BEFORE THE SOLE ARBITRATOR

Justice Arvind V. Savant, (Retd.)

(Former Chief Justice, High Court of Kerala)

In the matter of Arbitration between

National Spot Exchange Limited, ... Claimant

And

NCS Sugars Limited, ... Respondent

Appearances:

Mr. Chirag Kamdar, Counsel with Mr. Yashesh Kamdar, Counsel
a/w. Ms. Anuja Jhunjhunwala, Ms. Madhu Gadodia and
Mr. Shashank Trivedi, Advocates
i/b M/s. Naik Naik & Company, Advocates

Mr. Vishwanathan Iyer, Mr. Abhijit Aher and
Mr. Santosh Dhuri, Claimant's representatives ... For the Claimant

Ms. Swadha UNS, Counsel

with Mr. Ganesh Kamath, Advocate

i/b. Mr. S.P. Bharti, Advocate for the Respondent

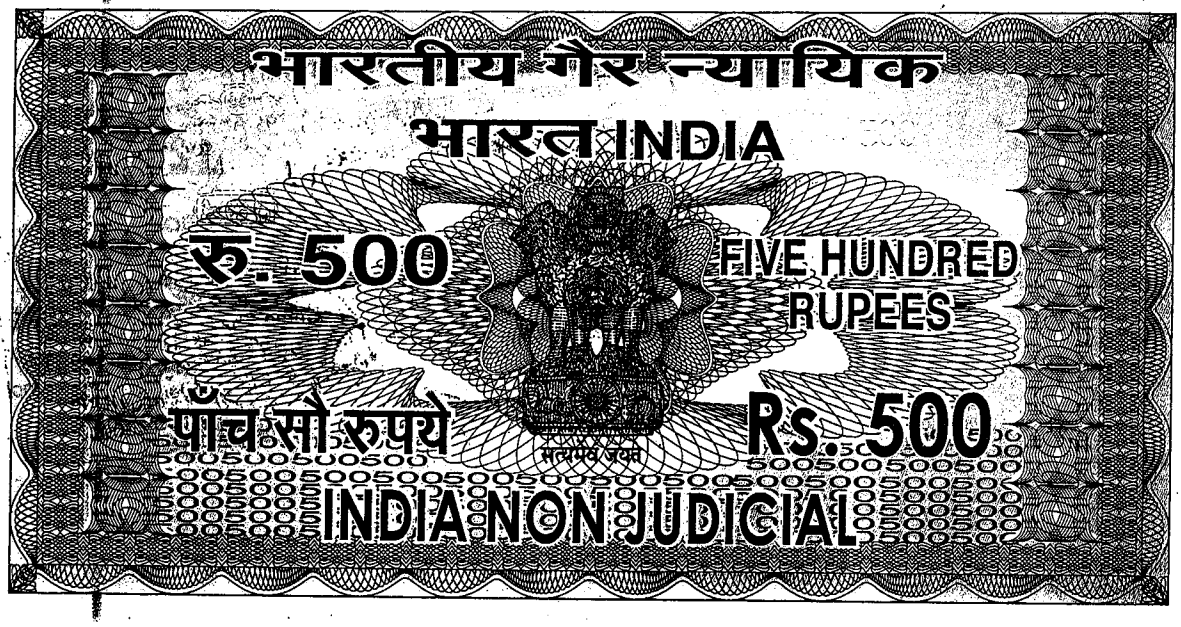
Mr. Jagdish Byram, Respondent's Constituted Attorney ... For the Respondent

AWARD

This Award is made and declare at Mumbai on 26th March 2018.

Justice Arvind V. Savant (Retd.)
Sole Arbitrator

Mumbai
26th March 2018



महाराष्ट्र MAHARASHTRA ◐ 2017 ◐ AG 205975

प्रधान मुद्रांक कार्यालय, मुंबई
प.म.वि.क. ८०००००८
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सक्षम अधिकारी
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BEFORE THE SOLE ARBITRATOR

Justice Arvind V. Savant, (Retd.)

(Former Chief Justice, High Court of Kerala)

In the matter of Arbitration between

National Spot Exchange Limited,)
a Public Limited Company, incorporated under)
the provisions of the Companies Act 1956,)
having its registered office at FT Towers, CTS)
No. 256 and 257, 4th Floor, Suren Road, Chakala,)
Andheri (East), Mumbai 400093.) ... Claimant

And

NCS Sugars Limited,)
a Public Limited Company, incorporated under)
the provisions of the Companies Act 1956,)
having its registered office at 405 and 406,)
Minar Apartments, Deccan Towers,)
Basheerbagh, Hyderabad, Andhra Pradesh)
500001 and having its warehouse at Lakshmi)
Thirumala Latchayyapeta, Seethanaharam)
Mandal, Via Bibbili Vizianagaram, Andhra Pradesh)
535573.) ... Respondent

Appearances:

Mr. Chirag Kamdar, Counsel with Mr. Yashesh Kamdar, Counsel a/w. Ms. Anuja Jhunjhunwala, Ms. Madhu Gadodia and Mr. Shashank Trivedi, Advocates i/b M/s. Naik Naik & Company, Advocates

Mr. Vishwanathan Iyer, Mr. Abhijit Aher and Mr. Santosh Dhuri, Claimant's representatives ... For the Claimant

Ms. Swadha UNS, Counsel with Mr. Ganesh Kamath, Advocate i/b. Mr. S.P. Bharti, Advocate for the Respondent

Mr. Jagdish Byram, Respondent's Constituted Attorney

... For the Respondent

AWARD

[Date: 26th March 2018]

1. Heard both the learned counsel at length; Mr. Chirag Kamdar for the Claimant and Ms. Swadha UNS for the Respondent. Perused the relevant material on record and the Orders passed in the present proceedings from time to time.

2. For the regulation of certain matters relating to Forward Contracts, the prohibition of options in goods and for matters connected therewith, the Parliament enacted the Forward Contracts (Regulation) Act, 1952 (Act 74 of 1952), which came into force on 26th December 1952. The Act was amended in 2008 by the Forward Contracts (Regulation) Amendment Ordinance, 2008 (No. 3 of 2008) which subsequently became an Act. Section 2(c) of the 1952 Act as amended defines a Forward Contract to mean a contract for the delivery of goods and which is not a ready delivery contract. For the purpose of regulating the Forward Contracts, the Forward Markets Commission was established under Section 3 of the Act. In exercise of the powers conferred by Section 27 of the Act, the Central Government, Ministry of Consumer Affairs, Food & Public Distribution (Department of Consumer Affairs), issued a Gazette Notification dated 5th June 2007, which is at Exhibit C-3, exempting contracts for the sale and purchase of commodities traded on the National Spot Exchange Limited (**"Claimant"**), from

operation of the provisions of the said 1952 Act, subject to certain conditions.

3. Claimant, National Spot Exchange Limited, is a Public Limited Company incorporated under the Companies Act 1956, having its registered office at the Mumbai address mentioned above. It carries on business as a Spot Exchange providing an electronic platform (**"platform"**) for contracts in commodities on a compulsory delivery basis. It may be mentioned that the entire software hardware, as also the facilities and the complete environment provided by the Claimant, for the purpose of trading in commodity business, is colloquially known as and, hence, referred to in these proceedings by both the parties, as the platform. In exercise of the powers conferred by Section 27 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952), the Central Government, Ministry of Consumer Affairs, Food & Public Distribution (Department of Consumer Affairs), issued a Gazette Notification dated 5th June 2007, which is at Exhibit C-3, exempting contracts for the sale and purchase of commodities traded on the National Spot Exchange Limited (**"Claimant"**), from operation of the provisions of the said 1952 Act, subject to certain conditions. Claimant started carrying on its operations in 2008 pursuant to the abovementioned Gazette Notification dated 5th June 2007. Its operations ceased in August 2013, giving rise to various legal proceedings, including the present arbitration.

4. Respondent, NCS Sugars Limited, is also a Public Limited Company incorporated under the Companies Act, 1956, having its registered office at the Hyderabad (A.P.) address mentioned above. It is a trading-cum-clearing member of the Claimant and has traded in sugar on the Claimant's platform for itself and on behalf of its client viz. Sai Samhita Storages Pvt. Ltd. All trades carried out / transactions entered on the Claimant's platform are required by law to be in respect of delivery of commodities sold and purchased on Claimant's platform, within the time period permitted by the Contract.

5. The present proceedings relate to the claim to recover an amount of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred Five and Paise Thirty Four only), which amount became due and payable by the Respondent to the Claimant by 1st August 2013, with interest at the rate of 18% per annum. This claim is only in respect of the unsettled trades viz. the trades for which Respondent has (a) neither made payments for the buy transactions; nor (b) delivered the goods in respect of the sale transactions, in its warehouse at Bobbili, Vizianagaram, Andhra Pradesh. This is clear from Question/Answer (**"Q/A"**) 151 in the cross examination of CW-1, Santosh Dhuri, which reads as under:

> *"Q.151 What do you mean by the term "unsettled trade"?'*
> *Ans. "Unsettled Trade" means (i) trades where members have either not made the payments of*

the buy transactions or (ii) not delivered the goods for the sale transactions."

The amount of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred Five and Paise Thirty Four Only) is worked out on the basis of the details mentioned in the ledger at Exhibit C-18, which is Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred Five and Paise Thirty Four Only). This amount is repeatedly admitted by the Respondent to be due from it, as will be discussed later. Claimant alleges that its claim arises due to the Respondent's failure to honour the Bye-Laws and Rules of the Claimant in the execution of the trades in sugar on the Claimant's platform. It is alleged that, as a member of the Claimant, Respondent was bound by the said Bye-Laws and Rules. In these facts, the Claimant prayed for an Award calling upon the Respondent to pay to the Claimant the admitted dues of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred Five and Paise Thirty Four Only), along with interest at the rate of 18% per annum, or at such other rate as the Tribunal may deem appropriate, from 1st August 2013 till the date of the Award, along with future interest. There is a further prayer for an Award on Admissions made by the Respondent to pay to the Claimant the amounts as above. Claimant filed its Statement of Claim (**"SoC"**) on 23rd December 2015.

6. Claimant has produced voluminous documentary evidence and has examined its Assistant Manager, CW-1, Mr. Santosh Dhuri, who has deposed in great detail and was cross examined at length. Without prejudice to the other documentary and oral evidence on record, Claimant has placed heavy reliance, inter alia, on five important documents / Applications / Affidavits / Orders containing the admissions of its liability ("admission") by the Respondent. I will deal with the same in details while answering the Issues; but I may briefly indicate them as under: **(i)** Letter dated 1st August 2013, at Exhibit X-5, addressed by the Respondent to the Claimant, containing an admission to pay Rs.61,18,17,121/- (Rupees Sixty One Crores Eighteen Lakhs Seventeen Thousand One Hundred Twenty One Only) *(subject to final reconciliation)*; **(ii)** Minutes of the Meeting held between the parties on 27th August 2013, which are at Exhibit C-14, where the Respondent has admitted its liability to pay Rs.58,85,00,000/- (Rupees Fifty Eight Crores Eighty Five Lakhs Only) as on 31st July 2013; **(iii)** The email sent by the Claimant to the Respondent on 15th October 2013, at Exhibit C-19, in connection with settlement of the Respondent's outstanding obligations towards the Claimant, attaching the Minutes of the Meeting held between the parties on 9th October 2013; **(iv)** Respondent's admission contained in paragraphs 05 and 06 of its Miscellaneous Application No. 34 of 2014, dated 6th February 2014 Exhibit C-8, in E.O.W.C.R. No. 89/13, under the Maharashtra Protection of Interest of Depositors (In Financial Establishments)

("**MPID**") Act, 1999 Special MPID Case No. 1 of 2014, to the Special MPID Court at Mumbai for interim bail – prayer not to take any coercive action; and **(v)** Affidavit dated 20th August 2014, Exhibit C-22, made by Mr. N. Nageshwara Rao, Promoter and Managing Director of the Respondent, in Bail Application No. 28 of 2014, in C.R. No. 89 of 2013, in R.A. No. 17 of 2014, in the Designated Court under MPID Act 1999, giving an undertaking to deposit an amount of Rs.50,00,000/- (Rupees Fifty Lakhs) per month, on the basis of which, an Order was passed on 11th September 2014 granting him bail (see paragraph 8 of Exhibit C-22). It needs to be mentioned that the above Order at item (v) was modified on 23rd September 2016 in Miscellaneous Application No. 308 of 2015, in Bail Application No. 28 of 2014, in Bail Order dated 11th September 2014, in E.O.W. C.R. No. 89 of 2013 (MPID Case No. 01 of 2014) by the Designated Court under the MPID Act, by reducing the instalment to Rs.25,00,000/- per month from Rs.50,00,000/- per month.

7. Respondent filed its Statement of Defence ("**SoD**") on 17th March 2015 and denied most of the allegations made and contentions raised by the Claimant. It was contended that the claim was based on documents which were not only disputed, but were alleged to have been either forged or fabricated, requiring serious investigation. It is further contended that there was a lot of mismanagement and malfunctioning in the affairs of the Claimant. The Respondent admitted in paragraph 3 of its SoD that it had

executed the trades on the Claimant's platform during the period May 2013 to July 2013. The admission reads as under: "*The Respondent submits that the Respondent has not executed any trade on the platforms of the Claimant save and except the trades executed during the period May 2013 to July 2013 totalling*". It is contended that the liability of the Respondent towards the Claimant was not in respect of any trades conducted on the Claimant's platform, but was in respect of some financing transactions. It was in connection with such financing transactions that the Respondent had filled in various blank forms and signed them. While in paragraph 4 of the SoD, the Respondent made out a case of some financing transactions between the parties, in paragraph 5, it Respondent has clearly admitted that it had traded on the Claimant's platform in respect of 5240 MTs of sugar – delivery ex-Patna – for a value of Rs.15,10,07,000/- (Rupees Fifteen Crores Ten Lakhs Seven Thousand only) on 29th March 2013. Respondent has further admitted in the same paragraph that it had also traded in respect of another 2620 MTs of sugar between 11th and 17th April 2012 on the Claimant's platform. The said admission reads as under:

> "*5. The Respondent submits that the Respondent sold tarded sugar of 5240 Mts of sugars delivery at Ex Patna for value of Rs.15,10,7,000/- under T+10 days contract on 29.03.2013 and vide mail dated claimant was informed of loading of the material and sough for buyers details which was provide by the claimant vide mail dated 09.04.2012.*

Further, the Respondent traded quantity of 2620 Mts of sugar and confirm the same vide mail dated 11.4.2012. Vide mail datd 16.4.2012, the Respondent confirmed availability of trdaed sugar and reqested for payout in advance. By mail dated 17.4.2012, the Respondent confirmed various thing incluiding deposit of Rs.60 lacs with the Claimant. However, due to problem in the Sugar Industries, a small amount was left undelivered. Hereto annexed and marked documents/communication in realtion to trade of sugar in 2012."

8. In respect of the 1st admission of liability contained in Exhibit X-5 dated 1st August 2013 for Rs.61,18,17,121/- (Rupees Sixty One Crores Eighteen Lakhs Seventeen Thousand One Hundred Twenty One Only), Respondent contended that it was forced to issue the said letter. In respect of the 2nd admission in the Minutes of the Meeting at Exhibit C-14 held on 27th August 2013, there is no specific plea in the SoD denying the execution thereof, save and except a general denial of the contents of paragraph 7 of the SoC in paragraph 16 of the SoD. Similarly, in respect of the 3rd admission in the email sent by the Claimant to the Respondent on 15th October 2013 at Exhibit C-19, attaching the Minutes of the Meeting held between the parties on 9th October 2013, there is no specific plea in the SoD. There are no specific pleadings in the SoD regarding the other two documents containing admissions of liability, which were produced in the course of evidence. Respondent has also produced documentary evidence and examined its Authorised Signatory, Mr. G. Kannababu as RW-1.

9. Rejoinder was filed by the Claimant on 20th April 2016, reiterating its contentions and pointing out that the contentions sought to be raised by the Respondent were either vague or totally baseless and were clearly an afterthought.

10. This Tribunal held its 1st meeting on 26th September 2015; the 2nd meeting was held on 18th December 2015; the 3rd meeting was held on 17th February 2016, in which a reference was made to an email dated 28th September 2015 received from Mr. S.P. Bharti, Advocate for the Respondent, raising a challenge to the constitution and jurisdiction of this Tribunal. A statement was made by Ms. Swadha UNS, learned counsel appearing for the Respondent on 17th February 2016 that, the Respondent will file a separate Written Objection to the constitution and jurisdiction of this Tribunal. Accordingly, 2 Written Objections were filed on: **(i)** 9th March 2016 (which is dated 5th March 2016); and **(ii)** 19th March 2016 (which is dated 17th March 2016). A plea that the claim was barred by law of limitation was also raised by the Respondent. Claimant filed its Reply on 21st March 2016, denying the alleged preliminary objections. Elaborate arguments were heard in the 4th meeting held on 21st March 2016, 5th meeting held on 31st March 2016, and in the 6th meeting held on 1st April 2016. Relying upon several Judgments and Orders passed by the Hon'ble Bombay High Court in companion matters, I have held by a detailed Order dated 4th May 2016, passed under Section 16(5) of the Arbitration & Conciliation Act, 1996 ("**the 1996 Act**"), that there was no

substance in any of the preliminary objections raised by the Respondent. In arriving at this conclusion, I have referred to the following Judgments / Orders: **(i)** Order dated 7th October 2013 passed by the Division Bench of S.J. Vazifdar and K.R. Sriram JJ in Writ Petition (L) No. 2340 of 2013 with Writ Petition No. 2534 of 2013; **(ii)** Order dated 4th March 2014 passed by S.C. Gupte J. in Arbitration Petition (L) No. 1778 of 2013, which was later on registered as Arbitration Petition No. 388 of 2014; **(iii)** Order dated 2nd September 2014 passed by S.C. Gupte J. in a batch of Notices of Motion in companion matters, where parties submitted Minutes of Order agreeing to the constitution of a Three-Member-Committee consisting of Justice V.C. Daga (Retd.), Mr. J.S. Solomon, Advocate & Solicitor and Mr. Yogesh Thar, Chartered Accountant, to investigate the transactions and facilitate mutual settlement between the parties; **(iv)** Order dated 10th September 2014 passed by S.J. Kathawala J. in High Court Suit (L) No. 870 of 2013, relying upon the decision of the Supreme Court in *Swiss Timing Limited vs. Commonwealth Games 2010 Organizing Committee – (2014) 6 SCC 677* where it was held that an Arbitrator is entitled to hold a limited enquiry into the plea of fraud; and **(v)** Order dated 1st December 2014 passed by R.D. Dhanuka J. in Notice of Motion (L) No. 2632 of 2014 in Suit No. 1097 of 2014. I do not wish to burden this Order with the detailed reasoning in my Order dated 4th May 2016, a copy of which at **Annexure "1"** and will form part of this Award.

11. There was also an Application dated 20th September 2017 filed by the Respondent under Section 27 of the 1996 Act praying for approval for making an Application to the Court for assistance in taking evidence. Upon hearing both the learned counsel, I had disposed of the said Application by a separate Order dated 3rd October 2017, which is at **Annexure "2"** and will form part of this Award.

12. In the light of the pleadings of the parties and upon hearing both the learned counsel, Mr. Chirag Kamdar for the Claimant and Ms. Swadha UNS for the Respondent, Issues were framed in the 9th meeting held on 17th June 2016, which read as under:

(1) Whether the Claimant proves that the Respondent has traded in various contracts to the tune of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred and Five and Paise Thirty Four), but has failed to honour the same in violation of the Bye-Laws and Rules of the Claimant's platform, as alleged in paragraph 3 of the Statement of Claim?

(2) Whether the Claimant proves that the Respondent has received monies in respect of the trades executed by the Respondent on the Claimant's platform?

(3) Whether the Claimant is entitled to an award on admission for Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five

Lakhs Nine Thousand Two Hundred and Five and Paise Thirty Four) on account of the various admissions of liability, made by the Respondent?

(4) Whether the Respondent is liable to pay Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred and Five and Paise Thirty Four) together with interest at 18% as claimed by the Claimant?

(5) Whether the Respondent proves that the Settlement Agreement dated 21st January 2014 is valid, subsisting and binding on the parties?

(6) Whether the Respondent proves that the documents produced by the Claimant in the present proceedings, except the documents at Exhibit "A", "C", "AA", "BB", "CC", "DD", "EE", "FF" and "GG", are forged and fabricated as alleged in paragraph 2 of the Reply?

(7) Whether the Claimant proves that the Respondent claimed VAT against the sale contract executed on the same date as the outstanding (unsettled) purchase contract and for which the Respondent received funds as alleged in paragraph 5 of the Statement of Claim?

(8) Whether the Claimant proves that the Respondent executed T+2 and T+25 contracts simultaneously, as alleged in paragraph 7(k) of the Statement of Claim?

(9) Whether the Respondent proves that the letter dated 1st August 2013 was signed by it under force or pressure, as alleged in paragraph 6 of the Reply?

(10) What award, if any, including award as to interest and costs?

13. As stated above, parties have produced documentary evidence and examined one witness each, CW-1, Mr. Santosh Dhuri who is the Assistant Manager of the Claimant and RW-1, Mr. G. Kannababu, who is the Authorised Signatory of the Respondent.

14. Before answering the Issues, it is necessary to briefly refer to the relevant definitions and provisions in the Claimant's Bye-Laws and Rules. The relevant definitions/provisions in the Bye-Laws are as under:

> *"1.1 These Bye-Laws shall be known as **'The Bye-Laws of National Spot Exchange Limited, Mumbai'** and are for the sake of brevity and convenience, herein referred to as 'these Bye-Laws' or 'the Bye-Laws of the Exchange'.*
>
> *1.3 These Bye-Laws shall be in addition to the provisions of the Business Rules and Regulations including Business rules made thereunder. These Bye-Laws shall at all times be read subject to the regulation by authorities regulating spot trade in the area where such trade takes place.*

2.7 ***Automated Trading System or Trading system of the Exchange*** *means National Electronic Spot Trading System, which shall be the computerized system provided by the Exchange for conducting spot trading in commodities permitted by the Exchange, access to which is made available to an exchange member, for use either by himself or by his authorised persons, participants, authorised users and clients, and which makes available, quotations in the commodities traded on the Exchange, facilities trading in such commodities and disseminates information regarding trades effected, volumes transacted, other notifications, etc., as may be decided to be placed thereon by the Relevant Authority. The Automated Trading System shall hereafter be referred to as "NEST".*

2.13 ***Business Rules means*** *unless the context otherwise, rules and regulations of the Exchange drawn by the relevant authority from time to time for regulating the trading activities and responsibilities of the members of the Exchange and procedure thereof and incudes any modification or alteration made therein, as also circulars, orders and notices issued by the relevant authority from time to time and is a part and parcel of Regulation of the Exchange.*

2.14 ***Buy Order*** *means an order to buy a commodity permitted for trading on the exchange.*

2.15 ***Buyer*** *means and includes, unless the context indicates otherwise, the buying client, the buying exchange member acting either as an agent on*

behalf of the buying client or buying on his own account.

2.16 ***Bye-Laws, Rules and Regulations*** *mean the Bye-Laws, Rules and Regulations including the Business Rules of the Exchange made pursuant to the Articles of Association of the Exchange and these Bye-Laws, and includes any re-enactment, modification or alteration made thereof, as also circulars, orders and notices issued by the Board or any committee constituted by it and empowered to issue such circulars, orders and notices.*

2.26 ***Clearing member*** *means a trading-cum-clearing member or an institutional clearing member of the Exchange who has the right to clear transactions in commodities that are executed in the trading system of the Exchange.*

2.40 ***Exchange*** *means National Spot Exchange Limited and the premises and/or the NEST system for executing transactions in commodities that are permitted to be traded.*

2.69 ***'Rules'****, unless the context otherwise, means rules of the Exchange drawn from time to time for regulating the activities and responsibilities of the members of the Exchange and as prescribed by the Relevant Authority from time to time for the constitution, organisation and functioning of the Exchange.*

2.71 ***Sale Order*** *means an order to sell a commodity permitted for trading on the Exchange.*

2.72 ***Seller*** *means and includes, unless the context indicates otherwise, the selling client, and the selling exchange member acting as an agent on behalf of such selling client and denotes the selling exchange member when he is dealing on his own account.*

2.86 ***Trader Work Station*** *(hereafter referred to as* ***"TWS"****) means a computer terminal of an exchange member which is approved by the Exchange and which is installed and connected to "NEST" or any other trading system of the Exchange, for the purpose of trading on the Exchange.*

2.88 ***Trading System*** *means such space, systems and networks as the Company may from time to time determine and which shall be notified by the Board as reserved for trading in specific commodities permitted on the exchange.*

2.91 ***Trading-cum-clearing member*** *means a person who is admitted by the Exchange as a member of the Exchange conferring a right to trade and clear through the Clearing House of the Exchange conferring a right to trade and clear through the Clearing House of the Exchange as a clearing member and who may be allowed to make deals for himself as well as on behalf of his clients and clear and settle such deals only.*

2.92 ***Approved User*** *is an individual approved by the Exchange in accordance with the Rules and Regulations of the Exchange. The term 'user' may*

be used interchangeability with the term 'approved user'.

