by the learned Arbitrator does not suffer from any perversity or patent illegality.

8. During the pendency of this petition, it was brought to the notice of this Court that the respondent had undergone liquidation and the Liquidator was appointed by the National Company Law Tribunal, Kolkata Bench. Hence, on 07.8.2025, this Court directed the petitioner to serve notice on the Liquidator appointed for the respondent.

9. Thereafter, the matter was taken up for hearing on 10.9.2025 and the learned counsel appearing for the respondent submitted that the respondent had entered to corporate insolvency resolution process (CIRP) and gone to the hands of the corporate liquidator and that he would get authorisation from the Liquidator and would represent the respondent. Accordingly, the learned counsel for the respondent got

the authorisation from the Liquidator of the respondent and made his submissions on behalf of the respondent. He also made an endorsement on 18.11.2025 in Arb.O.P.(Com.Div.) No.102 of 2021 that was filed by the respondent before this Court that it may be not pressed. Recording the same, Arb.O.P.(Com.Div.) No.102 of 2021 was dismissed vide order dated 18.11.2025.

10. The KOPT issued a letter of intent dated 09.10.2015 to the respondent in respect of shore handling operation at berth Nos.2 and 8 of Haldia Port Trust, Kolkata Complex. As per this document, the respondent was supposed to give a performance bank guarantee within a period of 30 days under Clause 7.2 of the tender document. But, the respondent was not in a position to arrange for the funds. Hence, the respondent approached the petitioner and they entered into the MoU dated 11.12.2015. As per this MoU, the petitioner agreed to pay a sum of Rs.2.50 Crores to the respondent for the purpose of providing the performance bank guarantee to the KOPT and that the respondent would return back the said amount within 30 days and not later than 89 days under Clause 1.5 of the MoU. The parties also agreed to form an alliance through a special purpose vehicle (SPV) to

assist the respondent in the performance of the work allotted under the tender.

11. The respondent also issued sufficient collateral security in terms of handing over share, execution of the promissory note and issuing a post dated cheque. The petitioner considered this transaction as a pure and simple financial transaction wherein the petitioner had handed over a sum of Rs.2.50 Crores to the respondent. In turn, the respondent was expected to repay back the said amount with interest. The stand taken by the respondent is that they approached the petitioner not only for financial assistance, but also for mobilisation and commission of the equipment to carry out the work. For this purpose, the respondent would rely upon the letter of intent issued by the KOPT. Thus, according to the respondent, both the payment of money and the supply of equipment were conjoint and they could not be separated.

12. The money was paid to the respondent, pursuant which, the respondent had furnished the performance bank guarantee to the KOPT. The SPV was supposed to be created for the purpose of carrying

out the work contract and the petitioner was supposed to supply and commission the equipment within 90 days' deadline that was fixed by the KOPT. Though repeated reminders were issued, the petitioner failed to commission and supply the equipment. As a result, a termination letter dated 10.2.2016 came to be issued by the KOPT to the respondent.

13. The learned Arbitrator considered the evidence on record and came to the conclusion that the work order is the foundation for the MoU, that both parties agreed that the work would be done through the SPV, that since the petitioner did not take any steps to provide the equipment and start the work, the tender was cancelled and as a consequence, the KOPT forfeited the performance bank guarantee. Accordingly, the learned Arbitrator came to the conclusion that the petitioner did not cooperate for the creation of the SPV and had committed breach of the MoU.

14. In the MoU that was entered into between the parties on 11.12.2015, it was stated that the respondent approached the petitioner for getting associated with them as a shore handling

facilitator. For this purpose, the petitioner agreed to pay a sum of Rs.2.50 Crores for the purpose of enabling the respondent to submit the performance bank guarantee to the tune of Rs.3.52 Crores to the KOPT. The parties also agreed to form an alliance through the SPV and to complete the said process within a time frame and further agreed that all future jobs would be done through the SPV. It was, therefore, quite apparent that the agreement between the parties was not a pure and simple financial transaction. But, the parties really intended to develop a relationship and to perform the work by forming the SPV.