3.1.1 ***TRADING, CLEARING AND SETTLEMENTS ON THE EXCHANGE***

Subject to the foregoing Bye-Law, the Board or the Committee empowered for the purpose may provide for Rules, Regulations or issue orders for:-

3.1.1.1 ***TRADING ON THE EXCHANGE***

a. *Determination of trading sessions and proceedings in such trading sessions or "NEST" or any other trading system allowed by the Exchange, for specified commodities or price Indices permitted by the Exchange.*

b. *Allotment of TWS to the exchange members and appointment of approved users.*

3.1.1.3 ***CLEARING AND SETTLEMENT OF TRANSACTIONS***

a. *Procedure for determination of settlement prices.*

b. *Procedure of marking-to-market, delivery, payment and closing-out of transactions in commodities where trading is allowed.*

c. *Clearing and other settlement forms and returns, delivery and receive orders, statement of accounts and balance sheet, norms and procedures for clearing and settlement of transactions and delivery and payment.*

d. *Norms and procedures for establishment and functioning of Clearing House for clearing and settlement of trades.*

e. *Supervision of Clearing House and framing of Business Rules and Regulations for supervision of clearing and settlement activities of the members of the exchange.*

f. *Norms and procedures for availing of banking services from clearing banks for clearing and settlement of trades.*

g. *Norms and procedures for availing services from warehouses and warehouse keepers for physical delivery of commodities and from quality certification agencies or laboratories for quality certification of commodities deposited with warehouse keepers and of commodities tendered for delivery against commodities traded in the exchange.*

h. *Any other matter relating to clearing and settlement of transactions and deliveries thereto, including surveys and sampling for quality testing.*

i. *Appointment of surveyors, quality testing laboratories and other appropriate authorities and agencies for settling quality disputes arising out of deliveries.*

j. *Procedure for dissemination of information and announcements to be broadcasted by the Exchange on "NEST" or its computer system or internet.*

k. *Issue of guidelines for advertisements, booklets or circulars to be published by the members of the Exchange in connection with their business activities.*

l. *Appointment of monitoring, surveillance and intelligence agencies for monitoring of trading at the Exchange in different commodities.*

m. *Any other matter, as may be decided by the Board of Directors or Relevant Authority from time to time.*

3.5 ***RECORDS FOR EVIDENCE***

The records of the Exchange as maintained by a central processing unit or a cluster of processing units or computer processing units or on "NEST" or any other trading system of the Exchange, whether maintained in any register, magnetic storage units, electronic storage units, optical storage units or computer storage units or in any other manner or on any other accepted media, shall constitute the agreed and authenticated record in relation to any transaction entered into or executed through "NEST" or any other trading system of the Exchange.

The records as maintained by the Exchange shall, for the purpose of any dispute or claim between the members of the Exchange inter -se or between any exchange member and his clients or between the members of the Exchange and the Exchange or the Clearing House regarding trading, clearing or settlement of any deal or

transaction carried out on "NEST" or any other trading system of the Exchange and reported to the Exchange, constitute valid and binding evidence between and among the parties.

4. ***DEALINGS IN COMMODITIES***

4.1 *The Board or the Managing Director or the committee appointed and empowered for the purpose shall be the authority to finalise contract specifications and modification authority in respect of contracts in commodities and other instruments. The Exchange shall before commencement of any contract obtain prior concurrence of the Commission.*

5.6 ***WHO MAY BE PERMITTED TO TRADE***

The Relevant Authority may, at his / its discretion, grant permission to the members of the Exchange or their authorised representatives or approved users to trade through the TWS connected to "NEST" or any other trading system of the Exchange. The members of the Exchange shall be solely responsible for all the transactions done by or through the respective TWSs on the Exchange.

6.1 ***ACCESS TO TRADING***

6.1.1 *The Exchange shall provide an automated trading system, or any other trading system, to the exchange members to access and carry on trading in the commodities admitted to dealings on the Exchange.*

6.1.2 The Automated Trading System provided by the Exchange shall be called "NEST" or by other name, as may be decided by the Board.

6.1.3 "NEST" shall be available for facilitating trading in commodities permitted by the Exchange for trading from time to time.

6.1.4 The Exchange may provide an architecture and the infrastructure related thereto, to the extent possible, to facilitate the members of the Exchange to establish connectivity with "NEST" or any other trading system of the Exchange. The Exchange shall have absolute right to specify the maximum number of TWSs that may be allotted to an exchange member who has trading rights in the exchange and the conditions for such allotment. The Exchange shall also have absolute right to reject any place or places where it observes that the TWS shall not be installed.

6.1.5 The Exchange may prescribe the specifications / descriptions of hardware, software and equipment and the specifications to carry out the required testing thereof in such manner and time as may be specified by the Exchange from time to time, which an exchange member shall be required to strictly adhere to have connectivity with, or use of "NEST" or any other trading system of the Exchange, to ensure compatibility and minimize/avoid technical issues arising out of incompatibility of hardware, software and equipment.

6.1.6 An exchange member who has trading rights in the exchange may be authorised to appoint such number of persons as authorised representatives or authorised users, as may be provided in relevant Rules, Business Rules and Regulations of the Exchange that may be in force from time to time.

6.1.7 Any exchange member who has trading rights in the exchange and is desirous of extending his network, be it through VSAT connectivity and/or lease line connectivity and/or through any other means of connectivity, authorized by the Exchange, and/or through the Computer to Computer Link (CTCL) software or any other software approved by the Exchange, which facilitates access to the trading system of the Exchange, shall be required to seek prior approval of the Exchange. Such terminals of an exchange member may be allowed to be installed by the Exchange at the places from where the members of the Exchange or authorized representatives or approved users or clients carry out trading activities. No exchange member shall install either directly or indirectly any terminal through CTCL connectivity, having access to the trading system of the Exchange, without prior approval of the Exchange. In case any exchange member fails to obtain necessary approval from the Exchange for any terminal installed through CTCL connectivity having access to the trading system of the Exchange, the member concerned shall be personally responsible for trading done through such terminals and also render himself liable for disciplinary action by the Exchange.

Provided that where a client wishes to have a CTCL terminal installed at his place, such client shall be required to comply with such requirements relating to its use for his own activities, and shall not use it for activities, which may be termed/viewed by the Exchange, as intermediary or by whatever other name called as may be specified by the Exchange from time to time. The decision of the Exchange in this regard shall be final, binding and conclusive on the exchange member concerned and the client. The misuse of such CTCL terminal by his clients shall render the Exchange member concerned personally responsible for the trading done through such misuse and shall also render him and his client liable for disciplinary action by the Exchange.

6.1.8 ***The Relevant Authority shall have the power to provide for:***

a. *the procedure for registration and cancellation of the registration of a person as an authorised representative or approved user or client;*

b. *the conditions required to be fulfilled before a person can be registered as an authorized representative/ approved user/client;*

c. *the conditions required to be fulfilled before an authorised representative/approved user or client may have access to "NEST" or any other trading system of the Exchange;*

d. *the maximum number of persons who may be allowed to have access to "NEST" on behalf of an exchange member;*

e. *the procedure for provision and modification of a password used by an authorised representative / approved user / client to access "NEST"; and*

f. *the circumstances in which the Exchange may refuse and/or withdraw and/or cancel the permission to an authorised representative/ approved user / client to have access to "NEST" or any other trading system of the Exchange, either indefinitely or for a specified period or until the fulfilment of conditions, as may be specified by the Exchange from time to time.*

6.1.9 *All the orders for purchase or sale of commodities by an exchange member shall be required to be entered only through "NEST" or any other trading system approved by the Exchange.*

9. ***CLEARING AND SETTLEMENT***

9.7 *All outstanding transactions shall be binding upon the original contracting parties, that is, the members of the Exchange until issue of delivery notice or delivery order or payment for delivery, as the case may be.*

11. ***REPORTS***

11.1 In respect of all trades done by the members of the Exchange, the Exchange will electronically forward reports to the respective members, including settlement obligations relating thereto. All such reports and obligations shall be binding on the members of the Exchange.

11.7 In case of any dispute or difference of opinion originating from or pertaining to orders or trades due to a mismatch between the member's report and the Exchange's report, the report as per records of the Exchange shall be final, conclusive and binding on the members.

12.2 ***Contribution to and Deposits with Settlement Guarantee Fund***

12.2.1 The Exchange shall maintain Settlement Guarantee Fund in respect of different commodity segments of the Exchange for such purposes, as may be prescribed by the Relevant Authority from time to time."

15. The relevant definitions/provisions in the Rules are as under:

"2. ***DEFINITIONS***

Terms which are used in the Rules of the Exchange are defined as under:

l. "Client" means a client of the Member who is registered with the Exchange under the Bye-Laws.

x. "Member of the Exchange" or "Exchange Member" means a person, a sole proprietary firm, joint Hindu family, a partnership firm, a

company (as defined under the Companies Act), a co-operative society, a body corporate or public sector organisation or statutory corporation or a government department or non-government entity or any other entity admitted as such by the Exchange for trading, clearing or settlement of contracts permitted in the Exchange and shall not mean a shareholder of the Company unless expressly stated. Membership of the Exchange in this context shall not mean or require shareholding in the Company as a pre-condition.

22. ***MEMBERSHIP APPLICATION***

i. *Every person desirous of becoming a Member of the Exchange shall apply to the Exchange for admission as a Member of the Exchange, in the prescribed form which shall be provided by the Exchange at such fee that the Exchange may decide from time to time in the relevant Regulations and the membership shall be*

ii. *subject to compliance of all the Bye-Laws, Rules, and Regulations of the Exchange specified by the Exchange from time to time.*

23. ***ADMISSION AND ADMISSION FEE***

The Board or a Committee appointed and empowered by the Board for the purpose may admit an applicant as a Member of the Exchange

provided that he satisfies the conditions set out in these Articles, the Bye-Laws, Rules and Regulations made thereunder. The Board or the Committee as aforesaid may interview and/or test the applicant before admitting him as a Member of the Exchange. In case of rejection of the application for admission to the membership of the Exchange, the reason for such rejection shall be recorded in writing.

Provided that if the membership has been refused by the Committee appointed for the purpose, the applicant shall have the right to appeal to the Board against the decision of the said Committee.

The decision of the Board shall be final and binding on the applicant.

The applicant shall meet the net worth requirement, capital adequacy norms, fees, deposits, etc., as decided by the Board from time to time in the relevant Business Rules.

i. *Subject to the approval and decision of the Board or a Committee appointed and empowered by the Board for the purpose, every person applying for the membership of the Exchange shall pay, along with the membership application, non-refundable admission fee or any other fee/deposit as may be specified by the Board, from time to time. Where, however, a retiring Member of the Exchange or the legal heir(s) of a deceased Member of the Exchange nominate(s) a person eligible for admission as a member of the Exchange under these Rules, to*

succeed the established business of the retiring or deceased Member of the Exchange who is his father, uncle, brother or son or any other person in the opinion of the Board or a Committee is a close relative, such nominee shall be admitted as a Member of the Exchange provided he is found otherwise qualified, eligible and fit for the membership of the Exchange by the Board or a Committee under these Rules.

ii. *A Member of the Exchange on admission shall not be entitled to exercise any of the rights or privileges of membership until he shall have paid in full the non- refundable admission fee and any other fee or deposit as may be decided by the Board, and the annual subscription for the year of admission for the specific category of membership to which he has sought the admission. Where such member fails to make such payment within such number of days of receipt of the intimation of his admission, as may be decided by the Exchange from time to time, his admission shall be deemed to have been cancelled ab initio and he shall be deemed never to have been admitted as a member of the Exchange and the amount remitted to the Exchange shall be forfeited."*

It is well settled that the above Bye-Laws and Rules of the Claimant, though not made under a statute, having regard to the scheme as also the purport and object thereof, have a statutory flavour. Such Bye-Laws are required to be made for regulation and control of contracts; whereas Rules relate in general to the

constitution and management of an Exchange like the Claimant. [See paragraph 36 at page 170 of the decision of the Hon'ble Supreme Court in *Bombay Stock Exchange vs. Jaya I. Shah & Anr. (2004) 1 SCC 160.*

16. In the light of the above definitions/provisions, I will now discuss the broad features of the trades/transactions entered into by the Respondent on the Claimant's platform in respect of the sale and purchase of sugar in bulk. It is clear from the pleadings and evidence that the trades entered by the Respondent on the Claimant's platform were of two kinds,: **(a)** T+2 Contract, as per the details at Exhibit C-6 and **(b)** T+25 Contract, as per the details at Exhibit C-7, for purchase and sale of sugar. The word "T" connotes the transaction/trade date. The figures "+2" or "+25" connote the number of days after the transaction/trade date on which, the same has to be settled. Thus, in a T+2 trade, the parties have a two-day-window from the date of the trade to settle the same and in a T+25 trade, the parties have a 25-day-window to settle the same. The pattern followed for settlement of the trades was either by delivery of the goods or by payment of price thereof. The details of the T+2 delivery contracts launched for trading on 15th May 2013 are to be found at Exhibit C-6, and those of the T+25 delivery contracts launched for trading on 15th May 2013 are to be found at Exhibit C-7.

17. The evidence on record shows that, the Respondent traded in both kinds of trades; T+2 as well as T+25 with the same goods and delivery conditions, but with different delivery settlement cycles / dates. All the outstanding / unsettled purchase contracts of the Respondent were executed together with sale contracts of the same day, against which the Respondent received funds and also claimed VAT on such sales by submitting the VAT invoices. In other words, the very same commodity / sugar, which was sold in a short duration contract, and for which the Respondent had received the full sale proceeds / consideration, was then repurchased by the Respondent under contracts executed on the same day for a longer duration. It is in respect of these longer duration contracts, that the Respondent has defaulted in making the payments which is known as "settlement of the contract" and with the recovery of which, the present proceedings are concerned. Briefly stated, the present proceedings are for recovery of the amounts due to the Claimant from the Respondent in respect of the trades / contracts which the Respondent had entered into on the Claimant's platform and for which, it has failed to make the payment and hence, the said trades are unsettled.

18. In the light of the above, I proceed to answer the Issues. The first four Issues, as also Issue Nos. 8 and 9 are interconnected, in respect of which, the pleadings and evidence is overlapping and connected. Hence, to avoid repetition, they are discussed together as under:

Issue No. 1: Whether the Claimant proves that the Respondent has traded in various contracts to the tune of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred and Five and Paise Thirty Four), but has failed to honour the same in violation of the Bye-Laws and Rules of the Claimant's platform, as alleged in paragraph 3 of the Statement of Claim?

Issue No. 2: Whether the Claimant proves that the Respondent has received monies in respect of the trades executed by the Respondent on the Claimant's platform?

Issue No. 3: Whether the Claimant is entitled to an award on admission for Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred and Five and Paise Thirty Four) on account of the various admissions of liability, made by the Respondent?

Issue No. 4: Whether the Respondent is liable to pay Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred and Five and Paise Thirty Four) together with interest at 18% as claimed by the Claimant?

Issue No. 8: Whether the Claimant proves that the Respondent executed T+2 and T+25 contracts

simultaneously, as alleged in paragraph 7(k) of the Statement of Claim?

Issue No. 9: Whether the Respondent proves that the letter dated 1st August 2013 was signed by it under force or pressure, as alleged in paragraph 6 of the Reply?

I will answer these five Issues in two parts. In Part A, I will briefly discuss the five documents / Applications / Affidavits / Orders containing Respondent's unequivocal admissions of its liability. In Part B, I will discuss the other documentary and oral evidence, which clearly fastens the liability on the Respondent.

19. **Part A :** Admissions of liability (**"admissions"**) in the Applications / Affidavits / Orders containing Respondent's unequivocal admissions of its liability:- The 1st admission is in the letter dated 1st August 2013, at Exhibit X-5 addressed by the Respondent to the Claimant containing an unequivocal admission of its liability to pay Rs.61,18,17,121/- (Rupees Sixty One Crores Eighteen Lakhs Seventeen Thousand One Hundred Twenty One Only) *(subject to final reconciliation)*: This letter is on the Respondent's printed letterhead and the subject mentioned is *"Settlement of our outstanding dues against Exchange's settlement obligation pursuant to suspension of trading announced by the Exchange"*. Thereafter, the letter reads as under:

"With reference to our meeting held today, the 1st August, 2013, we hereby submit that:

3. *We are the bonafide Members of the Exchange. We are aware that the Exchange had to resort to suspension of trading due to pay-in delays committed by some of the members.*

2. *The total amount payable by us to the Exchange against our settlement obligation is Rs.61,18,17,121/- (Subject to final reconciliation).*

3. *We hereby agree to pay a minimum amount of 5 % of our dues every week on Friday commencing next week and settle all our outstanding dues within a period of next 20 weeks. We will, however, take all possible steps to repay all our outstanding much before the said 20 weeks time."*

(emphasis supplied)

This letter has been signed by RW-1, Mr. G. Kannababu who is the Authorised Signatory of the Respondent. The emphasized portion clearly shows that the Respondent was a member of the Claimant and had traded on the Claimant's platform, and in respect of the said trades, it was liable to pay Rs.61,18,17,121/- (Rupees Sixty One Crores Eighteen Lakhs Seventeen Thousand One Hundred Twenty One Only).

20. In reply to Exhibit X-5, the relevant portion of the Respondent's plea in paragraph 6 of its SoD is as under:

"the Claimant forced/pressurized the Respondent to issue letter dated 1st August 2013. The Respondent further submits that the Claimant threatened the Respondent's Managing Director to implicate him in criminal cases, if the documents and/or letters as desired by them is not signed. The officers of the Claimant further assured that these documents are not for conformation of liabilities, but for completing their records as in view of the action of the Government, the records of the Claimant are being audited. The Respondent submits that the Respondent had no option but to issue letter dated 1st August 2013 though there was no liability of Rs.61,18,17,121/-, the Claimant also forced the Respondent to issue cheques. The Respondent submits that the Respondent agreed to issue the said letter and the cheques only on specific assurance from the officers of the Claimant that the same will not be acted upon."

(emphasis supplied)

21. In the first place, the Respondent's Promoter and Managing Director, Mr. N. Nagheshwar Rao has not been examined. He was the person who was alleged to have been forced / pressurized / threatened with being implicated in criminal cases. There are no details as to who, on behalf of the Claimant, used the force / pressure and who gave the threats and how the force or pressure was used and the threats given. Similarly, there are no details pleaded as to where, whether at Hyderabad or Mumbai and in whose presence, the alleged acts were done and to whom on behalf of the Respondent, the alleged assurances were given by whom on behalf of the Claimant. Nothing is stated in the SoD on these serious issues, except making wild and baseless allegations.

Further, the evidence of RW-1 is blissfully vague on all these important aspects. The pleadings are completely bald without the details as required by the principles underlying the provisions of Order VI Rule 4 of the Code of Civil Procedure, 1908 which reads as under:

> ***"O.VI PLEADINGS GENERALLY***
>
> *4.* ***Particulars to be given where necessary.****— In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."*

In this behalf, I may refer to the following decisions of the Hon'ble Supreme Court: **(i)** Lynett Fernandes vs. Gertie (2018) 1 SCC 271 where, in paragraph 13 of the judgment at page 218, the relevant portion reads as under:

> *"Moreover, the particulars of fraud are neither pleaded nor proved by the party alleging fraud before the District Court. The party alleging fraud must set forth full particulars of fraud and the case can be decided only on the particulars laid out. There can be no departure from them. General allegations are insufficient."*

(ii) *New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd. (2015) 2 SCC 424* where, in paragraphs 9 and 10, the relevant portions read as under:

"9. It is therefore clear that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up a plea, must prima facie establish the same by placing material before the Chief Justice/his designate. ...

10. In our considered view, the plea raised by the respondent is bereft of any details and particulars, and cannot be anything but a bald assertion. ..."

Despite the above settled position of law, there is a startling plea raised by the Respondent in paragraph 31 of its written submissions suggesting that the burden to prove that there was no force or pressure used by the Claimant. It is further stated in the written submission that the *"Claimant has failed to disprove the Respondent's contention"*. Paragraph 31 reads as under:

"31. In answer to question nos 126 RW-1 has specifically explained the nature of force/ pressure that was put by the Claimant to issue letter dated 1 August 2013 and in answer to Q RW-1 133 has admitted that the said letter was issued under pressure and coercion. The Claimant has failed to prove that no such pressure was put. Further, CW-1 does not have any personal knowledge about the said letter and besides bald statement in CW-1's affidavit and SOC, Claimant has failed to disprove Respondent's contention. Therefore, Respondent proves its case in Issue no. 9."

22. In this behalf, some relevant Questions / Answers ("**Q/A**") in the cross examination of RW-1 are as under:

Shown paragraph 10 of the affidavit of evidence, particularly the sentence reading "I say that the Respondent was coerced ... also forced the Respondent to issue cheques." and shown paragraph 6 of the SoD, particularly the sentences reading "It appears that there were ... not acted upon." and the letter dated 1st August 2013 at X-5, page 244 of the Compilation of Documents tendered by CW-1.

Q. 126 *Can you tell us the nature of the force, pressure and coercion applied on you at the time of signing of this letter?*

Ans. *All the three words cannot be explained in writing. It is the way the Claimant had used pressure in words stating that the Respondent's Managing Director would be implicated in criminal cases if the Claimant's request is not heeded to. I may also hasten to refer to the said X-5 which though got signed in Hyderabad was notarized in Mumbai. The limited knowledge I possess, I may state that the signatory to any document should present himself before the Notary before the same is notarized. This only reflects the urgency and their attitude to implicate the Respondent.*

Q. 132 *Can you tell us whether any criminal proceeding or police complaint was filed by the Managing Director or by you in relation to the alleged force, pressure and coercion applied on the Managing Director?*

Ans. *I do not have any knowledge.*

It will be evident from the above questions and answers that RW-1 has not only given inconsistent and unsatisfactory answers but he has also avoided to answer inconvenient questions. Admittedly, there is no corroboration to his version, though the best evidence was available to the Respondent in the form of the evidence of its: (i) Mr. N. Nageshwara Rao, Promoter and Managing Director; (ii) Mr. B.S.R. Murthy, General Manager (Finance) upto 2014; and (iii) Mr. V.S. Soma, Chief Financial Officer. (**"Nageshwara Rao and the two Senior Executives"**). For reasons best known to the Respondent, none of these three persons has been examined. Further, admittedly, there is no whisper of any protest in any subsequent correspondence or email, leave alone any First Information Report being lodged anywhere or a criminal complaint being filed in any Court.

23. In the circumstances mentioned above, I hold that there is clinching evidence by way of Exhibit X-5 viz. the letter dated 1st August 2013, by which the Respondent has categorically admitted that it was a bonafide member of the Claimant, with which it had traded before the suspension of trading. Respondent has further categorically admitted that it had to pay Rs.61,18,17,121/- (Rupees Sixty One Crores Eighteen Lakhs Seventeen Thousand One Hundred Twenty One Only) *(subject to final reconciliation)* towards the settlement of its obligations to the Claimant.

24. The 2nd admission is in the Minutes of the Meeting held between the parties on 27th August 2013, which are at Exhibit C-14, where the Respondent has admitted its liability to pay Rs.58,85,00,000/- (Rupees Fifty Eight Crores Eighty Five Lakhs Only) as on 31st July 2013: This meeting was attended by no less than the Managing Director of the Respondent, Mr. N. Nageshwar Rao and by Mr. V.S. Soma who is the Chief Financial Officer of the Respondent. Both of them have signed the minutes. The first three items of "*DISCUSSIONS*" read as under:

> *"1. NCS Sugars Ltd is a Trading-Cum-Clearing Member of NSEL.*
>
> *2. As a part of trading NCS owes an amount of Rs.58.85 Cr as a pay in obligation as on 31.07.2013.*
>
> *3. NCS Sugars is an associate of NCS Industries Pvt. Ltd. with Mr. Nageeswara Rao being promoter having 100% share holdings in NCS Industries Pvt. Ltd."*
>
> (emphasis added)

Here again, the emphasized portion shows the Respondent's unequivocal admission that it was a Trading-Cum-Clearing Member of the Claimant, to which it owed the amount of Rs.58,85,00,000/- (Rupees Fifty Eight Crores Eighty Five Lakhs Only) as on 31st July 2013.

25. In reply to Exhibit C-14, there is no specific plea in the SoD, save and except a general denial of the contents of paragraph 7 of the SoC, in paragraph 16 of the SoD. Though the Minutes of the

Meeting are signed by Mr. N. Nageshwara Rao and Mr. V.S. Soma, none has been examined. On the contrary, what the Respondent has contended in paragraph 27 of its written submissions is that there was no Application filed by the Claimant for decree on admission of liability. The contention is that though there is a prayer in the SoC for a decree on admission, no interim application was filed for that relief. The relevant portion of paragraph 27 reads as under:

> *"27. ... Further, it is also curious to note that the Claimant's argument was based only on admission of liability by the Respondent in various documents. Though, the Claimant made specific payer in the SOC seeking award on admission and also though the Learned Arbitrator framed specific issue ie. Issue No. 3, regarding entitlement of the Claimant for award on admission, yet no application was filed by the Claimant, till date, for decree on admission of liability. It is not clear as to for whose benefit the Claimant prolonged the arbitration."*

It is difficult to appreciate the Respondent's contention. It has raised a plea of force or pressure, on which a specific issue No. 9 has been framed. It is obvious that when such a plea is raised and the issue framed, it would not be possible to entertain any application for an interim award on the basis of the admission of liability.

26. The 3rd admission is in the email sent by the Claimant to the Respondent on 15th October 2013, at Exhibit C-19 in connection

with settlement of the Respondent's outstanding obligations towards the Claimant, attaching the Minutes of the Meeting held between the parties on 9th October 2013: This email is sent by the Claimant's Recovery Team to Mr. Nageshwar Rao & Mr. V.S. Soma. The first two paragraphs read as under:

> *"This has reference to your visit at NSEL office on 9th October 2013 in connection with settlement of your outstanding obligations towards NSEL.*
>
> *Further during the discussions, you had agreed to send the copy of the documents relating to Land and other assets of NSEL Storage Systems Private Limited.*
>
> *We are still to receive the same."*

There is no specific plea or explanation in respect of the admission in Exhibit C-19.

27. The 4th admission is in paragraphs 05 and 06 of Exhibit C-8 – being Miscellaneous Application No. 34 of 2014 dated 6th February 2014 in E.O.W. C.R. No. 89/13 (MPID) Case No. 1 of 2014 to the Special MPID Court at Mumbai for interim bail – prayer not to take any coercive action. The relevant Paragraphs 05 and 06 in Exhibit C-8 read as under:

> *"05. The Applicant further states that the Applicant was trading in paired Contracts of T+2 and T+25 since 29/05/2012. They traded till 26/07/2013. The Applicant further states that the Applicant owed money to Respondent No. 1's platform with respect to the Settlement Account*

against the trade of the commodity i.e. Sugar which is done through the Respondent No. 1 to the tune of Rs.58.85 Crores.

06. ... This Settlement Agreement in fact is an Award U/s. 73 of the Arbitration and Conciliation Act, 1996. Hereto annexed and marked as ***Exhibit – "A"*** *is the Copy of the Settlement Agreement dated 21st January, 2014 between the Applicant and the Respondent No. 1."*

(emphasis supplied)

28. The 5th admission is in the Affidavit dated 20th August 2014 at Exhibit C-22 made by Respondent's Managing Director Mr. N. Nageshwara Rao, in Bail Application No. 28 of 2014, in C.R. No. 89 of 2013, in R.A. No. 17 of 2014, in the Designated Court under MPID Act 1999 / Sessions Court at Greater Mumbai, giving an undertaking to deposit an amount of Rs.50,00,000/- (Rupees Fifty Lakhs) per month on the basis of which, an Order was passed on 11th September 2014 granting him bail. Paragraph 8 of Exhibit C-22 reads as under:

"8. So also, the fact that the properties of the applicant is secured till date is not disputed either by applicant nor by the I.O. The property secured are alleged to be of much much more value than the amount due. The counsel for the applicant has made statement for and on behalf of the applicant that he has no objection if his secured movable and immovable properties are being sold. Applicant has also filed Xerox copies of the demand drafts for Rs.1 Crore in the name of NSEL Final settlement Account. In the affidavit Exh.3, filed by the applicant, he has undertaken to deposit

the amount of Rs.50 lacks per month till the amount due is being paid. The undertaking of the applicant is accepted. Applicant has already deposited an amount of Rs.5.25 Crores in pursuance to the settlement with NSEL. The act of applicant seems to be bonafide."

(emphasis supplied)

It needs to be mentioned that the above Order on the Affidavit at Exhibit C-22 was modified on 23rd September 2016, in Miscellaneous Application No. 308 of 2015, in Bail Application No. 28 of 2014, in Bail Order dated 11th September 2014, in E.O.W. C.R. No. 89 of 2013 (MPID Case No. 01 of 2014) by the Designated Court Mumbai, by reducing the instalment to Rs.25,00,000/- (Rupees Twenty Five Lakhs) per month from Rs.50,00,000/- (Rupees Fifty Lakhs) per month.

29. **Conclusion of the discussion in Part "A":** It will be evident from the above discussion that the pleas sought to be raised by the Respondent either in the SoD or in its written submissions are contrary to the statutory provisions and the decision of the Hon'ble Supreme Court referred to above. In particular, Respondent's pleas in paragraphs 27 and 31 of its written submissions quoted above are wholly untenable. In view of this clinching and conclusive evidence in the form of 5 documents / Applications / Affidavits / Orders, containing Respondent's unequivocal admissions that it had traded with the Claimant as its trading-cum-clearing member and further that it

was liable to pay to the Claimant, the amount of Rs.58,85,00,000/- (Rupees Fifty Eight Crores Eighty Five Lakhs Only) [as reduced from Rs.61,18,17,121/- (Rupees Sixty One Crores Eighteen Lakhs Seventeen Thousand One Hundred Twenty One Only) after reconciliation] towards its liability, I answer the first four Issues, as well as Issue No. 8, in the affirmative and in favour of the Claimant. Issue No. 9 is accordingly answered in the negative and against the Respondent and in favour of the Claimant. It is, however, clarified that as far as the claim for interest at the rate of 18% per annum on the amount of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred and Five and Paise Thirty Four) claimed in Issue No. 4 is concerned, the same will be discussed while answering Issue No. 10.

30. **Part B:** Other documentary and oral evidence: Without prejudice to and independent of the above findings on the first four Issues, Issue No. 8 and Issue No. 9 I will now discuss the other documents and oral evidence relating to the first four Issues, Issue No. 8 and Issue No. 9 as under.

31. In the light of the evidence on record, it is clear that it was on 14th March 2012, that the Respondent filed an Application at Exhibit C-4, for becoming a Trading-cum-Clearing Member of the Claimant. The Application contained undertakings which bind the Respondent to comply with the Circulars / Orders issued by the

Claimant from time to time. As a result of this, the Respondent accepted its liability for the trades / contracts entered into by it on the Claimant's platform. On 14th March 2012 itself, Respondent executed a separate Trading-cum-Clearing Undertaking which is at Exhibit X-1. The said Undertaking makes it clear that while the Claimant had agreed to admit the Respondent as its Trading-cum-Clearing Member, the Respondent had undertaken its liability to abide by and comply with the Circulars / Orders issued by the Claimant from time to time.

32. In its SoD, Respondent has raised wholly inconsistent and untenable pleas. Having signed the Application for Membership, Exhibit C-4 as also the Undertaking at Exhibit X-1 discussed above, Respondent has contended that it has never traded with the Claimant and that the liability was sought to be fastened on the Respondent on the basis of forged and fabricated documents. There is not an iota of evidence led by the Respondent in respect of the bald allegation of forgery and fabrication. In support of the said contentions sought to be raised in paragraph 2, Respondent has led no evidence at all. Further, while the Respondent has suggested in paragraph 4 that there were some financing transactions between the parties, meaning thereby that the Respondent had not traded in sugar on the Claimant's platform, it has categorically admitted in paragraph 5 of the SoD that had traded on the Claimant's platform in huge quantity of sugar. The said inconsistent pleas have already been quoted and dealt with in

paragraph 7 above. It is not possible to reconcile the inconsistent pleas taken by the Respondent in paragraphs 4 and 5 of its SoD.

33. In respect of the trades carried out by the Respondent on the Claimant's platform, some of the relevant questions put to and the answers given by CW-1 are reproduced below:

> *"Q. 14 Were you involved in the subject matter of the present arbitration since the very beginning?*
>
> *Ans. Yes.*
>
> *Q. 25 What is the nature of business of the Claimant?*
>
> *Ans. Claimant is providing environment / platform to trade for spot commodity business.*
>
> *Q. 27 Can you explain what is your understanding of T-2 and T-25 transactions?*
>
> *Ans. The letter 'T' denotes trade date and the figures '2' and '25' denote settlement days.*
>
> *Q. 28 Is it correct that according to the Claimant, the Respondent executed T-2 and T-25 trades?*
>
> *Ans. Yes.*
>
> *Q. 29 Is it correct to say that a party executing a T-2 trade must also execute a T-25 trade?*
>
> *Ans. No.*
>
> *Q. 30 How does a trading member come to know (a) who is the purchaser, (b) what commodity the purchaser wants to purchase, and (c) what quantity the purchaser wants to buy?*
>
> *Ans. The Claimant issues a circular about the commodity to be traded on the Claimant's*

platform. As to (a), the name of the purchaser is not disclosed at the time the trade takes place. As to (b), the nature of commodity is given in the circular itself. As to (c), the quantity is also mentioned in the circular.

Q.151 *What do you mean by the term "unsettled trade"?*

Ans. *"Unsettled Trade" means (i) trades where members have either not made the payments of the buy transactions or (ii) not delivered the goods for the sale transactions.*

Q.154 *In view of your answer to question 153, is it correct that besides the trades mentioned by you in your answer to question 128, all the remaining entries of trades in the trade summary (Exhibit C-23 at page 263) are of settled trade?*

Ans. *I will check and revert.*

Q.156 *Is it correct that as per the Claimant, the Respondent was required to make payment in respect of only the unsettled trade?*

Ans. *Yes, it is correct. The Respondent also admitted the said liability of Rs.58.85 Crore (i) by letter dated 1st August 2013, marked as X-5 for identification, page 244 of my affidavit of evidence dated 15th October 2016 ("my affidavit"), (ii) in the minutes of meeting held on 27th August 2013 at Exhibit C-14, page 246 of my affidavit, (iii) in the Settlement Agreement dated 21st January 2014 at Exhibit C-21, page 293 of my affidavit, and (iv) in the Bail Application No. 28 of 2014 dated 20th August 2014 at Exhibit C-22, page 322 of my affidavit.*

Q.169 *Can you now answer question 154?*

Ans. *Yes. As per the record, item Nos. 1 to 11 are settled trades. Item Nos. 12 to 16, 18, 20, 22, 24 and 26 are also settled trades. Item Nos. 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39 and 40 are T+2 trades executed by the Respondent against the item Nos. 28, 30, 32, 34, 36, 38, 41 to 47 in T+25 trades. In T+2 trades, the Respondent sold the quantity of the said goods and presumed that the goods were delivered to the warehouse mentioned in the circulars which are Exhibit C-6 and C-7, pages 184 and 194 of my affidavit. The said warehouse was in the possession and control of the Respondent. On the basis of that, the Claimant made the funds pay out to the Respondent. But later on, the Claimant found out that the actual goods were not delivered by the Respondent so that they have not either delivered the goods or made payment for the unsettled trade mentioned in answer to question 128.*

Q.173 *Is it correct that a trade file is the system generated document and does not involve any human intervention?*

Ans. *Yes, it is correct. The trade file is a system generated document, but it requires human being to process the system for generating the reports.*

Witness is shown paragraph 5, page 3 of Statement of Claim and paragraph 16, page 9 of his affidavit of evidence.

Q.184 *Isn't it true that all the unsettled trades were carried out in paired manner?*

Ans. *It is not true. The Claimant only provides an electronic platform to the trading members in commodity business. The Respondent was executing the trades in paired manner and it has admitted the outstanding liabilities of Rs.58.85 Crores for the unsettled trades in the documents referred to in my answers to questions 133 and 156.*

Q.185 *By your answer to question 184, are you suggesting that the alleged unsettled trades (T+25) were executed by the Respondent in paired manner along with T+2 contracts?*

Ans. *Yes, the unsettled trades were executed by the Respondent and its client in paired manner in T+2 and T+25 contracts.*

Q.187 *With reference to your answer to question 186, please explain the huge difference between the buy amount total (Rs.75,38,08,560/-) of unsettled trades and the claim amount as mentioned in the Statement of Claim (Rs.58,85,09,205.34)?*

Ans. *To arrive at the claim amount of Rs.58,85,09,205.34, the Claimant added transaction charges and VAT amount and then subtracted margin amount and payment received from the Respondent against the total buy amount of Rs.75,38,08,560/-. The total outstanding amount is referred to in Exhibit C-18 at pages 277 to 279.*

Q.190 *Isn't it true that all the trades executed on the platform of the Claimant on a particular day should be reflected in the trade file of that day?*

Ans. *Yes, it is true. In the present arbitration, we have only submitted the details of the trades executed by the Respondent with the other trading members, as the trade file is bulky document, and it is not necessary to produce such trade file contains the other records of the trading members executed on a particular day.*

"Shown Exhibit R-13, Trade File dated 21.06.2013 and answer to question 138.

Q.198 *Please explain as to how 91 trades were executed on the Claimant Exchange as mentioned in the Trade File, Exhibit R-13 if the trades executed were in paired manner?*

Ans. *I will check and revert on Monday, 26th June 2017.*

Shown Q/A 162.

Q.199 *Please show from Trade File, Exhibit R-13, where 163 trades as mentioned in item No. 38 of Trade Summary, Exhibit C-23 were executed by the Respondent on the Claimant Exchange?*

Ans. *I will check and revert on Monday, 26th June 2017.*

Witness is shown Q/A 198.

Q.202 *Can you answer the question now?*

Ans. *Yes. The Respondent executed T+2 contracts through its client SAI001 – Sai Samhitha Storages Pvt. Ltd. and sold 163 lots of sugar Ex-Bobilli. The said contracts were purchased by other trading members and their clients on 21st June 2013.*

On the same day, the Respondent executed T+25 contracts in its own account and purchased 163 lots of sugar Ex-Bobilli from the other trading members and their clients on the Claimant platform. I have produced the matching trade book

of trades executed by the Respondent and its clients with other trading members and their clients which is marked as Exhibit R-8. Even Exhibit R-13 reflects the summation of total 326 trades executed by the Respondent and its clients in T+2 and T+25 contracts.

Witness is shown Q/A 199.

Q.203 *Can you answer the question now?*

Ans. *Yes. The Respondent executed T+25 contracts on 21st June 2013. Even it has executed T+2 contracts at item No. 27 of Exhibit C-23 dated 21st June 2013. The 326 number of trades executed by the Respondent in T+2 and T+25 contracts which are reflected in Exhibit R-13.*

Witness is shown Q/A 202.

Q.205 *Question 198 is repeated.*

Ans. *In Exhibit R-8, I have already produced trade matching reports of 91 trades executed by the Respondent and its client with other trading members and their clients.*

Witness is shown Q/A 203.

Q.206 *Question 199 is repeated.*

Ans. *Exhibit R-13, item Nos. 3, 6, 7, 8, 10, 12, 18, 21, 24, 25, 27, 28, 29, 30, 32, 35, 36, 37, 39, 42, 44, 45, 47, 49, 53, 55, 56, 58, 60, 62, 64, 66, 68, 69, 72, 73, 75, 77, 79, 81, 83, 85, 87, 89 and 91 are the trades executed by the Respondent which are reflected in Exhibit C-23 in T+25 contracts dated 21st June 2013, item No. 38.*

Q.208 *Do you have any personal knowledge about the delivery obligation reports in Exhibit R-17 (colly.) and Exhibit C-24?*

Ans. *Yes.*

Q.209 *What personal knowledge do you have with respect to Q/A 208?*

Ans. *Whenever the trading members including the Respondent used to execute trades on the Claimant's platform, the Trading Department used to send the trade files to the Clearing and Settlement (C&S) Department where they used to process the trade file and generate the obligation report for each and every member of the Claimant for a particular day and send the obligation file on their respective FTP folders of the trading members including the Respondent. The trading members including the Respondent are required to download the said reports and act according to the obligations supposed to be completed for honouring the Pay-In and Pay-Out of commodities and payment.*

Q.233 *Do you have any personal knowledge about Exhibit R-18?*

Ans. *Yes.*

Q.234 *How did you derive the personal knowledge?*

Ans. *Delivery Department sent a specific format to each trading member who has executed trade in specific commodity, asking the billing information of the trading member and its clients. I collected the said documents from the Delivery Department.*

Shown C-18, pages 277 to 279 of the witness' affidavit of evidence dated 15th October 2016.

Q.237 *What information does this ledger contain?*

Ans. *This ledger contains information about (i) initial margin collected from the member, (ii) member's daily obligation ledger, and (iii) member's delivery obligation ledger, which is explained in paragraph 26 at page 14 – relevant portion at page 15 – of my affidavit of evidence dated 15th October 2016.*

Q.238 *Do you have any personal knowledge about Exhibit C-18?*

Ans. *Yes.*

Q.239 *What personal knowledge do you have?*

Ans. *This is a ledger maintained by the Claimant which reflects: (i) any initial margin received from the trading member, (ii) the obligation reports of the trades executed by the trading member, (iii) bank's payment entries towards pay-in and pay-out, and (iv) daily obligation regarding the charges to be collected from the trading member.*

Q.248 *Please explain the steps involved in the movement of money from the counterparty (buyer) to the Respondent's settlement account number 00990680024800 in T+2 trades?*

Ans. *After execution of the T+2 trades, the Claimant sends the obligation reports to respective trading members. The trading members who have purchased the said T+2 trades are supposed to maintain the balance in their settlement accounts. The Respondent which has sold the said T+2 trades is supposed to deliver the quantity in*

stipulated time mentioned in the settlement schedule at the warehouse mentioned in the circulars (Exhibits C-6 and C-7). After getting the delivery of the goods, the Claimant generates the pay-in file through the system and sends it to respective banks where the members maintain their settlement accounts. The banks send the reports of funds collected from the respective members and the Claimant sends pay-out file to the respective banks to make the payment to the Respondent who has executed the sale trade in T+2 as per the settlement schedule mentioned in the circulars.

Q.249 *Whether the same steps are involved in movement of money from the Respondent to the counterparty in T+25 trades?*

Ans. *Yes, but in the present case, the Respondent never delivered any goods or did not make any payment for the trade executed in T+25.*

Q.264 *What are the documents relating to unsettled trades that the Claimant has filed before this Tribunal ?*

Ans. *The Claimant has produced a large number of documents such as : a trade summary which is marked as Exhibit 'C-23', ledger copy which is marked as Exhibit 'C-18', settlement agreement marked as Exhibit 'C-21', letter dated 1st August 2013 marked as 'X-5' for identification, Minutes of Meeting dated 27th August 2013 marked as Exhibit 'C-14' and many other documents which are on record, of which I will submit a list on the next date of hearing.*

Q.265 *On what basis did the Claimant charge the transaction charges ?*

Ans. *The basis is indicated in the circulars at Exhibit 'C-6' (at page 184 of my Affidavit of Evidence – relevant portion at page 188) and Exhibit 'C-7' (at page 194 of my Affidavit of Evidence – relevant portion at page 198).*

Q.274 *Can you now answer question 264 today?*

Ans. *Yes. In continuation of my earlier answer to question 264, the Claimant has already submitted before this Hon'ble Tribunal the following documents relating to unsettled trades:*

(i) Letter dated 1st August 2013 (X-5 for identification);

(ii) Proceeding before the Hon'ble MPID Court being M.A. No. 34 of 2014 filed by the Respondent (Exhibit C-8);

(iii) Minutes of Meeting dated 27th August 2013 (Exhibit C-14);

(iv) Letter dated 22nd August 2013 issued by the Claimant to the Respondent (Exhibit C-16);

(v) Report filed by SGS India Pvt. Ltd. (X-6 for identification);

(vi) Email dated 11th September 2013 (X-7 for identification);

(vii) Trade Summary (pages 263-264, Exhibit C-23);

(viii) Sample Obligation Report (pages 265-266) sent to the Respondent (Exhibit C-24);

(ix) Statement from the clearing bank account of the Respondent (Exhibit C-17);

(x) *Ledger extract maintained by the Claimant for the trades carried out by the Respondent (Exhibit C-18);*

(xi) *Copy of email dated 15th October 2013 along with the document bearing the signatures of the representatives of the Respondent recording their presence in the meeting of 9th October 2013 (Exhibit C-19);*

(xii) *Copy of proceeding initiated under Section 138 of the Negotiable Instruments Act, 1881 by the Claimant (Exhibit C-20);*

(xiii) *Settlement Agreement dated 21st January 2014 (Exhibit C-21);*

(xiv) *(a) Undertaking given by Mr. Nageshwar Rao on 20th August 2014, and (b) Orders dated 11th September 2014 and 23rd September 2016 passed by the Hon'ble MPID Court, Mumbai, forming part of Exhibit C-22;*

(xv) *Minutes of Meeting dated 28th July 2016 (Exhibit R-6);*

(xvi) *Invoices raised by the Respondent on the respective buyers (pages 1 to 371, Exhibit R-7);*

(xvii) *Trade Book maintained by the Claimant for the Respondent's trade (pages 372 to 472, Exhibit R-8);*

(xviii) *Ledger for item Nos. 1 to 11 mentioned in the Trade Summary - Exhibit C-23 - page 263 (Exhibit R-9);*

(xix) *Offer letters stating that the commodity had been delivered or was available with the Respondent at its godown (Exhibit R-12);*

(xx) *Sample Trade File for the Respondent's trade dated 21st June 2013 (Exhibit R-13);*

(xxi) Order Book for transactions numbers 1 to 47 of Exhibit C-23, page 263 (Exhibit R-14);

(xxii) Copy of the bank statement of the Respondent (Exhibit R-15);

(xxiii) Documents at Serial Nos. C and D in Vol. I, pages 1 to 566 (Exhibit R-16); and

(xxiv) Documents at Serial Nos. E, F, G, H and K in Vol. II, pages 567 to 1260 (Exhibit R-17).

Q.279 I put it to you that your answer to questions 264 and 274 with regard to item No. (xvi) is false.

Ans. I deny the suggestion."

34. It will be further clear from the evidence that, on 16th March 2012, Respondent executed an Undertaking for Internet Based Trading ("Terms"), at Exhibit X-2, on a non-judicial stamp paper of Rs.300/-, to engage in Internet Based Trading on the Claimant's platform. The said "Terms", inter alia, by Clause 11.7 provided that all transactions entered into on the Claimant's platform would be subject to the provisions of its Bye-Laws, Rules, Circulars, etc. Clause 11.11 of the said "Terms" contains an arbitration clause under which, it is the Claimant alone which has the authority to appoint a Sole Arbitrator. Secondly, apart from Clause 11.11, at Exhibit X-2, there is also an arbitration clause in the Bye-Laws of the Claimant viz. Clause 15.4 at page 82 of the SoC. Thirdly, under Clause 6.3 of the Agreement dated 20th May 2013 at Exhibit X-4, there is a reference to an arbitration by a Sole Arbitrator to be appointed by the Claimant alone. All these clauses have been

quoted and dealt with in my detailed Order dated 4th May 2016 under sub-section (5) of Section 16 of the 1996 Act, which is at Annexure "1" to this Award.

35. It is also relevant to mention that in respect of a Deed for Procurement of Sugar as per the Contract dated 10th October 2012 at Exhibit R-21, Claimant had advanced an amount of Rs.20,00,00,000/- (Rupees Twenty Crores Only) to the Respondent, which was repaid on 18th May 2013 by the Respondent as per Exhibit R-23. Respondent has denied that it had entered into any trades in the nature of T+2 and T+25 on the Claimant's platform and that there were some financial transactions between the parties. In support of this plea, Respondent has sought to place reliance on the fact that the Claimant had advanced Rs.20,00,00,000/- (Rupees Twenty Crores Only) to the Respondent which it had returned, as stated above. However, it will be clear from the documents which are discussed later that the Respondent has clearly admitted that it had entered into trades (T+2 as also T+25) on the Claimant's platform and further that in respect of such trades, it was liable to pay to the Claimant the amount of Rs.58,85,00,000/- (Rupees Fifty Eight Crores Eighty Five Lakhs Only). In respect of this independent and stand alone transaction of procurement of sugar, though Respondent tried to contend that the payment of Rs.22,42,50,000/- (Rupees Twenty Crores Forty Two Lakhs Fifty Thousand Only) [Rs.20,00,00,000/- (Rupees Twenty Crores) advanced by the Claimant to it plus

interest and other charges added thereto] was towards the amount payable to the Claimant in respect of some financial transactions, the answer given by RW-1 Kannababu to Q. 159 completely destroys the Respondent's version in this behalf. Q/A 159 read as under:

> *"Q.159 I put it to you that the recitals read with Clause 1 of Exhibit R-21 would indicate that this Agreement dated 10th October 2012 is in the nature of procurement agreement for the purchase of sugar.*
>
> *Ans. Yes, it is so."*

In the light of Exhibits R-21, R-23 and Q/A 159 and other documentary evidence on record, it is clear that the contention raised by the Respondent in paragraph 12 of its written submissions is baseless.