15. One M/s.Collate Consultants Pvt.Ltd. came into picture and they also entered into two MoUs dated 09.1.2016 and 09.2.2016 respectively (part of the Ex.C.19 series) with the respondent. The learned Arbitrator, while examining Ex.C.1 and Ex.C.19 series, found that the person, who had signed on behalf of the said M/s.Collate Consultants Pvt.Ltd. was the same person, who had signed on behalf of the petitioner in Ex.C.1 and that the witnesses to both the documents were also one and the same. This entity came into the picture with an intention to supply the equipment. But, ultimately, such supply of equipment did not take place and the contract awarded

in favour of the respondent came to be terminated by the KOPT.

16. The learned Arbitrator, on considering the evidence on record, came to the conclusion that the said M/s.Collate Consultants Pvt. Ltd. was none other than the sister concern of the petitioner and that the petitioner was attempting to distance themselves as if they had no obligation to supply any materials. Therefore, the learned Arbitrator virtually lifted the corporate veil and came to the conclusion that the failure on the part of the said M/s.Collate Consultants Pvt. Ltd. to supply the equipment must be considered to be a failure on the part of the petitioner and hence, a finding was rendered to the effect that the petitioner committed breach of the MoU.

17. The original MoU marked as Ex.C.1 did not contain any clause creating an obligation for the petitioner to supply the equipment. Admittedly, such obligation was created by virtue of the subsequent MoUs that were marked as part of Ex.C.19 series entered into between the respondent and the said M/s.Collate Consultants Pvt. Ltd., which is a different entity. This MoU also contained a separate clause namely Clause 4.6 of the MoU dated 09.1.2016 and Clause 7.6

of the MoU dated 09.2.2016, which provided for resolving the dispute through arbitration. The learned Arbitrator had taken the said M/s.Collate Consultants Pvt. Ltd. to be the alter ego of the petitioner and therefore, fixed the liability on the petitioner to arrive at a conclusion that the petitioner had committed breach of the MoU.

18. The short question that arises for consideration is as to whether an Arbitrator can lift the corporate veil or render a finding that another entity is an alter ego of the petitioner and consequently, fix the liability on the petitioner.

19. The law on this issue was dealt with by a learned Single Judge of the Delhi High Court in the decision in ***Sudhir Gopi Vs. Indira Gandhi National Open University [reported in 2017 SCC OnLine Delhi 8345]***, the relevant portions of which are extracted as hereunder:

> *"**11.** 'Like consummated romance, arbitration rests on consent' (NON-SIGNATORIES AND INTERNATIONAL CONTRACTS: AN ARBITRATOR'S DILEMMA By Prof.William W.Park). The agreement between parties to resolve their*

disputes by arbitration is the cornerstone of arbitration. The arbitral tribunal derives its jurisdiction from the consent of parties (other than statutory arbitrations). In absence of such consent, the arbitral tribunal would have no jurisdiction to make an award and the award so rendered would, plainly, be of no value. Thus, the first and foremost question to be addressed is whether there existed any arbitration agreement between Mr.Sudhir Gopi and IGNOU.

12. *In terms of Section 7(3) of the Act, an arbitration agreement must be in writing. By virtue of Section 7(4) of the Act, an arbitration agreement is in writing if it is contained in "(a) a document signed by parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electric means which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which existence of an agreement is alleged by one party and not denied by the other". The term "party" is defined under Section 2(1)(h) of the Act to mean a party to an arbitration agreement.*

13. *In the present case, admittedly, the Agreement is not signed by Mr.Sudhir Gopi in his personal capacity. None of the communications produced provides a record of an agreement between Mr.Sudhir Gopi and IGNOU to arbitrate.*

The arbitral tribunal has also not proceeded on the basis of any such agreement.