36. Though RW1 has stated that most of the statements made in his Affidavit are based on his personal knowledge, or on the information derived from the records, this claim is not borne out by his answers to the following questions: Q/A 35 shows that the Respondent did trade on the Claimant's platform, though Q/A 35 relates to the settled trades regarding which there is no claim. The claim before me is only in respect of the unsettled trades. Q/A 35 can be contrasted with Q/A 49.

> *"Q. 35 Is it your evidence that the Respondent sold 5240 M.T. of sugar on 29th March 2012 on the Claimant's platform?*

Ans. *From the Compilation of Documents, pages 1 to 28 which are already on record and the Respondent's email dated 30th March 2012 (Exhibit R-11, page 2), it is evident that the Respondent has sold / traded a quantity of 5240 M.T. of sugar, delivery at ex-Patna for value of Rs.15,10,72,000/- under T+10 contract of 29th March 2012.*

Shown Exhibit R-11 @ pages 1 and 2 of the Compilation annexed to the affidavit of RW-1.

Q. 49 *If according to you, the trade had been carried out by Shri Anjani Sinha and Shri Amit Mukherjee of the Claimant, then why did the Respondent think it necessary to inform the Claimant that "We (Membership ID: 14230) has traded an quantity of 5240 Mts of sugars delivery at Ex-Patna for value of Rs.15,10,72,000/- under T+10 days contract on 29.03.2012 ..." by the said email dated 30th March 2012?*

Ans. *As stated earlier, the Respondent has not done any trading across the window. All these were being done by the nominated person/s of the Claimant, who were operating from the office of the Respondent on a dedicated system which was provided to them."*

Further, RW-1 has deposed as under:-

"Q. 60 *Can you tell us why the Respondent credited an amount of Rs.11,000/- to the Claimant on the same day thereby leaving a balance of Rs.15,10,72,000/-?*

Ans. *No. As stated earlier, I was never looking into the accounts part and I have no knowledge.*

Q. 61 *Can you tell us who was looking into the accounts part and has the necessary knowledge regarding the bank statement marked as Exhibit R-15?*

Ans. *The then Finance Manager, Shri BSR Murthy must be having the knowledge."*

37. When RW-1 was confronted with questions which he found inconvenient to answer, he gave wrong / false answers, and tried to throw the burden on Mr. N. Nageshwara Rao, who is the Promoter / Managing Director of the Respondent. This will be evident from the following Q/A:

"Shown Q/A 17.

Q. 19 *Can you please tell us who is your M.D. and who is your Legal Officer?*

Ans. *My M.D.'s name is Mr. N. Nageshwara Rao and the name of our Legal Officer is Mr. B. Jagadish.*

Q. 20 *Can you please tell us what are the responsibilities and duties that Mr. N. Nageshwara Rao discharges in so far as the Respondent Company's business is concerned?*

Ans. *Mr. N. Nageshwara Rao is the Promoter – Managing Director of the Respondent Company, I am too small to comment upon his responsibilities.*

Q. 21 *Can you please tell us why you are too small to comment upon Mr. N. Nageshwara Rao's responsibilities?*

Ans. *As informed above, since he is the Promoter – Managing Director and I am only a Director-Operations and as explained in detail about my*

own roles and responsibilities in the earlier question, it would be herculean to give complete details of his responsibilities.

Shown paragraphs 2 and 3 of the witness' affidavit of evidence and Q/A 15.

Q. 62 *Can you please tell us the source of your personal knowledge as to the fact that the Respondent received finance in the nature of a financial facility if you are unaware of the 'accounts part' of the Respondent's dealings?*

Ans. *On perusal of paragraphs 2 and 3 of the affidavit, I had nowhere stated that the Respondent received finance. With regard to the accounts part, I had got the feedback from the Finance Department of the Respondent.*

Q. 63 *Is it your evidence then that the Respondent has not received finance from the Claimant?*

Ans. *I had only answered to the question 62. I have to go back and obtain the answer.*

Q. 64 *From whom will you obtain the answer?*

Ans. *I will check and revert from the Managing Director.*

Q. 67 *Can you tell us, according to you, for what purpose were the amounts received by the Respondent from the Claimant in the bank account, the statement of which is at Exhibit R-15?*

Ans. *I am not aware of the various amounts that are reflected in the said statement, since I was never looking into the accounts part.*

Q. 68 *Can you please verify and inform the Tribunal for what purpose were these amounts received by the Respondent from the Claimant?*

Ans. *All the Accounts Department officials who were on the rolls during 2013 are no longer working with the Respondent. Hence, I do not know whether the person who is presently looking into the accounts would be aware of it.*

Q. 74 *Is it your evidence therefore, that Mr. N. Nageswara Rao, the Managing Director of the Respondent, has the necessary knowledge in relation to the bank accounts statement at Exhibit R-15?*

Ans. *Yes."*

38. Even in respect of a huge RTGS credit of Rs.20,00,00,000/- (Rupees Twenty Crores) from the Claimant, RW-1 who is the Authorised Signatory and the sole witness examined by the Respondent, has given false answers.

"Q. 107 *Can you now answer Q.63?*

Ans. *Yes. From the Accounts Department, I could gather that there was a direct remittance by RTGS for an amount of Rs.20 Crores from the Claimant's account to the Respondent's account during 2012. The correct date I did not ascertain. This should be purely a loan since the remittance has come directly from the Claimant to the Respondent.*

Q. 108 *Can you inform the Tribunal from whom in the Accounts Department, did you gather this information?*

Ans. *As earlier said, there are no responsible official (Chartered Accountant) heading the Finance Department presently. It was gathered from the Junior Accountant.*

Q. 109 *Can you now answer Q. 70?*

Ans. *This answer is already available on Q. 77. However, the Accounts Department expressed their inability to confirm.*

Shown Exhibit R-2 (colly.), email dated 21st January 2013 and tendered by CW-1 in response to Q/A 101.

Q. 116 *Was this email addressed by you to the Claimant?*

Ans. *No."*

(emphasis supplied)

39. It, further, appears from the evidence of RW-1 that there are three persons who fully know the financial transactions of the Respondent: viz.: Nageshwara Rao and the two Senior Executives.

"Q. 31 *Which representatives of the Respondent were present at that meeting?*

Ans. *The representatives of the Respondent who were present in the said meeting were (i) Mr. N. Nageshwara Rao, M.D., (ii) Mr. V.S. Soma, (iii) Mr. B.S.R. Murthy, who is no longer with the Company, and (iv) myself.*

Q. 32 *Can you please tell us about the responsibilities and duties of Mr. V.S. Soma and Mr. B.S.R. Murthy of the Respondent at that time?*

Ans. *Mr. V.S. Soma was the Chief Financial Officer (C.F.O.) and Mr. B.S.R. Murthy was the General Manager-Finance.*

Q. 33 *Would it be correct to say that Mr. V.S. Soma and Mr. B.S.R. Murthy were generally concerned with the financial affairs of the Respondent?*

Ans. *Yes, the Managing Director used to involve and consult the above Executives whenever financial affairs were being discussed."*

40. It is obvious that the Respondent has chosen not to examine any of the abovementioned 3 persons and has thus withheld the best evidence, for reasons best known to it. It would, therefore, follow that I must draw adverse inference against the Respondent in view of the principles underlying Illustration (g) to Section 114 of the Indian Evidence Act, 1872, which reads as under:

> *"(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."*

It is well settled that if a party in possession of the best evidence, which throws light on the issue in controversy, withholds it, the Court ought to draw an adverse inference against it, even if the onus of proof does not lie on that party. Please See *Gopal Krishnaji Ketkar vs. Mohd. Haji Latif 1968 SCR (3) 862.* In the present case, admittedly, the onus of proof was on the Respondent to prove that its signatures were obtained by force or pressure. Similar view has been expressed by the Hon'ble Supreme Court in *Tomaso Bruno vs. State of U.P. (2015) 7 SCC 178,* paragraph 27 where, the relevant ratio is as under:

"27. As per Section 114 Illustration (g) of the Evidence Act, if a party in possession of best evidence which will throw light to controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. ..."

There is no explanation whatsoever, as to why the Respondent has withheld the evidence of its Managing Director, Mr. N. Nageshwara Rao and its other Executives.

41. It appears that pursuant to a show cause notice issued from the Ministry of Consumer Affairs, Government of India, the Claimant submitted its response in May and August 2012. In July 2013, Claimant was called upon to furnish an Undertaking that all existing contracts would be settled by the due dates and that no further contract should be entered until further instructions. Accordingly, Claimant issued a Circular on 22nd July 2013 at Exhibit C-12, that all contracts where the settlement / payment was yet to be made by the members, should be settled by the due dates. Finally on 31st July 2013, vide Exhibit C-13, Claimant informed the Government of India that the trading in all contracts, other than E Series Contracts, would stand suspended until further Orders. Claimant issued a Circular on 31st July 2013 itself, calling upon its trading members that all payments due from them had to be made by 15th August 2013. Consequently, Respondent as a trading member of the Claimant, was bound to comply with the said

Circular, which it has failed to do. On 1st August 2013, Respondent addressed a letter to the Claimant which is at Exhibit X-5, referred to above, admitting its liability to the Claimant to the tune of Rs.61,18,17,121/- (Rupees Sixty One Crores Eighteen Lakhs Seventeen Thousand One Hundred Twenty One Only) being due and payable to the Claimant.

42. In August 2013, the Claimant appointed SGS India Limited, an agency to inspect the warehouses, which were designated by the Claimant, for verifying the quantum and quality of the stock of sugar alleged to have been deposited by the Respondent therein. The said agency submitted its report dated 11th September 2013, which has been produced by CW-1 along with his affidavit of evidence and which has been marked as Exhibit X-6 (the report) and Exhibit X-7 (which is the covering email). The report revealed that the representatives of SGS India Private Limited were not allowed by the Respondent to enter the warehouse even for the limited purpose of inspecting the stock of sugar alleged to have been lying there. As a result of this attitude on the part of the Respondent, the visit of the said agency proved abortive. The report also bears a remark that Mr. Nageshwara Rao stated that there was no stock of sugar available in the Claimant's – designated – warehouse to the credit of the account of the Claimant. There is also a *"SITE REPORT"* dated 30th November 2013 submitted by the representative of the Court Receiver, High

Court, Bombay which has been produced along with the SoC. The crucial part of the said report is reproduced below:

> *"Mr. Anjaneyulu pointed out me the said warehouse which is also confirmed by the Representative of the Petitioner. On the entrance of the said warehouse a board was affixed indicating the warehouse hypothecated to Andhra Bank, Oriental Bank of Commerce and Indian Overseas Bank. Mr. Anjaneyuly informed that the warehouse which is situated at the NCS Sugars Ltd., was belongs to the said company and it was hypothecated to the various banks as mentioned in their Afidavit dated 28th October 2013. I found the entire warehouse was empty/vacant except few empty gunny bags. On inquiry, he further added that there was no stock- in-trade belongs to the Petitioner company was kept at any part of time in the said warehouse."*
>
> *(emphasis supplied)*

It thus became clear that the Respondent had grossly failed in its obligations to deliver the stock of sugar in a timely manner or had surreptitiously removed the same from the designated warehouse after suspending the trading. The relevant Q/A of CW-1 is quoted below:

> ***"Shown Q/A 169.***
>
> *Q.287 How did the Claimant find out that the actual goods were not delivered by the Respondent?*
>
> *Ans. I have already answered this in answer to question 137. Even the independent agency, SGS India Pvt. Ltd. appointed by the Claimant to verify the stock of the Respondent after the Claimant shut its operations, has found in its reports (X-6 and X-7 for*

identification at pages 251 to 262 of my affidavit dated 15th October 2016) that no stock of sugar was available on account of the Claimant."

43. It is further clear from the evidence that the Respondent fraudulently conspired with some of the officials who were then working for the Claimant and without depositing any stock of sugar in the designated warehouse, obtained warehouse receipts showing that sufficient stock of sugar was deposited in the designated warehouse. When the Claimant came to know of this, it forthwith lodged criminal complaint with the Economic Offences Wing (E.O.W.) of the Mumbai Police against its former Managing Director (M.D.) and Chief Executive Officer (C.E.O.), Mr. Anjani Sinha, as also the managerial team working under him and the defaulting members including the Respondent. As a result of the complaint filed by the Complaint, the E.O.W. arrested the accused and the charge sheet was filed against them in January 2014 and further investigations have been completed. Respondent's general and vague criticism in its written submissions on the Claimant's evidence inspires no confidence at all.

44. In August 2014, the Claimant initiated proceedings in the Court of the 44th Metropolitan Magistrate, Andheri, Mumbai, being Criminal Case No. CC/2459/SS/2014 under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 in respect of the three cheques issued by the Respondent in favour of the Claimant for a total amount of Rs.6,00,00,000/- (Rupees Six Crores

Only) (Rs.2,00,00,000/- each x 3) which were dishonoured by the concerned banks. The said cheques were issued by the Respondent in terms of the Tripartite Settlement Agreement dated 21st January 2014 at Exhibit C-21. A copy of the said Criminal Complaint is at Exhibit C-20.

45. As stated above, pursuant to the investigation in the said crime, E.O.W. arrested Mr. Nageshwara Rao, the Promoter and Managing Director of the Respondent, on 11th August 2014. He was later on released on bail on 11th September 2014. However, the criminal proceedings initiated by E.O.W. viz. MPID Case No. 1 of 2014 are pending in the Designated Court Mumbai under the MPID Act.

46. To sum up the evidence, CW-1, Santosh Dhuri has fully explained what is a trade process and has produced a sample trade file. He has also produced a trade book which is a summary of the trade file for the relevant period viz. 13th June 2013 to 26th July 2013, during which the Respondent traded on the Claimant's platform, but has failed to settle the said trades. It is clear that the only manner of settling the trade was either to **(a)** deliver the goods contracted to be delivered, or **(b)** make the payment of the price of the goods contracted to be sold. Admittedly, Respondent failed to do either of the two things. As far as **(a),** delivery of goods contracted to be delivered was concerned, Respondent had no goods in its warehouse at Bobbili, Vizianagaram, Andhra

Pradesh. As stated above, when the inspection team of SGS India, visited the said warehouse, they were not allowed to enter the warehouse, obviously because there was no stock of sugar. In so far as **(b)**, making the payment of the price of the goods was concerned, the series of written admissions made by the Respondent conclusively prove that the Respondent has failed to make the payments that were admittedly due to the Claimant and which it had undertaken to pay.

47. Respondent has, in its SoD, tried to suggest that there were some financing transactions between the parties, in respect of which, an amount of Rs.20,00,00,000/- (Rupees Twenty Crores Only) was paid by the Claimant to the Respondent, on 10th October 2012, which was repaid by the Respondent on 18th May 2013. This plea is a red hearing and ex-facie false and is completely belied by series of documents on record which show that there was a totally different contract for procurement of sugar between the parties, for which, Claimant had advanced the said amount of Rs.20,00,00,000/- (Rupees Twenty Crores Only) to the Respondent. The distinct agreement for procurement of sugar is at Exhibit R-21 dated 10th October 2012. The letter by the Respondent to the Claimant in respect of the said procurement is at Exhibit R-22 dated 15th May 2013 and the payment by the Respondent of the amount of Rs.22,42,50,000/- (Rupees Twenty Crores Forty Two Lakhs Fifty Thousand Only) viz. the principal amount with interest and other charges etc. was as per Exhibit R-

23 on 18th May 2013. The clinching circumstances, which completely falsify the Respondent's defence are that the admissions of liability referred to in Part A above, dealing with the 5 important documents / Applications / Affidavits / Orders, are executed from 1st August 2013 onwards, that is to say after the Respondent had already repaid the amount of Rs.22,42,50,000/- (Rupees Twenty Crores Forty Two Lakhs Fifty Thousand Only) on 15th May 2013. Hence, it is obvious that the unsettled trades, which is the subject matter of the present proceedings, has no connection or relevance at all with the earlier sugar procurement deal referred to above. As will be evident from the discussion in Part A, the Respondent categorically admitted that it had traded on the Claimant's platform and had incurred huge liability and has also further admitted that it had to pay to the Claimant, at least Rs.58,85,00,000/- (Rupees Fifty Eight Crores Eighty Five Lakhs Only). It is not necessary to repeat what has been discussed above. Suffice it to say, that the defence of some purely financial transactions between the parties and the absence of any trading by the Respondent on the Claimant's platform is totally false, to say the least.

48. In its written submissions, Respondent has conveniently glossed over its own admissions of its liability, both in the documentary and oral evidence and has referred to some Questions/Answers in the evidence of CW-1 to contend that the evidence was not reliable. As pointed out above, **(a)** right from the

beginning viz. filing of the SoD, Respondent has been taking inconsistent and untenable pleas, **(b)** serious pleas such as force, pressure, forgery, fabrication are raised and beyond the *ipse dixit* of RW-1, Kannababu, there is no evidence of the persons concerned, **(c)** the abovementioned serious pleas are not substantiated with any details as required by the principles underlying the prvovisions of Order VI Rule 4 of the Code of Civil Procedure, 1908, **(d)** the best evidence, if any, available to the Respondent has been withheld in as much as, for reasons best known, Respondent has not examined either N. Nageshwara Rao or BSR Murthy or V.S. Soma, and **(e)** the pleas raised in paragraphs 27 and 31 which are quoted above are clearly contrary to the settled legal principles. It is obvious that if the Respondent had pleaded force / pressure being put on it for obtaining the written admissions of liability, Claimant could not have prayed by way of an interim application for a decree on admission. Specific issues such as Issue No. 6 and 9 were framed, in the face of which no interim application for decree on admission could have been entertained. In the result, there is no substance in the vague, inconsistent and wholly untenable contentions raised by the Respondent in its written submissions.

49. Another aspect of the written submissions of the Respondent is the alleged criticism on the evidence of CW-1 with a view to creating an impression that he did not know the subject matter of dispute to which he has deposed so extensively. Apart from the

elaborate discussion in Part A and Part B, my answer to this criticism is as under: **(a)** In the first place, most of the finding recorded on the above Issues discussed in details in Part A and Part B, are based on documents which have been held to be valid and binding on the Respondent. The discussion in paragraph 48 shows the baseless contentions raised by the Respondent which have been rejected; **(b)** Secondly, the unequivocal and repeated written admissions on the part of the Respondent have not been explained and are held to be valid and binding on the Respondent; **(c)** Thirdly, it is important to refer to some of the Questions / Answers in the cross examination of CW-1 which prove beyond the pale of doubt that he is the truthful witness to the trades carried out by the Respondent on the Claimant's platform. While I do not wish to burden the Award with a large number of such Q/A, some of the relevant Q/A are quoted below:

"Q. 14 *Were you involved in the subject matter of the present arbitration since the very beginning?*

Ans. *Yes.*

Q. 24 *Are you personally aware of the process as to how trades – transactions – are executed on the Claimant's platform and can you elaborate the said process?*

Ans. *Yes. I am personally aware of the said process. The process is that – Claimant Member is permitted to trade through Trading Window System (TWS). The Claimant allots authorized user to operate TWS. The Claimant Member through the*

authorized user allotted to him enters the trades and if the order matches with counter party, trade takes place.

Per Tribunal

Q. Do the above steps complete the trade – transaction?

Ans. Yes.

Q. 30 How does a trading member come to know (a) who is the purchaser, (b) what commodity the purchaser wants to purchase, and (c) what quantity the purchaser wants to buy?

Ans. The Claimant issues a circular about the commodity to be traded on the Claimant's platform. As to (a), the name of the purchaser is not disclosed at the time the trade takes place. As to (b), the nature of commodity is given in the circular itself. As to (c), the quantity is also mentioned in the circular.

Q. 86 In what manner, were you involved in the subject matter of the present arbitration?

Ans. I was involved directly and/or indirectly in the subject matter of the present arbitration.

Q. 88 Have you produced any documents or correspondence to show your involvement in the subject matter of the present arbitration?

Ans. Yes, I have produced.

Q. 89 Please show the Tribunal where the said documents are?

Ans. *I will go through the records and on the next date of hearing, submit a typed statement giving the details of the said documents on the record.*

Witness is shown Q/A 89.

Q. 94 *Can you answer the question today?*

Ans. *Yes, I am producing seven documents and correspondence running into 21 pages to show my involvement in the subject matter of the present arbitration.*

Per Tribunal:

The seven documents and correspondence running into 21 pages are taken on record and marked as Exhibit "R-6" (colly.).

Q. 100 *Have you produced any document on record of this Tribunal to show your direct involvement in the subject matter of the present arbitration from the period March 2012 to August 2013?*

Ans. *There is no document on record to show my direct involvement in the subject matter of the present arbitration from the period March 2012 to August 2013.*

(Witness volunteers) : However, when the Respondent applied for membership on 14th March 2012, I interacted with the officers of the Respondent for complying with the documents such as (i) Trading-cum-Clearing Membership Undertaking at page 156 of my affidavit of evidence, (ii) Undertaking for Internet Based Trading at page 165 of my affidavit of evidence, (iii) Agreement dated 14th May 2013 at page 203 of

my affidavit of evidence, (iv) Agreement dated 20th May 2013 at page 208 of my affidavit of evidence, and (v) letter dated 1st August 2013 received from the Respondent at page 244 of my affidavit of evidence.

(emphasis supplied)

Shown Q/A 165.

Q.166 *Can you say what personal knowledge do you have in respect to Exhibit R-14?*

Ans. *The said Order Book, Exhibit R-14 pertains to the trade executed by the Respondent.*

Q.171 *Do you have any personal knowledge about the trade book, Exhibit R-8?*

Ans. *Yes.*

Q.172 *What personal knowledge do you have about the trade book, Exhibit R-8?*

Ans. *These are the trades executed by the Respondent with the other trading members of the Claimant Exchange in sugar contract.*

(emphasis supplied)

Q.174 *Do you have any personal knowledge about the trade file dated 21st June 2013, Exhibit R-13?*

Ans. *Yes.*

Q.175 *What personal knowledge do you have with regards to the trade file dated 21st June 2013, Exhibit R-13?*

Ans. *These are the trades executed by the Respondent and its clients in T+2 and T+25 for sugar contracts.*

Q.192 *I put it to you that you do not have any personal knowledge about trade file dated 21.06.2013, Exhibit R-13 and Order Book, Exhibit R-14.*

Ans. *I deny your suggestion.*

Q.208 *Do you have any personal knowledge about the delivery obligation reports in Exhibit R-17 (colly.) and Exhibit C-24?*

Ans. *Yes.*

Q.209 *What personal knowledge do you have with respect to Q/A 208?*

Ans. *Whenever the trading members including the Respondent used to execute trades on the Claimant's platform, the Trading Department used to send the trade files to the Clearing and Settlement (C&S) Department where they used to process the trade file and generate the obligation report for each and every member of the Claimant for a particular day and send the obligation file on their respective FTP folders of the trading members including the Respondent. The trading members including the Respondent are required to download the said reports and act according to the obligations supposed to be completed for honouring the Pay-In and Pay-Out of commodities and payment.*

(emphasis supplied)

Q.233 *Do you have any personal knowledge about Exhibit R-18?*

Ans. *Yes.*

Q.234 *How did you derive the personal knowledge?*

Ans. *Delivery Department sent a specific format to each trading member who has executed trade in specific commodity, asking the billing information of the trading member and its clients. I collected the said documents from the Delivery Department.*

Shown C-18, pages 277 to 279 of the witness' affidavit of evidence dated 15th October 2016.