14. *It was contended on behalf of IGNOU that since Mr.Sudhir Gopi had filed counter claims jointly with UEIT, his consent to arbitrate must be inferred. However, that is not the basis on which the arbitral tribunal has proceeded against Mr.Sudhir Gopi. The contention that Mr.Gopi's consent to arbitrate must be inferred from his preferring counter claims, is also unmerited. This is so because, in compliance with the directions of the arbitral tribunal issued on 30.04.2015, both UEIT and Mr.Gopi had clarified that Mr.Gopi had preferred the counter claims on behalf of UEIT and not in his personal capacity. Further, both UEIT and Mr.Gopi had resisted the claims on the ground that there was mis-joinder of parties to the extent that Mr.Gopi had been arrayed as a respondent in the arbitral proceedings.*

15. *The jurisdiction of the arbitrator is circumscribed by the agreement between the parties and it is obvious that such limited jurisdiction cannot be used to bring within its ambit, persons that are outside the circle of consent. The arbitral tribunal, being a creature of limited jurisdiction, has no power to extend the scope of the arbitral proceedings to include persons who have not consented to arbitrate. Thus, an arbitrator would not have the power to pierce the*

corporate veil so as to bind other parties who have not agreed to arbitrate.

16. *There may be cases where courts can compel non signatory (ies) to arbitrate. These may be on grounds of (a) implied consent and/or (b) disregard of corporate personality. In cases of implied consent, the consent of non signatory (ies) to arbitrate is inferred from the conduct and intention of the parties. Thus, in cases where it is apparent that the non-signatory (ies) intended to be bound by the arbitration agreements, the courts have referred such non-signatories to arbitration.*

17. *The second class of cases, is where a corporate form is used to perpetuate a fraud, to circumvent a statute or for other misdeeds. In such cases, the courts have disregarded the corporate façade and held the shareholders/ directors (the alter egos) accountable for the obligations of the corporate entity.*

18. *In Chloro Controls India Private Limited v. Severn Trent Water Purifications Inc. (2013) 1 SCC 641, the Supreme Court had explained the above principle in the following words:*

'Various legal basis may be applied to bind a non-signatory to an arbitration agreement. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other

transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called the "alter ego"), joint venture relations, succession and estoppel They do not rely on the parties' intention but rather on the force of the applicable law.'

19. *It is also necessary to emphasize that whether a court will compel any person to arbitrate would have to be examined in the context of the specific provisions of the applicable statute. It is almost universally accepted that dispute resolution by arbitration must be encouraged; however, the courts determine the question whether an individual or an entity can be compelled to arbitrate, guided by the domestic law and the judicial standards of their country. In this respect, the laws of most countries are not identical and the case law emanating from courts in other countries, cannot be readily followed.*

20. *The courts would, undoubtedly, have the power to determine whether in a given case the corporate veil should be pierced and the persons behind the corporate façade be held accountable for the obligations of the corporate entity. However as stated earlier, an arbitral tribunal, has no*

jurisdiction to lift the corporate veil; its jurisdiction is confined by the arbitration agreement - which includes the parties to arbitration - and it would not be permissible for the arbitral tribunal to expand or extend the same to other persons.

……..

34. *As stated above, arbitration is founded on consent between the parties to refer the disputes to arbitration. The fact that an individual or a few individuals hold controlling interest in a company and are in-charge of running its business does not ipso jure render them personally bound by all agreements entered into by the company.*

35. *Arbitration agreement can be extended to non-signatories in limited circumstances; first, where the Court comes to the conclusion that there is an implied consent and second, where there are reasons to disregard the corporate personality of a party, thus, making the shareholder(s) answerable for the obligations of the company. In the present case, the arbitral tribunal has proceeded to disregard the corporate personality of UEIT. The arbitral tribunal has lifted the corporate veil only for the reason that UEIT's business was being conducted by Mr. Sudhir Gopi who was also the beneficiary of its business being the absolute shareholder (barring a single share held by Mr.Fikri) of UEIT. This is clearly impermissible and*

militates against the law settled since the nineteenth century. Any party dealing with the limited liability company is fully aware of the limitations of corporate liability. Business are organised on the fundamental premise that a company is an independent juristic entity notwithstanding that its shareholders and directors exercise the ultimate control on the affairs of the company. In law, the corporate personality cannot be disregarded. Undisputedly, there are exceptions to this rule and the question is whether this case falls within the scope of any of the exceptions.

……..

42. *Mr.Mirza had earnestly contended that the alter ego doctrine would be applicable and the arbitral tribunal had proceeded on the basis of the said doctrine. This contention is bereft of any merit. The alter ego doctrine is conceptually no different from the concept of piercing of corporate veil These doctrines are applied to disregard corporate personality only in cases where it is found that corporate form is being used to perpetuate a fraud, circumvent statute or for a wrongful purpose. The alter ego doctrine is essentially to prevent shareholders from misusing corporate laws by a device of a sham corporate entity for committing fraud."*

20. The above decision of the Delhi High Court is the direct answer to the issue in hand. An Arbitral Tribunal gets jurisdiction to decide the dispute between the parties based on the agreement between the parties in line with Section 7 of the Act. In the present dispute, the MoU dated 11.12.2015 that was entered into between the petitioner and the respondent formed the basis for referring the dispute to the learned Arbitrator. Admittedly, the said M/s.Collate Consultants Pvt. Ltd., which was an independent entity, was not a party to the MoU dated 11.12.2015 and the said entity entered into two separate MoUs with the respondent respectively dated 09.1.2016 and 09.2.2016 marked as part of Ex.C.19 series. These MoUs were for the purpose of supply of equipment.

21. The jurisdiction that was exercised by the learned Arbitrator was circumscribed by the agreement between the parties and as a consequence, an Arbitrator will not have the power to extend the scope of the arbitral proceedings and include persons, who have not consented to arbitrate. Ex consequenti, an Arbitrator will not have the power to pierce the corporate veil so as to bind another entity, which was not a party to the agreement. The Courts undoubtedly have the

power to determine in a given case as to whether the corporate veil should be pierced and the persons behind the corporate facade must be held accountable.

22. The Arbitral Tribunal certainly does not have the jurisdiction to lift the corporate veil since its jurisdiction is confined by the arbitration agreement. Even in a case of determining as to whether one entity is the alter ego of the other, this is conceptually the same like lifting the corporate veil. This exercise can never be done by the Arbitral Tribunal, which is a creature under an agreement with a limited jurisdiction to decide the dispute between the parties to the agreement as per the terms and conditions of the agreement.

23. In the light of the above discussions, the learned Arbitrator went wrong in applying the doctrine of lifting the corporate veil/ determining another entity as the alter ego and fastening the liability on the petitioner. Such a finding will fall foul of Section 34(2)(b)(ii) of the Act.

24. The other issue that was dealt with by the learned Arbitrator touches upon the scope of the MoU dated 11.12.2015. The learned Arbitrator was of the view that the financial arrangement could not be separated and dealt with as a stand alone agreement and that it was only part and parcel of the contract and was inseparable from the entire agreement, which dealt with shore handling. However, the National Company Law Appellate Tribunal, New Delhi (NCLAT) rendered a finding to the effect that the relationship between the petitioner and the respondent was only a financial arrangement and that it was a stand alone agreement.

25. In the light of this decision taken by the NCLAT, the learned Arbitrator had to answer issue No.1 in favour of the petitioner subject to the final result before the Hon'ble Apex Court. Ultimately, the Hon'ble Apex Court dismissed the appeal by judgment dated 27.2.2023 in Civil Appeal No.2914 of 2020 and thereby confirmed the order passed by the NCLAT and the parties were directed to agitate their rights in the pending arbitral proceedings. Hence, the fact remains that the finding of the learned Arbitrator was circumscribed by the finding of the NCLAT that the loan was a separate transaction and

that was further confirmed by the Hon'ble Apex Court. In view of the same, this Court has to reiterate the finding that the MoU dated 11.12.2015 constituted an independent financial arrangement between the parties de hors the other terms of the MoU.