Q.237 *What information does this ledger contain?*

Ans. *This ledger contains information about (i) initial margin collected from the member, (ii) member's daily obligation ledger, and (iii) member's delivery obligation ledger, which is explained in paragraph 26 at page 14 – relevant portion at page 15 – of my affidavit of evidence dated 15th October 2016.*

Q.238 *Do you have any personal knowledge about Exhibit C-18?*

Ans. *Yes.*

Q.239 *What personal knowledge do you have?*

Ans. *This is a ledger maintained by the Claimant which reflects: (i) any initial margin received from the trading member, (ii) the obligation reports of the trades executed by the trading member, (iii) bank's payment entries towards pay-in and pay-out, and (iv) daily obligation regarding the charges to be collected from the trading member.*

Q.240 How did you derive the personal knowledge about Exhibit C-18?

Ans. Exhibit C-18 is maintained by the Claimant for the Respondent and I got it from the Accounts Department of the Claimant as the said document is attached to recover the amount of Rs.58.85 Crores from the Respondent.

Q.257 I put it to you that you do not have any knowledge about the trading and clearing procedures conducted on the Claimant's exchange.

Ans. I deny the suggestion. I have explained the trading and clearing procedure in my answers to various questions earlier."

(emphasis supplied)

50. Further, there is a grievance which is again sought to be raised in the Respondent's written submissions that the Application filed by it on 17th April 2017 purporting to be under Order XI of the Code of Civil Procedure, 1908 seeking relief in terms of paragraph 7 of the Application, which was partly allowed. The prayer in the Application was to direct the Claimant to produce the documents mentioned in Exhibit A to the Application. This Application was contested by the Claimant and upon hearing both the learned counsel, I have passed a detailed Order dated 6th May 2017, granting the said Application in part, in the sense that certain documents were directed to be produced by the Claimant and the prayer in respect of other documents has been rejected. In arriving

at my conclusions, I have referred to the: **(a)** provisions of Section 19 of the 1996 Act relating to the appropriate procedure to be followed in the conduct of the present proceedings; **(b)** provisions of Order XI Rule 1 of the Code of Civil Procedure, 1908 dealing with *"Discovery by Interrogatories"*; and **(c)** judgments of **(i)** the Hon'ble Supreme Court in *Raj Narain vs. Smt. Indira Nehru Gandhi & Anr. AIR 1972 SC 1302*, **(ii)** the Hon'ble Orissa High Court in *M/s. J.S. Constructions Pvt. Ltd. vs. Damodar Rout AIR 1987 Orissa 207*, and **(iii)** the Hon'ble Supreme Court in *K.P. Poulose vs. State of Kerala AIR 1975 SC 1259*. A copy of the said Order dated 6th May 2017 is at **Annexure "3"** to this Award. In view of the same, I do not wish to burden this Award any further.

51. Yet another untenable criticism made by the Respondent in its written submissions is regarding the details of the parties with whom the Respondent had traded – referred to as counter parties – not being furnished by the Claimant. The grievance is untenable in view of the evidence of CW-1 and the large number of documents produced by him in the course of his cross examination, as will be evident from the following Q/A:

> *"Witness is shown paragraph 26 of his affidavit of evidence and reference to Sr. No. 24 viz. Exhibit C-23 – and Exhibit 24 at pages 263 to 266 of his affidavit.*
>
> *Q.134 Please explain as to what are the contents of Trade File and where is it in Exhibit C-23?*
>
> *Ans. The Trade File is not Exhibit C-23. I do not remember the exact contents of the Trade File. I*

will check and revert and if possible, I will produce a sample of the Trade File on the next date of hearing. The Trade File is generated in number of pages and is a bulky document. The same Trade File is available with the Respondent.

Q. 138 Can you now answer question 134?

Ans. Yes. I am producing a sample trade file for the Respondent's trades dated 21st June 2013 from which the contents of the trade file would become clear. There are total 91 trades executed by the Respondent on 21st June 2013.

Per Tribunal:

The said document is taken on record and marked Exhibit "R-13" (total 3 sheets).

(Witness continues) : The trade files are bulky documents and therefore, a trade book at Exhibit R-8 (pages 372 to 472 of the documents produced by the Claimant in response to the Respondent's letter dated 10th December 2016) is a compressed version of the Respondent's trade file containing all the relevant details of transactions executed by the Respondent on the Claimant Exchange. The trade book also has the details and records of 91 trades executed by the Respondent on 21st June 2013 at pages 457 to 462 of Exhibit R-8. The trade summary at Exhibit C-23, page 263 is prepared on the basis of such trade files and the trade book to summarize the trades executed by the Respondent on the Claimant Exchange by grouping together all the trades of a single day depending on whether the trades are for a buy or sell position. The sample trade file produced by me at Exhibit R-13 indicates that the summary maintained of trades dated

21st June 2013 contains in the trade book is true and correct which relate to the trade file of the Respondent.

(emphasis supplied)

Q.259 *Can you please inform the Tribunal the names of the parties whose trades are settled by the Respondent and also the names of the parties whose trades are not settled by the Respondent ?*

Ans. *The Claimant has produced Exhibit 'R-8' where the names of the respective parties are mentioned with whom the Respondent executed trades on the Claimant's platform. Further, the trades upto 13th June 2013 are settled trades and the trades in T+25 from 14th June 2013 onwards are unsettled trades.*

(Shown Q/A. 115)

Q.261 *In the absence of the counter party details in the trade file, how did you ascertain the genuineness or authenticity of the data without going through the entire records ?*

Ans. *The trade file also contains the data of counter parties who have executed buy and sell details on a particular date in a particular contract. On that basis, we match the record of the counter party who executed trades in a particular contract.*

(Shown Trade File dated 21.06.2013 being Exhibit 'R-13' and Q/A. 261)

Q.262 *Can you show where the counter party details are mentioned in this document on the basis of which you matched the record of the counter party who executed trades in a particular contract ?*

Ans. *I have already answered this question in reply to Q.138.*

Shown Q/A 262.

Q.280 *Please show from the contents of your answer to question 138 where the counterparty details are mentioned as stated by you in answer to question 262?*

Ans. *It is obvious that the Respondent executed trades in T+2 and T+25 with other trading members of the Claimant which is shown in Trade Book, Exhibit R-8 (pages 372 to 472 of the documents produced by the Claimant in response to the Respondent's letter dated 10th December 2016).*

Q.282 *Please refer Q/A 259 and provide the addresses of parties mentioned in Exhibit R-8.*

Per Tribunal:

After verifying Exhibit R-8, CW-1 states that there are a large number of parties mentioned at Exhibit R-8 (approximately 200 says CW-1). Hence, with a view to saving time, the witness is directed to submit a typed list of the addresses of the parties mentioned in Exhibit R-8, by the next date of hearing. Copy of this typed list to be furnished to the Advocate for the Respondent within two weeks from today.

Q.293 *Can you answer question No. 282 today?*

Ans. *Yes, I can answer. I am producing a typed list of 58 pages showing the addresses of the parties mentioned in Exhibit R-8.*

Per Tribunal:

By consent, the said typed list running into 58 pages is taken on record and marked <u>Exhibit R-19</u>.

Q.290 *If counterparty's purported unsettled trades were not settled by the Respondent, then has the Claimant settled the purported unsettled trades of the respective counterparty?*

Ans. *No.*

Q.291 *Have you filed any document on record of the Tribunal where any counterparty has complained to the Claimant regarding the non-payment of money / dues by the Respondent?*

Ans. *The Claimant has not filed any documents on record of the Tribunal where the counterparty has complained to the Claimant regarding the non-payment of money / dues by the Respondent. But one of the investor has filed a complaint before the E.O.W., Mumbai which is registered as C.R. No. 89/2013 which is transferred to Special MPID Court, Mumbai as Case No. 1 of 2014. The Respondent entered into the Settlement Agreement with the Claimant and filed one Miscellaneous Application No. 34 of 2014 on 6th February 2014 before the Special MPID Court, Mumbai for legally validating the Settlement Agreement. The said Miscellaneous Application No. 34 of 2014 is before this Tribunal at Exhibit C-8.*

<u>Shown Q/A 259 and 282.</u>

<u>Q.301</u> *<u>Have you provided the addresses of the third parties / counter parties with whom the Respondent traded as mentioned in Q/A 259 and 282 in Exhibit R-19?</u>*

Ans. Yes.

Q.302 Please point out from Exhibit R-19 names and addresses of the third parties / counter parties with whom the Respondent carried out the purported unsettled trades?

Ans. The names and addresses mentioned in Exhibit R-19 in columns 8 and 9 respectively were carried out the trades with their respective trading and clearing members mentioned in columns 3 and 5. It is not possible to point out the exact names and addresses of the third parties / counter parties who have unsettled trades with the Respondent as in Q.282, the direction was given to produce the addresses of the parties mentioned in Exhibit R-8.

Shown Q/A 138 and 280.

Q.306 In absence of third party details in trade file [Exhibit R-13], how can a trade book [Exhibit R-8 (colly)], which is a compressed version of a trade file, contain third party details?

Ans. Trade file, Exhibit R-13, contains the records of the trade executed by the Respondent. Such trade file for a particular day contains other trades also which is a bulky file. So we have produced the records of the Respondent for a particular day. However, in a trade book, Exhibit R-8 (colly), the said records produced by me which were matched with the respective counter parties / third parties of the clearing member or trading member with whom the Respondent executed trades in T+2 and T+25 sugar contracts.

Q.308 Isn't it true that all the entries in the ledger should have counter entries in the statement of clearing bank account of a trading member?

Ans. It is not true."

(emphasis supplied)

I have highlighted some of the Q/A which shows that the grievance is wholly untenable.

52. **Conclusion of discussion in Part B:** In view of the above oral and documentary evidence, which clearly indicates that the Respondent had traded in various contracts on the Claimant's platform as alleged in paragraph 3 of the SoC, I hold that it is liable to pay the amount of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eight Five Lakhs Nine Thousand Two Hundred Five and Paise Thirty Four Only), towards its liability to the Claimant. I, therefore, answer the first four Issues and Issue No. 8 in the affirmative and in favour of the Claimant and Issue No. 9 in the negative and against the Respondent. It is, however, clarified that as far as the claim for interest at the rate of 18% per annum on the amount of Rs.58,85,09,205.34 claimed in Issue No. 4 is concerned, the same will be discussed while answering Issue No. 10.

53. **Issue No. 5: Whether the Respondent proves that the Settlement Agreement dated 21st January 2014 is valid, subsisting and binding on the parties?** It appears that there

was a Tripartite Settlement Agreement dated 21st January 2014, which is at Exhibit C-21. The three parties were: **(i)** the Claimant, **(ii)** the Respondent, and **(iii)** NCS Industries Pvt. Ltd. which is the holding Company of the Respondent, NCS Sugars Ltd. Clauses (A) and (D) in the preamble of the Settlement Agreement at Exhibit C-21 read as under:

> *"WHEREAS*
>
> *A. NCS Sugars Limited is registered as trading-cum-clearing member is assigned CM-ID number – 14230. In the course of their dealings with NSEL, the NCS has incurred certain liabilities towards NSEL as of August 31, 2013, and the NCS has been declared as a 'defaulter' in terms of the Bye-laws and Rule No. 41 of the NSEL Rules vide NSEL circular dated August 22, 2013. NSEL claims that the amount owed to it by the NCS as of August 31, 2013 is Rs.58.85 Crores (Rupees Fifty Eight Crores and Eighty Five Lakhs Only) as set forth in Schedule 1.*
>
> *B. xxx*
>
> *C. xxx*
>
> *D. Thus, as a part of the Conciliation Process, NSEL and the NCS has now decided to mutually agree on a settlement amount of Rs.50 Crores (Rupees Fifty Crores only) ("Settlement Amount"), as full and final settlement amount towards all obligations of NCS towards NSEL as of August 31, 2013, subject to fulfillment of the terms and conditions set forth in this*

Settlement Agreement (including, the payment of the Settlement Amount as per the Payment Schedule)."

(emphasis added)

The emphasized clauses leave no manner of doubt that the Respondent was a Trading-Cum-Clearing Member of the Claimant, having CM/ID No. 14230, and that in the course of its trading business with the Claimant, it had to pay to the Claimant an amount of Rs.58.85 Crores, as of 31st August 2013. There are several other clauses in the said Agreement, which also refers to the arbitration proceedings pending in the Hon'ble Bombay High Court in Arbitration Petition (L) No. 1778 of 2013. Finally, Clause 7.6 of Exhibit C-21 sought to declare that it constituted the entire agreement between the parties and superseded all prior agreements. Relying upon this clause, it was contended before me in the preliminary objections filed by the Respondent under Section 16(2) of the Act that, in as much as, there was no specific arbitration clause in Exhibit C-21, the present proceedings were without jurisdiction. Elaborate arguments were heard and, as stated earlier, by the Order dated 4th May 2016 which is at Annexure "1" and is part of this Award, I have already rejected the preliminary objections. In arriving at my conclusion, I have referred to the judgments of the Hon'ble Supreme Court and of the Hon'ble Bombay High Court and hence, I do not wish to repeat the same here. Suffice if to say that I have held that in view of the Notification No. SO 2406-E dated 6th August 2013 issued by the

Ministry of Consumer Affairs, Food & Public Distribution (Department of Consumer Affairs), Government of India, it was not permissible for the parties to settle their dues, without prior approval of the Forward Market Commission, which was admittedly not obtained. Respondent's contention in paragraphs 9 and 25 of its written submissions is clearly misleading. It will be evident from the discussion in Part A above, that I have placed reliance on other documents containing Respondent's admissions of liability and the present Issue No. 5 is a distinct issue confined to the Respondent's plea that the said Exhibit 21 is valid, subsisting and binding on the parties. While the Respondent had all along admitted its liability to pay to the Claimant Rs.58.85 Crores as on August 2013, its liability was sought to be brought down from Rs.58.85 Crores to Rs.50 Crores under Exhibit C-21, which was clearly in the teeth of the said Notification, which is part of Exhibit C-3. The reason why Respondent wants to contend that Exhibit C-21 is valid, subsisting and binding is obvious viz. that its liability will be reduced from Rs.58.85 Crores to Rs.50 Crores. Hence, Issue No. 5 is answered in the negative and against the Respondent, which has failed to prove that the said Settlement Agreement at Exhibit C-21 dated 21st January 2014 is valid, subsisting and binding on the parties.

54. **Issue No. 6: Whether the Respondent proves that the documents produced by the Claimant in the present proceedings, except the documents at Exhibit "A", "C", "AA", "BB", "CC", "DD", "EE", "FF" and "GG", are forged and**

fabricated as alleged in paragraph 2 of the Reply? At the outset, it needs to be clarified that the Exhibits mentioned in Issue No. 6 as above, were the Exhibits, as mentioned by the Claimant in its pleadings. During the course of recording the evidence of the parties, the said Exhibits attached to the pleadings have been exhibited by the Tribunal with a different identity (Exhibit number) as under:

Details of the Exhibits mentioned in Issue No. 6 which have been exhibited by the Tribunal with a different identity:

Sr. No.	Particulars in Issue No. 6	Exhibits of the Tribunal as per the evidence of CW-1
1.	Ex. "A"	C-2
2.	Ex. "C"	C-4
3.	Ex. "AA"	C-21
4.	Ex. "BB"	Not produced in CW-1 Evidence
5.	Ex. "CC"	Not produced in CW-1 Evidence
6.	Ex. "DD"	Not produced in CW-1 Evidence
7.	Ex. "EE"	Not produced in CW-1 Evidence
8.	Ex. "FF"	Not produced in CW-1 Evidence
9.	Ex. "GG"	Not produced in CW-1 Evidence

Exhibit BB to Exhibit GG viz. Serial Nos. 4 to 9 except Serial No. 6 – Exhibit DD above are copies of the Orders of the Hon'ble Bombay High Court, which were not required to be produced in the present proceedings.

55. What I have discussed above while answering the first five Issues, makes it clear that the documents produced by the Claimant are reliable and genuine and the Respondent has failed to prove its vague and baseless allegations of forgery and fabrication. I have already held while dealing with the Respondent's admissions of its liability that, there are no details as required by the principles underlying the provisions of Order VI Rule 4 of the Code of Civil Procedure 1908. In the absence of sufficient particulars and details of the alleged forgery / fabrication and in the light of the convincing evidence led by the Claimant, it is not possible to accept the Respondent's version. Hence, I answer Issue No. 6 in the negative and against the Respondent.

56. **Issue No. 7: Whether the Claimant proves that the Respondent claimed VAT against the sale contract executed on the same date as the outstanding (unsettled) purchase contract and for which the Respondent received funds as alleged in paragraph 5 of the Statement of Claim?**

The relevant averments in this behalf are to be found in paragraphs 5 and 6 of the SoC, which read as under:

> *"5. It is pertinent to note that the Respondent was trading in two contracts with the same goods and delivery conditions (i.e. sugar with Bobbili, Andhra Pradesh delivery center contracts) but with different delivery / settlement cycles. All the outstanding (unsettled) purchase contracts of the Respondent were executed together with sale contracts of the same date, against which the Respondent received*

funds, and also claimed VAT on such sales by submitting VAT invoices also. In other words the very same goods / commodity which was sold in a short duration contract and for which the Respondent received the full sale proceeds / consideration were then repurchased, vide contracts executed on the same day for a longer duration. It is for these longer duration contracts that the Respondent has defaulted in making payments / settlement and for recovery of which amounts the present proceedings have been initiated.

6. The Respondent has admitted this liability, in writing, in two separate documents, viz., a letter dated 1st August 2013, and the minutes of the meeting dated 27th August 2013. However, the Respondent has not, as yet, paid the amount due. Hence, the present arbitration."

CW-1 was cross examined in respect of the above averments in paragraph 5, when he relied upon the statements made by him in paragraph 26 of his affidavit of evidence. The concluding portion of paragraph 26 reads as under:

"26. ... I say that ledger extracts are system generated files and are stored on the server on the Exchange without any human intervention. I confirm that the ledger extracts are authentic and have not been tampered with or fabricated in any manner. I say that the said ledger will show that as on 15th August, 2013, the Respondent had a debit balance in the account of the Claimant in the amount of Rs.58,85,09,205.34 (Rupees Fifty-Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred And Five and Paise Thirty Four)."

CW-1 was also cross examined in respect of the above, and the relevant Q/A is 187 which is already quoted above. It is thus clear that the amount of Rs.58,85,09,205.34, which includes the amount of VAT claimed under Issue No. 7, has been clearly admitted by the Respondent repeatedly in its admission of liability. In view of the above, Issue No. 7 is answered in the affirmative and in favour of the Claimant.

57. **Issue No. 10: What award, if any, including award as to interest and costs?** As discussed earlier in details, Respondent has unequivocally admitted its liability to pay a total amount of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred Five and Paise Thirty Four Only). This unequivocal admission is repeated as discussed in Part A above. There is also ample other evidence which is discussed in Part B, to hold that the Respondent is liable to pay to the Claimant the said amount of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred Five and Paise Thirty Four Only). Pursuant to my query during the course of the Claimant's oral arguments on 27th February 2018, it was brought to my notice that certain amounts have been deposited by the Respondent pursuant to the Orders passed by the Designated Court under the MPID Act 1999. The details of these deposits are as under:

(i) Rs.8,20,00,000/- (Rupees Eight Crores Twenty Lakhs) deposited by the Respondent in the NSEL Escrow Account

pursuant to the Orders dated 11th September 2014 and 23rd September 2016 passed by the Designated Court (Additional Sessions Judge, Mumbai) under the MPID Act, 1999, in Special Case No. 1 of 2014, and in M.A. Nos. 134 and 308 of 2015, in Bail Application No. 28 of 2014 (See pages 327 to 353 of the Affidavit of Evidence of CW-1, Exhibit C-22).

(ii) Rs.3,20,00,000/- (Rupees Three Crores Twenty Lakhs) deposited by the Respondent in the Competent Authority Account.

However, there is no order passed by the Designated Court that the above two deposits should be transferred or credited to the account of the Claimant. It will obviously depend on the final Orders that may be passed in the proceedings under the MPID Act 1999. Hence, at this stage, it is not possible to give any credit to the Respondent in respect of the abovementioned two deposits totaling to Rs.11.40 Crores. In the result, the Respondent will be liable to discharge the admitted liability of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred Five and Paise Thirty Four Only).

58. As far as the question of interest is concerned, having regard to the provisions of sub-section (7) of Section 31 of the 1996 Act, and the Claimant's Byelaw No. 15.35, the Claimant would be entitled to interest on the entire amount awarded with effect from 1st August 2013, which is the first date of its admission of liability

as per Exhibit X-5, discussed above. Claimant has claimed interest at the rate of 18% per annum. The trades / transactions between the parties were purely commercial transactions. In view of the judgment of the Hon'ble Supreme Court of India in Hyder Consulting (UK) Limited Vs. Governor, State of Orissa (2015) 2 SCC 189, in the facts and circumstances of the case, it would be reasonable to award interest at the rate of 18% per annum on the amount of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred Five and Paise Thirty Four Only) with effect from 1st August 2013 till the date of payment.

59. **Costs of Arbitration:** As far as costs of the present arbitration proceedings are concerned, Claimant has submitted the details along with the relevant documents, claiming an amount of Rs.1,75,09,917/- (Rupees One Crore Seventy Five Lakhs Nine Thousand Nine Hundred Seventeen only). It is relevant to mention here that in the present proceedings, except one initial payment of Rs.3,00,000/- (Rupees Three Lakhs only), Respondent has refused to pay any fees or expenses incurred for the arbitration proceedings. Consequently, an Order was passed on 1st April 2016, under the first proviso to sub-section (2) of Section 38 of the Act, requiring the Claimant alone to pay the entire costs, including the Respondent's share, incurred for the arbitration proceedings.

60. There is yet another aspect of the matter to which a reference needs to be made at this stage. There were several

Applications, letters, emails, unsigned / signed sent by the Respondent, raising frivolous contentions and making baseless allegations. These Applications, letters, emails, unsigned / signed were required to be replied by the Claimant and have been dealt with by passing elaborate Orders and at times, costs have been awarded to the Claimant. Adjournment Applications were repeatedly made by the Respondent at the eleventh hour on some pretext or the other and due to the absence of the Respondent's Advocate or its sole witness, whose evidence was being recorded, the proceedings had to be repeatedly adjourned, awarding costs to the Claimant. It is the repeated grievance of the Claimant that none of these Orders awarding costs to it, have been honoured and no payment whatsoever has been made by the Respondent towards the costs so awarded. Be that as it may.

61. Claimant has claimed an amount of Rs.1,75,09,917/- towards the total cost of arbitration under the following five heads:

Sr No.	Particulars	Amount	Annexure
1	Arbitrator Fee	1,26,50,000/-	A
2	NNCO lawyer Fee	34,65,875/-	B
3	Counsel Fee	9,64,500/-	C
4	Conference Room Charges & Steno Charges	3,32,400/-	D
5	Out of Pocket Expenses	97,142/-	E
	Grand Total	**1,75,09,917/-**	

The annexures mentioned in the last column give the date-wise details of the amount paid to the concerned person under each of the first four heads. As far as the first item of Rs.1,26,50,000/-, of which the details are to be found in Annexure "A", for the reasons mentioned in the last two paragraphs, the amount has gone up, since the Claimant alone had to pay the entire fees payable to the Sole Arbitrator. I need not repeat what I have stated above in the last two paragraphs. However, I find that in respect of Serial No. 2 *"NNCO lawyer Fee"* relating to the fees paid to the Advocates engaged by Naik Naik & Co., the first eight items mentioned below do not pertain to the arbitration proceedings before me. The details of the said eight items are as under: __

Sr.No.	Invoice No.	Date	Amount (Rs.)
(i)	MS/2015-16/131	22nd June 2015	12,750/-
(ii)	MS/2015-16/194	16th July 2015	78,000/-
(iii)	MS/2015-16/224	4th August 2015	50,250/-
(iv)	MS/2015-16/319	18th September 2015	13,500/-
(v)	MS/2015-16/337	1st October 2015	82,500/-
(vi)	MS/2015-16/384	20th October 2015	27,000/-
(vii)	MS/2015-16/620	20th January 2016	38,250/-
(viii)	MS/2015-16/719	17th February 2016	18,000/-
		Total:	3,20,250/-

Hence, the claim under Serial No. 2 to the extent of Rs.3,20,250/- is rejected. In the result, the balance payable in respect of the second item under Annexure "B" will be Rs.34,65,875/- less Rs.3,20,250/- amounting to Rs.31,45,625/-.