26. In the light of the above two findings, this Court must hold that the petitioner cannot be mulcted with breach of the MoU dated 11.12. since it did not contemplate the supply of equipment by the petitioner. As a consequence, whatever amount was paid by the petitioner to the respondent has to be repaid with interest.

27. The last issue pertains to the counter claim made by the respondent.

28. On carefully going through the statement of defence and the counter claim made by the respondent, it is seen that there is a total lack of pleadings to substantiate the counter claim made by the respondent.

29. The respondent made a counter claim at paragraph 18 of the statement of defence that they lost the earning opportunity amounting to Rs.69.75 Crores. Ultimately, they sought for a counter claim of Rs.75 Crores. The learned Arbitrator rendered a categoric finding that the counter claim made by the respondent was within the realm of uncertainty and that therefore, the same could not be acted upon. But, since the learned Arbitrator, having rendered a finding that the petitioner had committed breach of the agreement, proceeded to fix the damages at Rs.3.52 Crores. While doing so, the learned Arbitrator took into consideration the fact that the respondent had already initiated arbitration proceedings against the KOPT and that the same was pending. Hence, the performance bank guarantee, which was encashed by the KOPT, was fixed as damages payable by the petitioner to the respondent for the breach of agreement. This amount was directed to be paid along with interest at the rate of 18% per annum.

30. In so far as payment of damages for the breach of contract is concerned, I had an occasion to deal with the position of law in ***M/s.Prime Store, Rep. by its Partner Mr.S.Kaarthi & others Vs.***

Sugam Vanijya Holdings Private Limited & others [Arb.O.P. (Com.Div.) Nos.257 of 2021 & 209 of 2022 dated 08.10.2025],

the relevant portions of which are extracted as hereunder :

> *"30. The rule embodied in Section 73 is that the party, who "suffers by breach," is entitled to receive "compensation" for "any loss or damage caused to him". It then goes on to state that such loss or damage must have arisen naturally in the usual course of things from such breach, which the parties knew, when they made the contract, would be likely to result from the breach. Section 73 statutorily authorizes the grant of "compensation" for loss or damage caused on account of a breach of contract.*
>
> *.....*
>
> *32. The aforesaid passage makes it clear that it is not mere breach that makes a claim actionable, but a breach coupled with some loss or damage, which results in an actionable claim for damages. A breach, without injury or loss, is, therefore, not actionable per se.*
>
> *33. The last limb of Section 73 embodies another rider. It recognizes that the loss or damage caused must have arisen naturally ie., in the usual course of things from such breach. This is nothing but a statutory recognition of the principle laid down by Baron Alderson, who was one of the*

Judges, in the old case of Hadley Vs. Baxendale [reported in (1853) 156 ER 145] wherein it was held as follows:

'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. If special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For,

had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.'

.....

37. As pointed out by Nariman,J in Kailash Nath Associates Vs. Delhi Development Authority [reported in (2015) 4 SCC 136], Section 74 is a departure from English law and 'all stipulations naming amounts to be paid in case of breach would be covered by Section 74 and this is because Section 74 cuts across the rules of the English common law by enacting a uniform principle that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise.'

38. However, unlike the facts in Fateh Chand, we are, in this case, concerned with the first situation viz., "where the contract names a sum to be paid in case of breach", and not with the second situation i.e., "where the contract contains any other stipulation by way of penalty," which was the case in Fateh Chand. The jurisdiction of the Court to award compensation in case of breach of contract is unqualified, but is limited to the maximum stipulated. Another aspect of Fateh Chand is that it recognizes Section 74, which dispenses with "proof of actual loss or damage,"

but does not dispense with the requirement of showing legal injury i.e., loss or damage. This is a subtle, but important distinction.

.....

50. As noticed earlier, Section 74 of the Indian Contract Act provides that the party complaining of a breach, can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and if it is found to be such by the Court. There are two categories of stipulated payment for the breach of contract and they are : (a) a sum named in the contract as the amount to be paid in case of breach; and (b) stipulation by way of penalty. In both the categories of payment, the sum stipulated operated as the maximum amount or ceiling.

51. The nomenclature of "liquidated damages" or "penalty" is not relevant or conclusive or determinative and what is relevant is the entire clause read together. If the Court concludes that the stipulated payment is a genuine pre-estimate of anticipated loss in case of breach, the sum stipulated would be managed to be paid if the Court also concludes that it is difficult or impossible to prove the loss in the facts and circumstances of the case. In both the contingencies, i.e. in cases where the amount is fixed as compensation or it is stipulated by way of penalty, only reasonable

compensation can be awarded."

31. It is clear from the above common order that a mere breach of the contract will not automatically result in the payment of damages unless a party is able to show that such loss or damage had arisen naturally in the usual course of things from such breach and that the breach must necessarily be coupled with some loss or damage, which resulted in an actionable claim for damages. Thus, a breach without injury or loss is, therefore, not actionable per se.

32. In so far as Section 74 of the Indian Contract Act is concerned, there must be a stipulation in the contract naming the amounts to be paid in case of breach. That contingency does not arise in the facts of the present case since the MoU entered into between the parties does not stipulate any sum to be paid in case of breach. Therefore, this Court must only decide the case in the touchstone of Section 73 of the Indian Contract Act.

33. As already held supra, this Court holds that the finding rendered by the Arbitral Tribunal by applying the principle of alter ego

against the petitioner and holding the petitioner as having committed breach of the agreement is unsustainable. This finding itself would disentitle the respondent from claiming any damages. Apart from that, the respondent, not having pleaded and proved the actual loss or damages suffered by them, cannot be granted any sum towards damages as a windfall.

34. The learned Arbitrator fixed the sum towards damages to the tune of Rs.3.52 Crores based on the performance bank guarantee, which was encashed by the KOPT. There was absolutely no basis for fixing this amount towards damages. This is more so since this amount included a sum of Rs.2.50 Crores that was contributed by the petitioner and the respondent had already initiated the arbitral proceedings against the KOPT against the alleged illegal encashment of the performance bank guarantee. In the light of the above finding, this Court has to necessarily interfere with the damages awarded by the learned Arbitrator against the petitioner for the alleged breach of the MoU.

35. The Arbitral Tribunal cannot award an amount, which it may think just to a party in the interest of justice. There must be a basis for fixing the quantum of damages subject to the party properly pleading and proving the claim.

36. The upshot of the above discussions leads to the only conclusion that the petitioner is entitled to payment of a sum of Rs.2.50 Crores along with interest at the rate of 12% per annum. But, the finding rendered and the award made in favour of the respondent towards damages along with interest will have to be interfered. This would mean that the award passed by the learned Arbitrator has to be modified.

37. For this purpose, this Court has to follow the judgment of the Hon'ble Apex Court in ***Gayatri Balasamy Vs. ISG Novasoft Technologies Ltd. [reported in 2025 (7) SCC 1]***.

38. Accordingly, the invalid portion of counter claim awarded along with interest is severable from the valid portion of the award directing the respondent to pay a sum of Rs.2.50 Crores along with

interest. Hence, the award can be modified.

39. In the result, the above original petition is partly allowed, the award passed by the learned Arbitrator is partly set aside and is modified and there shall be a direction to the respondent to pay a sum of ***Rs.2,50,00,000/- (Rupees two crores and fifty lakhs only)*** to the petitioner along with interest at the rate of 12% per annum from 11.12.2015 till the date of actual payment. No costs.

26.11.2025

Index : Yes
Neutral Citation : Yes

RS

N.ANAND VENKATESH,J

RS

Arb.O.P.(Com.Div.) No.10 of 2021

26.11.2025