62. Similarly, in respect of Serial No. 3 *"Counsel fee"* totaling to Rs.9,64,500/- as per Annexure "C", the following nine items do not pertain to the arbitration proceedings before me. The details are as under:

Sr.No.	Invoice No.	Date	Amount (Rs.)
(i)	MS/2015-16/132	6th June 2015	45,000/-
(ii)	MS/2015-16/228	29th July 2015	12,000/-
(iii)	MS/2015-16/228	16th July 2015	37,500/-
(iv)	MS/2015-16/279	14th July 2015	1,95,000/-
(v)	MS/2015-16/609	11th January 2016	37,500/-
(vi)	MS/2015-16/695	27th January 2016	37,500/-
(vii)	MS/2015-16/775	10th February 2016	37,500/-
(viii)	MS/2015-16/822	18th February 2016	9,000/-
(ix)	MS/2015-16/198	17th March 2016	4,500/-
		Total:	4,15,500/-

Hence, the claim under Serial No. 3 to the extent of Rs. 4,15,500/- is rejected. In the result, the balance payable in respect of the second item under Annexure "C" will be Rs.9,64,500/- less Rs. 4,15,500/- amounting to Rs.5,49,000/-.

63. Coming to the last item at Serial No. 5 *"Out of Pocket Expenses"* of Rs.97,142/- as per Annexure "E", there are no vouchers or any other documentary evidence to support the claim. Hence, this item is rejected in toto.

64. I have considered the quantum of costs claimed in respect of the first three items on the basis of the supporting documents. The claim is duly vouched and supported and having regard to the complexity of the issues sought to be raised and the time taken, I think the same is reasonable. In the circumstances, apart from the costs awarded in favour of the Claimant under different Orders passed from time to time, interests of justice would be met by directing the Respondent to pay the following costs claimed by the Claimant at this stage.

S. No.	Particulars	Ann.	Claimed (Rs.)	Allowed (Rs.)
1	Arbitrator Fee	A	1,26,50,000/-	1,26,50,000/-
2	NNCO lawyer Fee	B	34,65,875/-	31,45,625/-
3	Counsel Fee	C	9,64,500/-	5,49,000/-
4	Conference Room Charges & Steno Charges	D	3,32,400/-	3,32,400/-
5	Out of Pocket Expenses	E	97,142/-	Nil
	Grand Total		1,75,09,917/-	1,66,77,025/-

65. **Summary of the Award**

(i) Issue Nos. 1 to 4 and 8 are answered in the affirmative and in favour of the Claimant and Issue No. 9 is answered in the negative and against the Respondent as per the discussions in paragraphs 18 to 52.

(ii) Issue No. 5 is answered in the negative and against the Respondent as per the discussions in paragraph 53.

(iii) Issue No. 6 is answered in the negative and against the Respondent as per the discussion in paragraphs 54 and 55.

(iv) Issue No. 7 is answered in the affirmative and in favour of the Claimant as per the discussion in paragraph 56.

(v) Issue No. 10 is answered as per the discussion in paragraphs 57 to 64, to the effect that the Claimant is entitled to an amount of Rs.58,85,09,205.34 with interest thereon @ 18% per annum, with effect from 1st August 2013 till the date of payment. The Claimant is further entitled to the amount of Rs. 1,66,77,025/- towards the Costs of Arbitration.

66. In view of the above, I make the following Award:

(A) The Claimant is entitled to an amount of Rs.58,85,09,205.34 (Rupees Fifty Eight Crores Eighty Five Lakhs Nine Thousand Two Hundred Five and Paise Thirty Four Only) from the Respondent, with interest thereon at the rate of 18% per

annum, with effect from 1st August 2013 till the date of payment;

(B) Respondent is further called upon to pay the amount of Rs.1,66,77,025/- (Rupees One Crore Sixty Six Lakhs Seventy Seven Thousand Twenty Five only) towards the costs of arbitration incurred by the Claimant, which includes the Respondent's share which has also been paid by the Claimant;

(C) Respondent is directed to pay to the Claimant, the amounts mentioned in (A) and (B) above, within four weeks from today.

67. This Award is made and declare at Mumbai on 26th March 2018.

Justice Arvind V. Savant (Retd.)
Sole Arbitrator

Mumbai
26th March 2018

Annexure 1

BEFORE THE ARBITRAL TRIBUNAL OF

Shri. Justice Arvind V. Savant, (Retd.) Sole Arbitrator

(Former Chief Justice, High Court of Kerala)

In the matter of Arbitration between

National Spot Exchange Limited ... ... Claimant
And
NCS Sugars Limited ... ... Respondent

Appearances:

Mr. Chirag Kamdar, Counsel with Mr. Yashesh Kamdar,
Mr. Abhishek Kale, Mr. Asadulla Thangal and
Ms. Ashwini Hariharan, Advocates
i/b M/s. Naik Naik & Company
Ms. Hemlata Marathe, Claimant's representative is also present
... for the Claimant

Mr. S.P. Bharti, Ms. Swadha UNS, Mr. Ganesh Kamath and
Mr. Dilip Mishra, Advocates ... for the Respondent

4th May 2016

ORDER UNDER SECTION 16(5) OF THE ARBITRATION & CONCILIATION ACT, 1996, ON THE RESPONDENT'S PRELIMINARY OBJECTION AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

1. On the Respondent's preliminary objection that this Arbitral Tribunal has no jurisdiction to entertain the present disputes, I have heard learned counsel for the parties at length: Mr. S.P. Bharti and

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Ms. Swadha UNS for the Respondent, and Mr. Chirag Kamdar for the Claimant opposing the said objection. Respondent first raised its "Objection to Constitution of Tribunal / Jurisdiction" (for short, "**Preliminary Objection**") by an Application dated 5th March 2016, which was received on 9th March 2016. This was followed by an "Additional Affidavit in Support of Objection To Jurisdiction" ("**Additional Affidavit**") dated 17th March 2016, which was received on 19th March 2016. Claimant has filed its Affidavit in Reply on 21st March 2016 opposing the said Preliminary Objection.

2. In the Tribunal's meeting held on 21st March 2016, I heard both the learned counsel; Mr. S.P. Bharti for the Respondent and Mr. Chirag Kamdar for the Claimant. Since the arguments remained incomplete on 21st March 2016, the same were further heard on 31st March 2016 and 1st April 2016, on which dates, I heard Ms. Swadha UNS for the Respondent and Mr. Chirag Kamdar and the arguments were completed. Both sides have filed written arguments. My attention was invited to a large number of documents and some case law during the course of the arguments on 21st March, 31st March

and 1st April 2016 and in the written arguments. I have considered the same.

3. The only point which arises for my consideration, at this stage, is whether this Arbitral Tribunal has the jurisdiction to entertain the present disputes? Having considered the entire material on record, my answer is in the affirmative for the following reasons.

4. In its Preliminary Objection, Respondent has placed reliance on the Settlement Agreement dated 21st January 2014, to contend that this Tribunal has no jurisdiction to arbitrate upon the disputes arising in the present matter in view of the provisions of Clause 7.6 of the Settlement Agreement, which reads as under:

> *"7.6. Entire Agreement:*
>
> *The Settlement Agreement, including its Annexures and Schedules, constitutes the entire agreement between the parties with respect to the subject matter contained in this Settlement Agreement and supersedes all prior agreements, whether written or oral, with respect to such subject matter. This settlement agreement is the product of negotiations between the parties and represents the parties intentions.*

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After entering into this Agreement, the Parties are at liberty to move the MPID Court or any other Court of Competent Jurisdiction, seeking appropriate relief of no coercive action by EOW, Mumbai against them, their representatives, Directors and such persons who are or were associated with them (expect the charge sheeted accused) arising out of Complaint / FIR by one Mr. Pankaj Saraf being C.R. No. 89 of 2013."

5. It must be stated that in its Statement of Claim ("**SoC**") in paragraph 12, Claimant has relied upon three independent arbitration clauses in three different documents viz., **(i)** Bye-Laws and Rules of the Claimant (page 24 to 150 of SoC/Vol. I); **(ii)** Respondent's "Undertaking for Internet Based Trading" dated 16th March 2012 given to the Claimant on a non-judicial stamp paper of Rs.300/-, which document is referred to as "Terms", which is at pages 165 to 183 of SoC/Vol. II; and **(iii)** Clause 6.3 of the Agreement dated 20th May 2013 between the Claimant and the Respondent executed on a non-judicial stamp paper of Rs.300/-, which is at pages 208 to 216 of SoC/Vol. II. Under the caption "Jurisdiction", paragraph 12 of SoC reads as under:

"*Jurisdiction:*

12. It is submitted that this Hon'ble Tribunal has the jurisdiction to hear and determine the present dispute by virtue of the arbitration clauses found in the following documents inter alia: Clause 15.4 of the Bye-laws of the Claimant exchange; Clause 11.11 of the Respondent's undertaking dated 16th March 2012 in order to engage in internet based trading on the Claimant's exchange; and Clause 6.3 of the agreement dated 20th May 2013 between the Claimant and Respondent."

6. Since the Claimant relies on three independent clauses, the same are reproduced below:

(i) Clause 15.4 of the Bye-Laws of the Claimant, at SoC page 82, reads as under:

"*Reference to Arbitration*

All claims, differences or disputes between the members inter se or between a member and a constituent member or between a member and a registered non-member client or arising out of or in relation to trades executed on the Exchange and made subject to the Bye-Laws, Rules, Business

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Rules and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their validity, construction, interpretation or fulfillment and / or the rights, obligations and liabilities of the parties thereto and including any question of whether such transactions have been entered into or not shall be submitted to arbitration in accordance with the provisions of these Bye-Laws and Regulations that may be in force from time to time.

Provided these Bye-Laws shall not in any way affect the jurisdiction of the Exchange on the clearing member through whom such member has dealt with or trade in regard thereto and such clearing member shall continue to remain responsible, accountable and liable to the Exchange in this behalf."

(ii) The second clause relied upon by the Claimant is Clause 11.11 of the Terms at page 182 of Soc/Vol. II. It reads as under:

"11.11 Governing Laws & Dispute Resolution: This terms shall, in all respects, be governed by and construed in accordance with the laws of India, without regard to the principles of conflict of laws. All disputes and differences arising out of or in

connection with the Terms, which cannot be settled amicably between the parties hereto through dialog or discussion, shall be finally settled exclusively by Arbitration. The dispute shall be referred to the sole arbitration of a person to be appointed by the Exchange and arbitration shall be held under the provisions of the Arbitration and Conciliation Act, 1996 or any re-enactment, modification or amendment thereto. The arbitration proceedings shall be conducted at Mumbai only. Any award by the single arbitrator shall be final and binding upon both parties hereto. All arbitration proceedings and all documents submitted to any arbitration tribunal shall be in the English language. In relation to any legal action or proceedings for any urgent, interlocutory or final orders, the parties irrevocably submit to the exclusive jurisdiction of the courts in Mumbai, and waive any objection to such proceedings on grounds of venue or on the grounds that the proceedings have been brought in an inconvenient form or that the Services were used / accessed / availed in a different domestic / international territory."

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(iii) The third clause relied upon by the Claimant is Clause 6.3 of the Agreement dated 20th May 2013. It reads as under:

> *"6.3 The Parties hereto agree that during the subsistence of this Agreement or thereafter, any dispute in connection with the validity, interpretation or alleged breach of any provision of this Agreement, which remains unresolved by mutual discussion shall be referred to a sole arbitrator appointed by NSEL and even if NSEL is not a party to such dispute then a sole arbitrator appointed by the NSEL."* (emphasis supplied)

7. Admittedly, Claimant invoked arbitration by its Advocates' letter dated 7th February 2015 appointing the undersigned as the Sole Arbitrator. Respondent replied by its Advocate's letter dated 13th February 2015 that it was not agreeable to accept the appointment of the undersigned and nominated Justice S. D. Pandit, Former Judge of the Bombay High Court, as the Arbitrator. On 5th September 2015, Claimant's Advocates referred to the above correspondence of 7th and 13th February 2015 and invited the attention of the Respondent to Clause 11.11 of the Terms, under which the Respondent had

agreed that the Claimant alone was entitled to appoint the Sole Arbitrator and the arbitration was to be conducted under the provisions of the Arbitration and Conciliation Act, 1996 ("**the 1996 Act**"). Claimant further relied upon Clause 6.3 of the Agreement dated 20th May 2013, under which also, the Claimant alone was entitled to appoint the Sole Arbitrator. After quoting the above mentioned two clauses in its letter dated 5th September 2015, Claimant reiterated the appointment of the undersigned as the Sole Arbitrator. In the reply dated 16th September 2015, Respondent reiterated its earlier stand in the letter dated 13th February 2015 suggesting the name of Justice S. D. Pandit. It is relevant to note that the question of arbitrability of the disputes was not at all raised in either of the two letters sent by the Respondent's Advocate.

8. The main two objections of Mr. Bharti, learned counsel for the Respondent, are as under: Firstly, Clause 7.6 of the Settlement Agreement dated 21st January 2014, supersedes all prior Agreements. Secondly, there is no arbitration clause in the said Settlement Agreement. Relying upon certain clauses of the Settlement Agreement, counsel contended that though the

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Respondent acknowledged that it owed the Claimant, as on 31st August 2013, an amount of Rs.58.85 Crores, under the Settlement Agreement, the Respondent had to pay only Rs.50 Crores, out of which it has paid Rs.1 Crore on 16th December 2013 and had agreed to pay the balance of Rs.49 Crores in 12 installments. Counsel, therefore, contended that the Respondent had agreed to pay to the Claimant Rs.2 Crores by the 10th of each month commencing with 10th February 2014 and ending on 10th July 2014; thus six installments of Rs.2 Crores each totaling to Rs.12 Crores. The balance of Rs.37 Crores was to be paid by the Respondent in six further installments; first of Rs.6.15 Crores on 10th August 2014 and the remaining amount to be paid in five monthly installments of Rs.6.17 Crores on 10th of each month commencing with 10th September 2014 and ending with 10th January 2015. Schedule 2 to the said Settlement Agreement is reproduced below for ready reference:

SCHEDULE 2 – SETTLEMENT PAYMENT SCHEDULE

Installment No.	Cheque Date	Cheque No.	Drawn On	Amount (Rupees in Crores)
1	10 Feb 2014	001080	HDFC Bank Ltd., Hyderabad	2.00
2	10 Mar 2014	001081	HDFC Bank Ltd., Hyderabad	2.00
3	10 Apr 2014	001082	HDFC Bank Ltd., Hyderabad	2.00
4	10 May 2014	001083	HDFC Bank Ltd., Hyderabad	2.00
5	10 June 2014	001084	HDFC Bank Ltd., Hyderabad	2.00
6	10 July 2014	001085	HDFC Bank Ltd., Hyderabad	2.00
7	10 Aug 2014	001086	HDFC Bank Ltd., Hyderabad	6.15
8	10 Sep 2014	001087	HDFC Bank Ltd., Hyderabad	6.17
9	10 Oct 2014	001088	HDFC Bank Ltd., Hyderabad	6.17
10	10 Nov 2014	001089	HDFC Bank Ltd., Hyderabad	6.17
11	10 Dec 2014	001090	HDFC Bank Ltd., Hyderabad	6.17
12	10 Jan 2014	001091	HDFC Bank Ltd., Hyderabad	6.17
(Total Rupees Forty Nine Crores Only)				**49.00**

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Since the Respondent had paid Rs.1 Crore on 16th December 2013, the balance of Rs.49 Crores was to be paid in 12 installments as indicated above. Admittedly, the Respondent has paid not a single installment out of the above 12 installments and thus, it has paid only Rs.1 Crore to the Claimant out of the total liability of Rs.58.85 Crores which was reduced to Rs.50 Crores in the said Settlement Agreement.

9. Without prejudice to the abovementioned two principal contentions, Mr. Bharti further contended that even if the Settlement Agreement was not applicable and/ or enforceable in the facts of the present case, the arbitration clauses on which the Claimant has relied were not applicable and/or enforceable.

10. In its Additional Affidavit, it is contended by the Respondent that the Claimant has been charged with some offences by the Economic Offences Wing of the Government of Maharashtra and First Information Reports have been filed by certain parties alleging that the Claimant has engaged in fraudulent transactions. It is then stated that it was also the case of the Respondent that documents on which

reliance was placed by the Claimant were false and fabricated and hence, no liability can be fastened on the Respondent on the basis of such documents. A reference is made to one First Information Report lodged by some other investor and an order passed by the Hon'ble Bombay High Court on 1st October 2015 in Writ Petition No. 1403 of 2015 and certain Criminal Applications made in the said Writ Petition. Claimant had filed the said Writ Petition seeking to quash the invocation of Sections 3 and 4 of the Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act, 1999 ("**MPID Act**") in relation to C.R. No. 89 of 2013 registered against the Claimant, in which the High Court had refused to interfere in the matter on the ground that the investigation was pending and the Claimant had an alternate efficacious remedy to apply for discharge before the Trial Court. It was clarified that if the Claimant filed an application for discharge, the same was to be decided on its own merits. In view of this, it was contended by Mr. Bharti that since a criminal prosecution launched by some other investor was pending, the Arbitral Tribunal should not proceed with the present matter.

11. In its Affidavit in Reply dated 21st March 2016, Claimant has denied the allegations made by the Respondent and opposed the contentions raised. Apart from pointing out the inordinate delay on the part of the Respondent in raising the preliminary objection despite repeated adjournments, it is contended as under:-

(i) When the Claimant filed a Petition under Section 9 of the 1996 Act being Arbitration Petition No. 388 of 2014 before the Hon'ble Bombay High Court, no objection was raised by the Respondent regarding the absence of an arbitration agreement. Interim reliefs were granted in the said Section 9 Petition, after which also, no objection as to jurisdiction or existence of an arbitration agreement was raised by the Respondent.

(ii) The clauses of the Terms dated 16th March 2012 and of the Agreement dated 20th May 2013, on which reliance was placed by the Claimant in paragraph 12 of its SoC, were clearly applicable and enforceable in the facts of the present case and hence, arbitration was properly invoked and the constitution of this Arbitral Tribunal was in accordance with the said clauses.

(iii) The Settlement Agreement dated 21st January 2014, was subject to the approval of the Regulatory Authority viz., the Forward Markets Commission and since no such approval was obtained, the Settlement Agreement was not enforceable.

(iv) It was further contended that the Settlement Agreement does not amount to waiver of the rights of the Claimant under the earlier Agreements. Only a single payment of Rs.1 Crore was made under the Settlement Agreement and admittedly, no further payments were made since the three cheques issued by the Respondent for Rs.2 Crores each, were dishonoured. It was, therefore, contended that since the Respondent has itself committed breaches of the terms of the Settlement Agreement, it was not enforceable at all.

(v) Claimant was entitled to appoint the Sole Arbitrator and as per Clause 11.11 of the Terms dated 16th March 2012 and Clause 6.3 of the Agreement dated 20th May 2013, Respondent had agreed that the Sole Arbitrator was to be appointed by the

Claimant alone. It was, therefore, denied that this Tribunal has no jurisdiction to entertain the present dispute.

(vi) The allegation that the Claimant had engaged in manipulating any documents or records was denied. It was contended that the initiation of the criminal proceedings by some other investor was of no consequence to the present arbitration proceedings between the parties. The allegation of fraud and fabrication was denied and a reference was made to certain decisions of the Hon'ble Supreme Court and High Court dealing with the question of the allegation of fraud vis-à-vis the Arbitral Tribunal's powers to entertain the disputes.

12. As stated earlier, in paragraph 12 of its SoC, Claimant relies on three independent clauses in three different documents, which are reproduced above. In so far as Clause 15.4 of the Bye-Laws of the Claimant is concerned, it is very widely worded : All claims, differences or disputes between the members inter-se or arising out of or in relation to trades executed on the Claimant's Exchange and made subject to the bye-laws, rules, business rules and regulations

of the Claimant or with reference to anything incidental thereto or in pursuance thereof or relating to their validity, construction, interpretation or fulfillment and/or the rights, obligations and liabilities of the parties thereto and including any question of whether such transactions have been entered into or not, have to be submitted to arbitration in accordance with the said Bye-Laws. Further, Clause 11.11 of the Terms dated 16th March 2012 signed by the Respondent on a non-judicial stamp paper of Rs.300/-, makes it clear that all disputes and differences arising out of or in connection with the said Terms, which cannot be settled amicably between the parties shall be finally settled exclusively by arbitration. It is further made clear that the disputes shall be referred to the sole arbitration of the person to be appointed only by the Claimant and the arbitration shall be held under the provisions of the 1996 Act. There is yet another clause which has been relied upon by the Claimant viz., Clause 6.3 of the Agreement dated 20th May 2013 executed by the parties on non-judicial stamp paper of Rs.300/-. This clause also gives the right to the Claimant alone to refer the disputes to a Sole Arbitrator.

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13. Respondent has relied upon the Settlement Agreement dated 21st January 2014 and, in particular, Clause 7.6 thereof which is reproduced above which, the Respondent claims to supersede all previous Agreements between the parties. It is not possible to accept the Respondent's contentions for several reasons, which are as under:

(i) In exercise of the powers conferred by Section 27 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952), the Central Government has exempted all forward contracts of one day duration for the sale and purchase of commodities traded on the National Spot Exchange Limited (Claimant) from operation of the provisions of the said 1952 Act, subject to certain conditions. This has been done by Notification No. S.O. 906 (E) issued on 5th June 2007 by the Ministry of Consumer Affairs, Food & Public Distribution, Department of Consumer Affairs, Government of India. By another Notification No. S.O. 2406 (E) issued by the same Ministry on 6th August 2013, two additional conditions were imposed on the Claimant to protect

the interest of the commodity market participants, which are as under:

> *"2. Now, therefore, in partial modifications of the Government of India notification number S.O.906(E), dated 5th June, 2007, the Central Government, in terms of condition (v) thereof, which reserves its right to impose additional conditions from time to time, hereby imposes the following additional conditions upon the National Spot Exchange Limited to protect the interests of commodity market participants, namely:-*
>
> *(i) no trading in the existing e-series contracts, and no further or fresh one day forward contracts in any commodity, shall be undertaken on National Spot Exchange Limited without prior approval of the Central Government;*
>
> *(ii) Settlement of all outstanding one day forward contracts at National Spot Exchange Limited shall be done under the supervision of Forward Markets Commission and any order or direction issued by the Forward Markets Commission in this regard shall be binding upon the National Spot Exchange Limited and any person, intermediary or warehouse connected*

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with the National Spot Exchange Limited, and for this purpose, the Forward Markets Commission is authorised to take such measures, as it deems fit."

[emphasis supplied]

It will be evident from the second condition highlighted above that any settlement of outstanding dues in respect of the contracts entered into by the Claimant had to be done under the supervision of the Forward Markets Commission. Admittedly, no such step was taken by the Respondent to approach the Forward Markets Commission and obtain its permission for the Settlement Agreement dated 21st January 2014. Respondent has admitted that it had to pay the Claimant Rs.58.85 Crores as on 31st August 2013. However, the parties settled the same at Rs.50 Crores, without obtaining the permission of the Forward Markets Commission. This is clearly impermissible in law.

(ii) The question as to whether a defaulter like the Respondent, can raise the contention that no permission of the Forward Markets Commission was required, is no longer *res integra*

since the same has been decided by an Order dated 7th October 2013 passed by the Division Bench of S.J. Vazifdar and K.R. Shriram JJ of the Bombay High Court in Writ Petition (L) No. 2340 of 2013 with Writ Petition No. 2534 of 2013, where it was conceded that the Claimant cannot accept any settlement without the prior approval of and in accordance with the permission granted by the Forward Markets Commission. Paragraph 8 of the said Order dated 7th October 2013 reads as under:

> *"8. The statement made by Dr. Saraf on behalf of respondent No. 4 that except with the prior approval of and in accordance with the permission of respondent No. 1, respondent No. 4 will not make any payment and/or settle dues in any manner in respect of the contracts other than the e-series contracts is accepted and it is so ordered."*

Respondent No. 4 in the said mater was the present Claimant. It is true that the present Respondent is not a party to the said proceedings. Nevertheless, I am concerned with the legal

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obligation cast on the parties before me in respect of which, the above quoted portion assumes importance.

(iii) In an Order dated 4th March 2014 passed by S.C. Gupte J. of the Bombay High Court, in Arbitration Petition (L) No. 1778 of 2013, which was later on registered as Arbitration Petition No. 388 of 2014, pursuant to the above referred Division Bench Order dated 7th October 2013, notice was issued to the Forward Markets Commission to appear in the matter, viz., the proceedings under section 9 of the Act in the present dispute.

(iv) In yet another Order dated 2nd September 2014 passed by S.C. Gupte J. in a batch of Notices of Motion in different Suits to which the Claimant is a party, the parties submitted Minutes of Order agreeing to the constitution of a Three-Member-Committee consisting of a retired Judge of the Bombay High Court, Justice V.C. Daga, Chairman, Mr. J.S. Solomon, Advocate & Solicitor – Member and Mr. Yogesh Thar, Chartered Accountant – Member, to investigate the transactions and facilitate mutual settlement between the parties. When the

present dispute went before the said Committee, the following Order was passed on 5th March 2015:

> *"1. Heard Ms. Swadha UNS for NSC Sugar and Mr. Naik for NSEL.*
>
> *2. Both the parties make a statement that the matter is being taken up under the provisions of Arbitration and Conciliation Act, 1996. In this view of the matter, the Committee is of the opinion that no further proceedings need to be taken until arbitration dispute is decided in accordance with law. Order accordingly."*

It is thus clear that Ms. Swadha UNS, learned counsel appearing for the present Respondent, made the above statement before the Committee. This clearly shows that the Respondent preferred to resolve the disputes through arbitration and not to participate in the proceedings before the Committee. In short, no objection was raised by the Respondent to the jurisdiction of the present Arbitral Tribunal. On the contrary, it was conceded that the disputes be resolved through arbitration.

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(v) By an Order dated 10th September 2014 passed by S.J. Kathawalla J in High Court Suit (L) No. 870 of 2013, relying upon the decision of the Supreme Court in *Swiss Timing Limited Vs. Commonwealth Games 2010 Organizing Committee – (2014) 6 SCC 677* it was held that the Arbitrator is entitled to hold a limited inquiry into the plea of fraud. I will discuss the Supreme Court decision, a little later, in details. Suffice it to say at this stage that, it is now well settled that an Arbitrator can hold a limited inquiry as to the prima-facie merits of the plea of fraud which, as the Supreme Court has said, is nowadays being routinely raised to delay/avoid the Arbitration.

(vi) In yet another proceedings before the Bombay High Court viz., Notice of Motion (L) No. 2632 of 2014 in Suit No. 1097 of 2014, R.D. Dhanuka J. passed an Order on 1st December 2014, that the defaulter cannot raise a plea that the permission of the Forward Markets Commission was not a condition precedent for enforcing any Settlement Agreement. At the end of paragraph 27 of his Order, it is observed as under:

> *"In my view, the defendant No. 1 thus cannot raise a plea that the permission of the Commission was not a condition precedent for enforcement of the settlement agreement or that the suit itself is not maintainable on the ground that the said settlement agreement is an executable award under section 36 of the Arbitration Act."*

It is true that the Respondent is not a party to these proceedings where the Claimant is the Plaintiff. However, there are different defaulters who had entered into similar Settlement Agreements with the Claimant and none of the said Agreements was approved by the Forward Markets Commission, whose approval was mandated. It was in this background that the finding of the learned Judge, which is reproduced above, that the Defendant cannot raise a plea that the permission of the Forward Markets Commission was not a condition precedent for enforcement of the Settlement Agreement, assumes importance.

14. The above discussion makes it clear that the Bombay High Court has consistently held that the dues which are payable to the

Claimant, cannot be mutually settled by the parties, without obtaining the prior permission of the Forward Markets Commission, which in the facts of this case, has not been obtained. There is no dispute before me that the permission of the Forward Markets Commission was not obtained before executing the Settlement Agreement dated 21st January 2014. Having regard to the various Orders passed by the Hon'ble Bombay High Court, I have no hesitation in coming to the above conclusion.

15. Apart from the above, in my view, there are some further objections to the enforceability of the said Settlement Agreement, which are as under:

(i) Whereas the Claimant has invoked arbitration relying upon three different documents mentioned in paragraph 12 of the SoC, which documents bind both the parties before me, the Settlement Agreement is between (a) Claimant, (b) Respondent, (c) NCS Industries Pvt. Ltd. which is a holding Company of the Respondent, and (d) three other persons viz., N. Murali, and N. Srinivas who are the Promoter-Directors of

NCS Industries Pvt. Ltd.; and N. Nageswara Rao who is the Promoter-Managing Director of NCS Sugar Ltd., the Respondent. Thus, the parties to the Settlement Agreement are not only the two parties before me, but there are four other parties viz., NCS Industries Pvt. Ltd and the three Directors mentioned above.

(ii) Admittedly, as against the liability of Rs.58.85 Crores payable by the Respondent to the Claimant, as on 31st August 2013, the settlement arrived at was to pay Rs.50 Crores only. Out of this, only Rs.1 Crore was paid on 16th December 2013 and though the balance of Rs.49 Crores was to be paid by 10th January 2015 in 12 different installments as per Schedule 2 reproduced above, nothing was paid. Hence, admittedly, the Settlement Agreement was not acted upon by the Respondent itself, which committed several breaches.

(iii) Claimant has not claimed any specific performance of the Settlement Agreement in the present proceedings and no proceedings are pending in any Court or Forum at the behest of

either of the parties before me seeking specific performance of the said Settlement Agreement.

(iv) Clause 3 of the Settlement Agreement provides for *"Default and End of Settlement"*. Under Clause 3.1, failure to comply with the provisions of the Settlement Agreement amounts to breach of the said Agreement and a ground for termination of the same. Under Clause 3.2, it is specifically provided that the Settlement Agreement was subject to the satisfaction of each of the obligations cast on the Respondent and also the Confirming Parties. Claimant's contention is that failure on the part of the Respondent to pay anything beyond Rs.1 Crore, itself shows that the Respondent never acted upon the said Settlement Agreement and treated the same as having been terminated. The non-payment of balance of Rs.49 Crores, is tantamount to ipso facto termination of the Settlement Agreement, says Mr. Kamdar.

(v) Relying upon Clauses 2, 3 and 4 of the said Settlement Agreement, counsel contended that without prejudice to his

earlier contentions regarding the failure to comply with the legal requirement of obtaining the permission of the Forward Markets Commission, as also without prejudice to the different orders passed by the Bombay High Court, the conduct of the Respondent, viewed in the light of the different clauses of the Settlement Agreement, shows that the Respondent itself had treated the said Settlement Agreement as being terminated.

Needless to add that the above objections are without prejudice to and in addition to the earlier objections.

16. It will thus be clear from the above discussion as under:

(i) Respondent's reliance on the Settlement Agreement dated 23rd January 2014 is in the teeth of the Notification issued by the Government of India on 6th August 2013, which does not permit settlement of dues payable to the Claimant without the prior approval of the Forward Markets Commission, which has admittedly not been obtained by the Respondent. [See paragraph 13(i) above.]

(ii) The Order dated 7th October 2013 passed by the Division Bench of the Bombay High Court specifically records the statement of the counsel for the Claimant that no such settlement was permissible without obtaining the prior approval of the Forward Markets Commission. [See paragraph 13(ii)]

(iii) Similar view has been taken in the Order dated 4th March 2014 passed by the Bombay High Court in Arbitration Petition No. 388 of 2014. [See paragraph 13 (iii)]

(iv) By an Order dated 2nd September 2014 passed by the Bombay High Court, a Three-Member-Committee has been constituted which is headed by a retired Judge of the Bombay High Court to investigate into the transactions entered into by different parties with the Claimant. When the Committee was dealing with the present dispute, learned counsel appearing for the present Respondent, Ms. Swadha UNS, made a statement that in view of the pendency of the present arbitration proceedings, the Committee need not take any further proceedings. This has

been recorded in the Order passed by the Committee on 5th March 2015. [See paragraph 13 (iv)]

(v) By an Order dated 10th September 2014, relying upon the decision of the Supreme Court, the Bombay High Court has held that even when a plea of fraud is raised in arbitration proceedings, the Arbitrator is entitled to hold a limited inquiry as to the prima-facie merits of the said plea. [See paragraph 13 (v)]

(vi) In view of the Order dated 1st December 2014 passed by the Bombay High Court, the Respondent cannot even raise a plea that the prior approval of the Forward Markets Commission was not a condition precedent for enforcing any Settlement Agreement like the one dated 21st January 2014 in the present case. [See paragraph 13 (vi) above]

(vii) The parties before me are bound by: (a) Clause 15.4 of the Bye-Laws and Rules of the Claimant, (b) Clause 11.1 of the Terms viz., Respondent's Undertaking dated 16th March 2012 given to the Claimant on a stamp paper, and (c) Clause 6.3 of

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the Agreement dated 20th May 2013 between the parties. As against this, the Settlement Agreement is not between the same parties but there are many others involved therein. [See paragraph 15 (i)]

(viii) Respondent has itself failed and refused to comply with the said Settlement Agreement and as against the admitted amount of Rs.50 Crores payable to the Claimant, Respondent has paid a meager Rs.1 Crore. Thus, Respondent itself has not acted upon the said Settlement Agreement but committed several breaches thereof. [See paragraph 15 (ii)]

(ix) Claimant has not claimed any specific performance on the said Settlement Agreement nor are there any proceedings pending at the behest of any of the parties to the said Settlement Agreement seeking specific performance thereof. [See paragraph 15 (iii)]

(x) The willful and deliberate failure of the Respondent to comply with the said Settlement Agreement shows its dilatory tactics to evade its obligations of payment of its admitted liability of Rs.49

Crores which amounts to ipso facto termination of the said Settlement Agreement. [See paragraph 15 (iv)]

(xi) The Orders passed by the Bombay High Court from time to time, as referred to above, make it clear that the Respondent has itself treated the said Settlement Agreement as having been terminated and not binding upon the parties and it has voluntarily consented to participate in the present arbitration proceedings and did not even permit the Three-Member-Committee appointed by the Bombay High Court to investigate its conduct. [See paragraph 15 (v)].

17. In the light of the above factual matrix, I must make a reference to the decisions, to which my attention was invited by Mr. Bharti and Ms. Swadha UNS for the Respondent:

(i) *The Union of India vs. Kishorilal Gupta & Bros.: AIR 1959 SC 1362:* At the outset, it needs to be emphasized that this is a decision under the Arbitration Act, 1940 where Section 33 of the 1940 Act fell for consideration. It was in this background that, in the facts of the case, the Supreme Court held that the

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arbitration clause was a collateral term of the contract, as distinguished from its substantive terms; nonetheless it was an integral part of it. Hence, it was held that however comprehensive the terms of an arbitration clause may be, the existence of the main contract is a necessary condition for its operation; the arbitration clause perishes with the main contract. These principles have been laid down in paragraph 10 of the judgment at page 1370. It is not necessary to elaborate this aspect of the matter in view of the decision in *Renusagar Power Co. Ltd. vs. General Electric Co. : (1984) 4 SCC 679 :: AIR 1985 SC 1156.* Admittedly, the 1940 Act had no provision similar to Section 16(1) of the 1996 Act which reads as under:

> ***"16. Competence of arbitral tribunal to rule on its jurisdiction.*** –
>
> *(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, –*

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause." (emphasis supplied)

Clauses (a) and (b) of sub-section (1) of Section 16 leave no manner of doubt that the arbitration clause, though forming part of the contract, is to be treated as an agreement independent of the other terms of the contract and even if the main contract is held to be null and void, it does not entail *ipso jure* the invalidity of the arbitration clause. This is because of the well settled three fundamental principles of modern arbitration viz., (a) party autonomy, (b) *Kompetenz–Kompetenz* meaning thereby, power of the Tribunal to rule on its own jurisdiction, and (c) minimal judicial intervention. I may in this behalf mention the decisions in **(i)** *Food Corporation of India vs. Indian Council of Arbitration : (2003) 6 SCC 564*; and

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(ii) *Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khaitan: (1999) 6 SCC 651 @ 662.*

(ii) *Waverly Jute Mills Co. Ltd. vs. Raymon & Co. (I) Pvt. Ltd. : AIR 1963 SC 90* : This also was a case, where Section 33 of the 1940 Act fell for interpretation. For the reasons stated above while dealing with Kishorilal Gupta's case (supra), I do not think that the ratio of this decision has any application while interpreting Section 16(1) of the 1996 Act.

(iii) *State Bank of India Vs. Mula Sahakari Sakhar Kharkhana Ltd. : (2006 (6) Mah.LJ 257* – This decision reiterates the well settled principle that a document must be primarily construed on the basis of the terms and conditions contained therein and if there is no ambiguity in the said terms, the surrounding circumstances would not be relevant for construction of a document. There can be no dispute about this principle of interpretation.

(iv) Young Achiever Vs. IMS Learning Resources Pvt. Ltd.: (2013) 10 SCC 535 – This case dealt with the question as to whether,

in a case where the original agreement was superseded by a later agreement, the arbitration clause in the original agreement could survive. It is clear from the facts narrated in that case that there was no question as to the legality and or validity of the later agreement. In the case before me, the Settlement Agreement is clearly an agreement which was prohibited by law as discussed above. The Supreme Court was not called upon in Young Achievers' case to deal with a later agreement which was illegal, as in the case before me. A reference has also been made in paragraph 7 of the judgment to Kishorilal Gupta's case, (Supra), which was admittedly under the 1940 Act. There are various reasons why a later agreement may be held to be invalid or illegal, as discussed in Kishorilal Gupta's case. Having regard to the facts of the case before me, I do not think that the ratio of the decision in Young Achievers case can apply to the present case.

18. Mr. S.P. Bharti and Ms. Swadha UNS also tried to contend that even assuming that the Terms dated 16th March 2012 – were valid, Clause 11.11 thereof which is quoted in paragraph 6 above, was ex-

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facie arbitrary and illegal since the power to appoint the Sole Arbitrator has been given to the Claimant alone. This contention has no merit and is impressible in law in the light of the Respondent's stand before the Three-Member-Committee appointed by the High Court that it would prefer to have the dispute resolved in the present proceedings rather than by the said Committee. Thus, the plea now sought to be raised is barred by the provisions of Section 4(b) of the 1996 Act which reads as under:

> "***4. Waiver of right to object*** *– A party who knows that –*
>
> *(a) Any provision of this Part from which the parties may derogate, or*
>
> *(b) any requirement under the arbitration agreement,*
> *has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."*

In my view, in the above stated facts, Respondent is clearly estopped from raising such a plea.

19. Apart from what I have held above, the law is well-settled that in certain contracts between the Government / Government Corporations / State owned companies on the one hand and private parties on the other, there are two peculiar features viz., (a) the Government alone has the right to appoint the Sole Arbitrator, and (b) the Sole Arbitrator may as well be an Officer, Engineer or a Technocrat of the Government. Mr. Chirag Kamdar has invited my attention to the decision in The *Union of India & Ors. vs. Uttar Pradesh State Bridge Corporation Ltd. : (2015) 2 SCC 52* where, at page 65 paragraph 17 reads as under:

> *"17. In the case of contracts between government corporations / State-owned companies with private parties / contractors, the terms of the agreement are usually drawn by the government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a Managing Director, nominates a*

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designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid." *(emphasis supplied)*

In the light of the above ratio, there is no merit in this contention raised by the Respondent.

20. Mr. S.P. Bharti, learned counsel for the Respondent, also invited my attention to the Additional Affidavit filed by the Respondent, wherein there is a reference to some criminal complaints filed by some other investors regarding some other transactions. Having referred to the same, Respondent has also made a vague allegation that the documents which are annexed by the Claimant to the SoC are also false and fabricated. In view of this, counsel contended that an Arbitrator cannot investigate into allegations of fraud, which involves an element of criminality. In the first place, admittedly, Respondent has not filed any complaint against the Claimant. Secondly, the allegations in paragraph 1 of the Additional Affidavit are too vague and general, without referring to a particular document. No date or other relevant details of the so called

Annexure to the SoC, are mentioned. Thirdly, even applying the test of Order VI Rule 4 of the Code of Civil Procedure, 1908, there are no details of the alleged fraud.

21. Mr. Chirag Kamdar has invited my attention to the decision of the Supreme Court in Swiss Timing Ltd. vs. Commonwealth Games 2010 Organizing Committee (2014) 6 SCC 677, where the Court has taken note of the recent tendency of routinely taking such a defence to avoid / delay the arbitration proceedings. In paragraph 28 of the judgment, the Court has dealt with the plea of pendency of simultaneous criminal proceedings as a ground to shut out arbitration. In paragraph 30, the Court has also dealt with the plea of a contract being void, which is being routinely taken along with other grounds to avoid / delay reference to arbitration. It is observed that the Court ought to act with caution and circumspection, while examining such pleas. The said pleas were rejected with the following reasoning in paragraphs 28 to 30 of the judgment at pages 693-694:

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"**28.** To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by arbitral tribunal, and the criminal proceedings result in conviction rendering the underlying contract void, necessary plea can be taken on the basis of the conviction to resist the execution/enforcement of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is void or voidable, it would have the wholly undesirable result of delaying the arbitration. Therefore, I am of the opinion that the Court ought to act with caution and circumspection whilst examining the plea that the main contract is void or voidable. The Court ought to decline reference to arbitration only where the Court can reach the conclusion that the contract is void on a meaningful reading of the contract document itself without the requirement of any further proof.

29. In the present case, it is Pleaded that the manner in which the contract was made between the petitioner and the respondent was investigated by the CBI. As a part of

the investigation, the CBI had seized all the original documents and the record from the office of the respondent. After investigation, the criminal case CC No.22 of 2011 has been registered, as noticed earlier. It is claimed that in the event the Chairman of the Organising Committee and the other officials who manipulated the grant of contract in favour of the respondent are found guilty in the criminal trial, no amount would be payable to the petitioner. Therefore, it would be appropriate to await the decision of the criminal proceedings before the arbitral tribunal is constituted to go into the alleged disputes between the parties. I am unable to accept the aforesaid submission made by the learned counsel for the respondents, for the reasons stated in the previous paragraphs. The balance of convenience is tilted more in favour of permitting the arbitration proceedings to continue rather than to bring the same to a grinding halt.

30. *I must also notice here that the defence of the contract being void is now-a-days taken routinely along with the other usual grounds, to avoid/delay reference to arbitration. In my opinion, such ground needs to be summarily rejected unless there is clear indication that the defence has a reasonable chance of success. In the present case, the plea was never taken till the present petition was filed in this Court. Earlier, the respondents*

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were only impressing upon the petitioners to supply certain information. Therefore, it would be appropriate, let the Arbitral Tribunal examine whether there is any substance in the plea of fraud now sought to be raised by the respondents." *(emphasis supplied)*

21. Even in Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and ors (1995) 5 SCC 651, the plea of a contract being null and void was held to not affect the validity of the arbitration clause. Paragraph 14 at page 662 reads as under:

"14. It will be noticed that under the Act of 1996 the arbitral tribunal is now invested with power under sub-section (1) of Section 16 to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement and for that purpose, the arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract and any decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure affect the validity of the arbitration clause. This is clear from clause (b) of Section 16(1) which states that a decision by the arbitral tribunal

that the main contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

In view of the above decisions, I find no substance in the contentions raised by Mr. Bharti and Ms. Swadha.

22. A belated oral plea was raised Mr. Bharati, regarding the bar of limitation. Counsel contended that the averments in paragraph 13 of the SoC would show that the claim is clearly barred by the law of limitation. It is not possible to accept the contention. Paragraph 13 of the SoC reads as under:

*"**13**. The trades under which the liability of the Respondent all arose in July, 2013, in respect of which the Respondent defaulted in making its pay-in obligation. The settlement obligation in respect of the trades arose in August, 2013. As such, the claims are all within time. Further, the Respondent has admitted its liability in writing in two documents: letter dated 1st August 2013 and the minutes of the meeting dated 27th August 2013. As such, the period of limitation starts running from the later of the said dates, and the present claims are therefore within time."*

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It is thus clear that the obligation to settle the dues payable to the Claimant arose in August 2013 and the Respondent has admitted its liability in two letters viz., 1st August 2013 and minutes of meeting dated 27th August 2013. Ms. Swadha herself referred to the letter dated 7th February 2015, by which Claimant nominated the undersigned as the Sole Arbitrator. This was responded by the Respondent's Advocate on 13th February 2013, only suggesting the name of a different retired Judge of the High Court. No other objection is raised in this response dated 13th February 2013. On 31st March 2016, Ms. Swadha sought leave to place on record the next letter dated 5th September 2015, from the Claimant's Advocates referring to the above 2 letters. This letter specifically refers to Clause 11.11 of the Terms dated 16th March 2012 and Clause 6.3 of the Agreement dated 20th May 2013. Again on 16th September 2015, the same response was received from the Respondent suggesting the name of a different Judge. No other objection is raised in this response also. By consent of both the learned counsel, this letter was taken on record as Exhibit R-1 on 31st March 2016. Claimant's claim is for recovery of money. Prayer clause 15 of the SoC is for an Award

for Rs.58,85,09,205.54. If this liability was crystalized and admitted on 27th August 2013, in my view, the invocation of arbitration even by the Claimant's letter Ex. R-1 dated 5th September 2015 is clearly within the period of limitation of 3 years in view of the provisions of Section 43(1)(2) read with Section 21 of the 1996 Act. The said Sections read as under:

> *"**43. Limitations.** –*
>
> *(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.*
>
> *(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21."*
>
> ***"21. Commencement of arbitral proceedings.** – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."*

23. In connection with this belated plea of bar of limitation, it is very significant to note that though the Respondent filed its

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paragraph-wise Written Statement – Reply – to the SoC, there is no specific reply to the averments made in paragraph 13 of the SoC reproduced above. The specific replies are only to the first 7 paragraphs, after which the following are the two concluding paragraphs in the Reply:

> *"17. With reference to remaining paragraphs what is stated is incorrect and denied, save and except the order passed by the Hon'ble Court in Arbitration Petition No. 388 of 2014 and the order passed by the MPID Court, Mumbai.*
>
> *18. The Respondent submits that in the facts and circumstances stated above, this Hon'ble Tribunal be pleased to dismiss the claim filed by the Claimant."*

The above denials are totally vague and do not state how the claim is barred by the law of limitation. Respondent has not stated on which date the cause of action had accrued, though the Claimant has mentioned the date as 27th August 2013, in paragraph 13 of the SoC. Similarly, Respondent has not stated when the period of limitation would have expired, when the provisions of Section 43 read with Sec. 21 clearly stipulate 3 years' period for commencement of arbitral

proceedings viz., by 26th August 2016. The invocation of arbitration by the Claimant is admittedly, on 7th February 2015, in reply to which on 13th February 2013, all that the Respondent's Advocate has stated is that, the Arbitrator should be a different Judge. Again when on 5th September 2015, the Claimant reiterated its invocation of Arbitration, Respondent by its Advocate's letter dated 16th September 2015, reiterated the same objection regarding a different Judge.

24. Even on merits, Respondent's belated plea of bar of limitation based on Clause 15 of the Bye-Laws, is clearly misconceived. A careful analysis of different sub-clauses of Clause 15 will make it clear that there is also an internal dispute redressal mechanism of the Claimant, viz. the "*Board*" or the "*Relevant Authority*" as defined in Clause 2.10 and Clause 2.68 respectively, of the said Bye-Laws. The question as to which of these two Authorities is to deal with the dispute, depends upon the category in which the dispute falls and the quantum of value involved, which is also a relevant factor for deciding the composition of the Tribunal, such as a Sole Arbitrator or a Tribunal of three Arbitrators. Further, Clause 15.4 of the Bye-Laws contemplates different types of dispute between different persons,

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such as disputes between (i) members *inter se* (ii) between a member and a constituent member or (iii) between a member and registered non–member client or (iv) arising out of or in relation to trades executed on the exchange and made subject to the Bye-Laws, Rules, Business Rules or regulations of the Claimant exchanged or with reference anything incidental thereto or in pursuance thereof, etc. It is not necessary to burden this Order with a detailed analysis of the entire scheme of the internal dispute redressal mechanism of the Claimant as provided under Clause 15, which has, as many as, 69 sub-clauses. Suffice it to refer to only two sub-clauses which are as under:

> "***15.2 Arbitration Subject to the Arbitration & Conciliation Act.***
>
> *The Bye-Laws and Regulations relating to arbitration shall be consistent with the provisions of the Arbitration and Conciliation Act. The provisions not included in these Bye-Laws but included in the Arbitration & Conciliation Act shall be applicable as if they were included in these Bye-Laws.*
>
> ***15.3*** *The Board or the Relevant Authority shall constitute every year a panel of not less than ten arbitrators, at least 50% of whom shall be drawn from*

professionals conversant with the trading at a commodity exchange and its Bye-Laws, Rules, Business Rules and regulations, or having expertise in such areas like law or commodity economics, finance, commodity services and appraisal, commodity physical trade, etc. At least 25 percent of such members of the panel shall be surveyors of the Exchange, who shall adjudicate any dispute relating to quality."

Thus there can be no doubt that in view of the mandate of clause 15.2, the present arbitration has to be governed by the provisions of the 1996 Act, which will bring in to play Section 43 read with Section 21, as far as the question of commencement of proceedings and limitation is concerned. Since the Indian Limitation Act, 1963 is applicable, Article 26 of Part-II of the Schedule makes it clear that the period of limitation is three years.

25. In this behalf, I may again refer to the Judgment & Order dated 10th September 2014, passed by S. J. Kathawalla J in Suit (L) No.870 of 2013 (supra), where the Claimant is the Defendant. A similar contention was raised regarding the interpretation of clause 15.4 of the Bye-Laws. Relying upon the Supreme Court decisions in **(i)** SMS

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Tea Estates Pvt. Ltd. Vs. Chandmari Tea Co. Pvt. Ltd. – (2011) 14 SCC 66 para 12(iv), **(ii)** World Sport Group (Mauritius) Ltd. Vs. MSM Satellite (Singapore) Pvt. Ltd. 24th January, 2014, Manu/SC/0054/2014, paragraphs 23 to 25 and **(iii)** Renusagar Power Co. Ltd. Vs. General Electrical Company (1984) 4 SCC 679 paragraphs 43 to 49, it was held that an arbitration agreement must be interpreted in widest possible manner. Relying upon the ratio of the said decision of the Bombay High Court, it is contended by Mr. Chirag Kamdar that arbitration agreement contained in Clause 15 of the Bye-Laws stands independent of the other parts of the said Clause and the present arbitration is squarely covered by the provisions of the 1996 Act. Consequently, the period of limitation of six months for reference to the internal dispute redressal Authorities of the Claimant can, by no stretch of imagination, control of statutory mandate of Section 43 r/w 21 of the 1996 Act. I find merit in the above contention raised by Mr. Chirag Kamdar, who also made a grievance that no plea of bar of limitation was raised at any time during the earlier stages of the proceedings, either before the Three-Member-Committee appointed by the High Court or even in the

present proceedings at the time of filing the Written Statement – Reply – to the SoC or even when the Preliminary Objection was filed and thereafter an Additional Affidavit was filed. Counsel, therefore, contended that apart from the lack of merits in the said plea of bar of limitation, it is clearly an afterthought when the Respondent realised that its plea that the present Tribunal has no jurisdiction to arbitrate upon the disputes, was not likely to succeed. I find merit in the contentions raised by the learned counsel.

ORDER

26. In the light of the above discussion, I find no substance in any of the contentions raised by Mr. Bharti and Ms. Swasdha UNS on behalf of the Respondent. In the result, Respondent's preliminary objections dated 5th March and 17th March 2016 are without any substance and are rejected. In the circumstances, Respondent will pay to the Claimant Rs.50,000/- by way of costs of the proceedings relating to its preliminary objection. The same to be paid within four weeks from today.

04.05.16

Justice Arvind V. Savant (Retd.)
Sole Arbitrator

Mumbai, 4th May 2016

Annexure 2

BEFORE THE ARBITRAL TRIBUNAL OF

Shri. Justice Arvind V. Savant, (Retd.)- Sole Arbitrator

(Former Chief Justice, High Court of Kerala)

In the matter of arbitration between

NCS Sugars Limited ... ... Applicant
(Original Respondent)

And

National Spot Exchange Limited ... ... Opponent
(Original Claimant)

Appearances:

Ms. Swadha UNS, Counsel and Mr. Ganesh Kamath, Advocate
i/b. Mr. S.P. Bharti, Advocate ... Advocates for the Applicant
(Original Respondent)

Mr. Chirag Kamdar, Counsel a/w. Ms. Madhu Gadodia
and Mr. Shashank Trivedi, Advocates
i/b M/s. Naik Naik & Company ... Advocates for the Opponent
(Original Claimant)

Received C.S.K. 3/10/17 6.33 pm

Mr. Abhijit Aher and Mr. Santosh Dhuri,
Claimant's representatives ... for the Opponent
(Original Claimant)

ORDER on the Original Respondent's Application dated 20TH September 2017 under Section 27 of the Arbitration & Conciliation Act, 1996

[Date : 3rd October 2017]

1. On the *"APPLICATION OF RESPONDENT FOR WITNESS SUMMONS"* ("Application") under Section 27 of the Arbitration & Conciliation Act, 1996 ("Act"), I have heard at length both the learned counsel; Ms. Swadha UNS for the Original Respondent – NCS Sugars Limited – ("Respondent") and Mr. Chirag Kamdar for

the Original Claimant –National Spot Exchange Limited – (Claimant"). Perused the relevant papers. In this Order, I have referred to the parties as per their original description in the main proceedings.

2. In this Application, Respondent has prayed for approval of this Tribunal to apply to the Court for assistance in taking evidence of as many as seven witnesses. Section 27 reads as under:

> "***27. Court assistance in taking evidence.*** *– (1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.*
>
> *(2) The application shall specify –*
>
> *(a) the names and addresses of the parties and the arbitrators;*
>
> *(b) the general nature of the and the relief sought;*
>
> *(c) the evidence to be obtained, in particular;–*
>
> *(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;*
>
> *(i) the description of any document to be produced or property to be inspected.*

(3) The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to be arbitral tribunal.

(4) The Court may, while making an order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.

(6) In this section the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents."

3. Without going into the merits of the rival contentions raised by both the parties in the main proceedings, for the limited purpose of appreciating the controversy raised in the Application, I may briefly indicate the nature of the dispute in the main proceedings. The dispute before me relates to the claim arising

out of the unsettled trades conducted / transactions carried out during the period May 2013 to July 2013, by the Respondent Company, which is a trading member of the Claimant Exchange. Admittedly, there are a large number of trading members of the Claimant. Each of such trading members, has a large number of its own trading clients. It is the Claimant's case that the Respondent has executed several documents which clearly indicate its obligation to be bound by the Bye-laws of the Claimant. Reliance is placed by the Claimant on the Respondent's Undertaking dated 16th March 2012, in order to engage in internet based trading on the Claimant Exchange, as also on an Agreement dated 20th May 2013 between the Claimant and the Respondent. Respondent has its own version about the Bye-laws, Undertaking dated 16th March 2012 and Agreement dated 20th May 2013 and it has denied its liability in toto.

4. The first meeting in the arbitration proceedings was held on 26th September 2015. Claimant has filed its Statement of Claim ("SoC") on 23rd December 2015 claiming an amount of Rs.58,85,09,205.34 with interest at the rate of 18% per annum and for other ancillary reliefs. Claimant has, inter alia, placed reliance on the Respondent's alleged admission of its liability in

two documents viz. **(i)** letter dated 1st August 2013, and **(ii)** minutes of the meeting dated 27th August 2013.

5. Respondent has filed its Statement of Defence ("SoD") on 17th March 2016, denying the contentions and the claim raised by the Claimant. A large number of documents, running into thousands of pages, have been produced by both the parties during the course of the last two years. Claimant has examined only one witness viz. its Assistant Manager, CW-1 Mr. Santosh Dhuri. He was cross examined at length and as many as 330 questions were put to him in his cross examination. Respondent's Authorised Signatory – RW-1, Mr. G. Kannababu is currently being cross examined by the Claimant. His evidence was recorded in parts on 20th and 21st September 2017.

6. This Application was presented on 20th September 2017. It refers to some documents produced by CW-1, Mr. Santosh Dhuri in the course of his evidence, regarding which he has been cross examined at length. However, in paragraph 6 of the Application, Respondent has referred to three of its trading members viz. **(i)** M/s. Phillip Commodities India Pvt. Ltd., **(ii)** M/s. Eureka Commodity Brokerage Pvt. Ltd., and **(iii)** M/s. J.M. Financial Commtrade Ltd. Paragraph 6 of the Application also mentions the

names of **(a)** three trading clients of the first trading member M/s. Phillip Commodities India Pvt. Ltd., **(b)** two trading clients of the second trading member M/s. Eureka Commodity Brokerage Pvt. Ltd., and **(c)** two trading clients of the third trading member M/s. J.M. Financial Commtrade Ltd. Paragraph 6 reads as under:

> *"6. The Respondent therefore, submits that the Hon'ble Tribunal may be pleased permit /approve the request of the Respondent to approach the Court for issuance of witness summons for their appearance and production of relevant documents pertaining to purported trades etc. on the Claimant exchange who are as follows:*
>
> *A. M/s Phillip Commodities India Pvt. Ltd C/o Ms. Nita Nimish Mehta, G-4, Sani Appts, Bank of India Lane Subhanpura Vadodara, Vadodara 390023, Gujarat India. (466)*
>
> *B. M/s Phillip Commodities India Pvt. Ltd C/o Mr. Ketan Anil Shah, 44/B, Rajul Apts, J Mehta Marg, Nepeansea Road, Mumbai 400 006, Maharashtra, India. (444)*
>
> *C. M/s Phillip Commodities India Pvt. Ltd C/o Mr. Prakash Lachhwani, Flat no 901, 9th-floor, Ghaswala Tower, Dr. P G Solanki, Lamington road Mumbai 400 007, Maharashtra, India. (459)*

D. M/s Eureka Commodity Brokerage Pvt. Ltd. C/o. Ms. Manju Devi Chamaria 194E, Satin Sen Sarani Maniktalla, main Roaf, Kolkatta – 700054, West Bengal, India. (101)

E. M/s Eureka Commodity Brokerage Pvt. Ltd. C/o Mr. Vijay Kumar Chamaria M/s vijay cloth store, 196, Jammunalal Bajaj Street 1st Floor, Kolkatta – 700054, West Bengal, India. (101)

F. M/s J.M. Financial Commtrade Ltd C/o. Jaya Amol Dalal, 501 Prashanti Apts, Vaudevta Mandir Complex, Devidas lane, Borivali West, Mumbai 400 103, Maharashtra, India. (38)

G. M/s J.M. Financial Commtrade Ltd C/o Shailesh Ratilal Zaveri HUF, A Kamala Niketan, 1st floor, Dr Bhagwanlal Inderji Road, Mumbai 400 006, Maharashtra, India. (37)

7. Claimant has opposed the Application by its Reply dated 25th September 2017, raising several contentions such as : **(i)** lack of privity of contract between the Claimant and the seven trading clients of its three trading members; **(ii)** attempt to seek a fishing and roving enquiry without giving the details of the relevance or necessity of the evidence of the seven trading clients of its three trading members; **(iii)** repeated attempts on the part of the Respondent to delay and derail the present proceedings,

and one ground or the other. In the course of their oral arguments, both the learned counsel, advanced some further contentions. In short, Respondent has orally contended that it is not aware of the details of the accounts of the said seven clients, such as **(i)** Ms. Nita Nimish Mehta, **(ii)** Mr. Ketan Anil Shah, **(iii)** Mr. Prakash Lachhwani, **(iv)** Ms. Manju Devi Chamaria, **(v)** Mr. Vijay Kumar Chamaria, **(vi)** Jaya Amol Dalal, and **(vii)** Shailesh Ratilal Zaveri HUF. Claimant has orally contended that it is only concerned with its trading members, such as the Respondent and since there is no privity of contract between the Claimant and the seven trading clients of its three trading members, the Application is untenable and should be rejected. The absence of: (a) privity of contract, (b) relevancy and (c) necessity of the alleged evidence has also been reiterated.

8. In its Rejoinder dated 26th September 2017, Respondent has reiterated its contentions raised in the Application and further, in paragraph 8 of the Rejoinder, there is a list of 11 documents, which the Respondent now seeks *"to be produced by the proposed witness"*. Paragraph 8 of the Rejoinder reads as under:

"8. However, for further clarification, the Respondent is specifying below the nature of the requisite documents to be produced by the proposed witness.

Following documents relating to the purported trades carried out by the third parties / counter parties with the Respondent for the period March 2012 till August 2013 on the Claimant exchange:

1. Statement of settlement bank account maintained with the Claimant exchange
2. Income tax returns
3. Sales tax returns
4. Invoices
5. Purchase/ Buy orders
6. Sale orders
7. Order Book
8. Trade file
9. Trade book
10. Delivery obligation report
11. Ledger"

It is not clear as to which of the seven witnesses is to produce the said 11 documents. Thereafter, paragraph 9 of the Rejoinder reads as under:

> "9. The Respondent reiterates that the Respondent seeks to approach the Hon'ble Court for issuance of witness summon for their appearance and for production of documents mentioned above in order to prove that they have never carried out the purported trades with the third parties/counter parties on the platform of the Claimant

exchange as claimed by the Claimant to fasten the liability on the Respondent."

9. The only point which arises for my consideration is whether the Respondent has made out a case for grant of approval to *"apply to the Court for assistance in taking evidence"*, as contemplated by sub-section (1) of Section 27 of the Act. My answer is in the negative for the following reasons.

10. As stated earlier, there are voluminous documents produced on record and the Claimant has examined its Assistant Manager, CW-1, Mr. Santosh Dhuri. Respondent's Authorised Signatory, RW-1, Mr. G. Kannababu is in the witness box. No other affidavit of evidence has been filed by either of the parties, apart from those of one witness each, as mentioned above. At this stage, no opinion can be expressed on the merits of the contentions of either party, since the recording of evidence is in progress. The proceedings have been delayed as a result of some Applications made by the Respondent, which have been separately dealt with and disposed of. Suffice it to say that the contentions raised by both the parties in the main proceedings relate to the Bye-Laws of the Claimant, the Respondent's Undertaking dated 16th March 2012, the Agreement dated 20th

May 2013 between the parties before me, as also the alleged admission of its liability by the Respondent in two documents viz. **(i)** letter dated 1st August 2013 and **(ii)** the minutes of the meeting dated 27th August 2013. Undoubtedly, both the parties have their own versions in respect of each of these documents, as also the interpretation of various clauses of these documents, which will have to be decided after the final hearing of the matter.

11. I must at this stage, briefly refer to the exact nature of the power to be exercised by an Arbitral Tribunal, under Section 27 of the Act. It was initially suggested by the Respondent that an Arbitral Tribunal has only to grant approval and it is for the Court, to whom an Application is made for assistance in taking evidence, to go into the merits of the Application. I need not discuss, the powers of the Court, which are of a different nature as compared to those of an Arbitral Tribunal. At the same time, Section 19 of the Act dealing with determination of rules of procedure require an Arbitral Tribual to conduct the proceedings in the manner it considers appropriate. While so conducting, an Arbitral Tribunal has *"the power to determine the admissibility, relevance, materiality and weight of any evidence"*. Section 19 of the Act reads as under:

"19. Determination of rules of procedure. – (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

12. On a true construction of the provisions of Section 19 and Section 27 of the Act, in my view, it is not as if an Arbitral Tribunal has to mechanically grant approval to a party to apply to the Court for assistance in taking evidence. Such an approach would reduce the Arbitral Tribunal to a mere post office and the granting of approval would be an empty formality, which would unnecessarily delay the conduct of the arbitral proceedings. The main purpose of the alternate dispute resolution mechanism is to ensure speedy adjudication of the disputes at a lesser cost. I must now make a

brief reference to some of the judgments, to which my attention was invited by Mr. Chirag Kamdar, learned counsel for the Claimant:

13. In *Hindustan Petroleum Corporation Ltd. vs. Ashok Kumar Garg : 2006 (91) DRJ 591 (Delhi)*, the Delhi High Court examined the scheme of the provisions of Section 27 of the Act read with Order XVI of the Code of Civil Procedure, 1908 and held in paragraph 7 of the judgment as under:

> *"7. Section 27 envisages an application to be made to the court for seeking assistance to take evidence. Such an application can be made either by the Arbitral Tribunal or a party with the approval of the Arbitral Tribunal. Thus, in case of an application by a party, the legislature itself envisaged an approval of the Arbitral Tribunal. This in turn puts an obligation on the Arbitral Tribunal to apply its mind and not to mechanically direct an application to be filed before the court."*
>
> *(emphasis supplied)*

Further, paragraph 14 of the said judgment reads as under:

> *"14. A perusal of the order passed by the tribunal for the present case shows that the tribunal appears*

to be under a misconception that it has no role to play in this application other than only giving a stamp of approval. It is not as if an application filed before the tribunal should be approved in a mechanical manner since the object is that the arbitral tribunal must scrutinize at least prima facie that there is relevancy of the witness sought to be produced. The pleadings are before the arbitrator and he is the master of the case. Thus, it is the tribunal who would have to apply its mind to find out whether the evidence to be produced is relevant or irrelevant. This does not appear to have been done by the arbitral tribunal in the present case possibly under a misconception of law."

(emphasis supplied)

14. In *Review Petition (L) No. 51 of 2015 in Arbitration Petition No. 1544 of 2015 : National Insurance Co. Ltd. vs. S.A. Enterprises* decided on 16th October 2016, the Bombay High Court has considered the nature of the powers to be exercised by an Arbitral Tribunal under Section 27 of the Act and has held that it is the duty of the Arbitral Tribunal to decide as to whether a particular document or presence of a particular witness would be necessary for the proper adjudication of the disputes between the parties. Paragraph 40 of the judgment reads as under:

"40. In my view, the arbitral tribunal cannot issue a witness summons itself or cannot enforce its own order of producing certain documents or cannot force a party or a third party to lead evidence or to produce documents. The arbitral tribunal or a party to the proceedings with the approval of the arbitral tribunal may apply to the Court for assistance in taking evidence. In my view, at this stage, this Court cannot go into the validity and correctness of the order passed by the learned arbitrator granting permission to the respondent herein for seeking assistance of this Court in taking evidence under Section 27 of the Arbitration Act. It is for the arbitrator to decide as to whether particular documents or presence of a particular witness would be necessary for the proper adjudication of the dispute between the parties or not, if any such application is made by the parties to the arbitral proceedings. In these proceedings under Section 27 of the Arbitration Act, this Court cannot decide whether production of such documents or presence of such witness was warranted or not."

(emphasis supplied)

15. Similar view has been expressed by the Delhi High Court on 28th March 2016 in O.M.P. (E) (COMM.) 12/2016 – Thiess Iviinecs India Vs. NTPC Limited & Anr. It has been held in paragraph 25 and 26 of the judgment that having regard to the mandate of

sub-section (4) of Section 19 of the Act, the Arbitral Tribunal has to determine the admissibility, relevance, materiality and weight of any evidence and "*Section 19(4) contemplates the Tribunal to govern the admissibility, relevance, materiality and weight of any evidence*" ... ... "*There is nothing in Section 27, where the Court can determine the admissibility, relevance, materiality and weight of any evidence*" ... "*The nature of power, exercised is to execute the request, as the Tribunal on its own cannot do it, in view of the inapplicability of the provisions of the Code of Civil Procedure, 1908*". The High Court of Andhra Pradesh in Sunder Vs. Mohd. Ismail and Anr. CRP No.5219 of 2003 decided on 3rd March 2004 (AIR 2004 AP 538), in paragraph 12 of the judgment, has held that while exercising the power under Order XVI Rule 6 read with Section 151 of the Code of Civil Procedure, it is necessary to examine the relevancy or otherwise of the evidence sought to be led. If this was not done, it "*would convert the judicial forum of a Court of law into a post office*".

16. Ms. Swadha UNS, learned counsel for the Respondent invited my attention to a judgment of the Hon'ble Supreme Court in *K.P. Poulose vs. State of Kerala : AIR 1975 SC 1259*. This was a case under Section 30 of the Arbitration Act, 1940 for setting aside an Award. Counsel invited my attention to the observations

in paragraphs 4, 5 and 6 of the judgment. There can be no doubt about the proposition of law laid down in the said decision, where the Supreme Court was dealing with Section 30(a) of the Arbitration Act, 1940 regarding the alleged legal misconduct of an Arbitrator as a ground for setting aside the Award. In my view, the ratio of the said decision has no application to the facts of the present case.

17. I must at this stage, refer to the fact that the Respondent had filed an Application on 17th April 2017, under Order XI of the Code of Civil Procedure 1908, dealing with "*Discovery and Inspection*" with the following prayer:-

> *"7. In view of the above submissions, the Respondent humbly prays before this Hon'ble Tribunal that the Claimant may be directed to produce the documents as specifically mentioned in Exhibit "A" herein."*

Upon hearing both the learned counsel, and on a consideration of the relevant decisions, I have disposed of the said Application. Such of the documents which were relevant and necessary for the proper adjudication of the disputes pending before me, were either furnished by the Claimant, or were directed to be produced by the Claimant and the said direction has been complied with. In

respect of such of the documents which were neither relevant nor necessary for the proper adjudication of the disputes pending before me, Respondent's Application dated 17th April 2017 was rejected by the Order dated 6th May 2017. It is not necessary to burden this Order with the details of the said Order. In fact, during the course of the oral hearing on 26th September 2017, it transpired that in respect of certain documents, the relief which the Respondent could not obtain in the Order dated 6th May, 2017, is sought to be now obtained in the present Application. This has been repeatedly criticized by the counsel for the Claimant as an attempt to circumvent the Order dated 6th May, 2017, which is impermissible in law. Counsel for the Respondent could not repel this criticism. That apart; I find merit in the said criticism.

18. The fact remains that in the Application filed by the Respondent, there is not a single averment as to the relevancy or necessity of the examination of seven witnesses for the proper adjudication of the dispute pending before me. Similarly, there are no averments to show the relevancy or the necessity of the evidence of the proposed seven witnesses qua a particular issue / point of determination framed by this Tribunal, as per the order dated 17th June, 2016. Even in the course of oral arguments, no

attempt was made on behalf of the Respondent to indicate the possible relevancy or necessity of the evidence of the seven witnesses proposed to be examined. There is only a bald averment in paragraph 5 of the Application, which reads under:

> *"The Respondent submits that the Respondent has always denied the purported trades with third parties/ counter parties as claimed by the Claimant to fasten liability on the Respondent. It is therefore necessary to bring some of these third parties/ counter parties whose names and details are provided in the document (Exhibit R-19) supplied to the Respondent before this Hon'ble tribunal to bring the truth on the record in order to do complete justice in the matter."*

Admittedly, there is no criterion indicated, on the basis of which the Respondent has selected the seven witnesses, whose names are mentioned in the Application. It was admitted before me by both the learned counsel that there are as many as 617 names in Exhibit "R-19", to which the Respondent has made a reference in its Application. However, Ms. Swadha UNS, learned counsel for the Respondent, could not indicate any criterion or basis upon which, the names of the seven trading clients of the three trading members of the Claimant were selected, as mentioned in paragraph 6 of the Application. She admitted that the names of the three members, as also the names of their seven clients were

selected at random without any basis. Neither in the pleadings of the Application, nor in the oral arguments, was there any indication as to the relevancy or necessity of the evidence of the said seven witnesses, for the purpose of deciding the dispute pending before me.

19. Coming to the Respondent's Rejoinder dated 25th September 2017, in the first place it travels much beyond the scope of the Application. Secondly, even in respect of the averments made and the documents referred to in paragraph 8 of the Rejoinder, no attempt is made to show either the relevancy or the necessity thereof in connection with the issues / points for determination framed by the Tribunal.

20. There was no dispute before me that the Claimant has a large number of trading members like the Respondent, or like **(i)** M/s. Phillip Commodities India Pvt. Ltd., **(ii)** M/s. Eureka Commodity Brokerage Pvt. Ltd. and **(iii)** M/s. J.M. Financial Commtrade Ltd. The last three trading members are those whose names are selected at random and mentioned in paragraph 6 of the Application, with reference to different trading clients of each of the said three trading members. As stated earlier, the first trading member, M/s. Phillip Commodities India Pvt. Ltd. has

member, the type of account, the name of the trading member's client, full address of the client.

Mr. Chirag Kamdar, learned counsel for the Claimant, is justified in expressing an apprehension that if this Application is granted, there may be many such Applications for examining some other clients of many members of the Claimant, though the Claimant has no privity of contract with the said clients and the proceedings will drag on for years. At this stage, I am not examining the merits of such a large number of documents produced before me, but I am referring to them only for the limited purpose of showing that sufficient material has been placed on record, which may or may not be relevant or necessary for the proper adjudication of the dispute pending before me in the main proceedings.

22. The nature of the alleged relationship between the Claimant – National Spot Exchange Ltd. – and its trading member viz. the Respondent – NCS Sugars Ltd. – is a matter which rests on several documents, such as the Bye-Laws of the Claimant, the Undertaking dated 16th March 2012 given by the Respondent as also the Agreement dated 20th May 2013 entered into between the parties. It is also a matter which depends on the interpretation of two more documents, such as **(i)** letter dated 1st August 2013; and **(ii)** the

minutes of the meeting dated 27th August 2013. I am mentioning these documents only for the limited purpose of disposing of this Application and I do not wish to go into the merits of the rival contentions in respect of any of these documents at this stage. Nevertheless the fact remains that, as far as the seven trading clients of the three trading members of the Claimant are concerned, admittedly, there is no privity of contract between the Claimant and the said clients of the trading members of the Claimant and it is not permissible for the Respondent to indulge in a fishing and rowing enquiry in respect of the settlement accounts of its own trading clients. The Application is completely bereft of the relevant details which are necessary for recording a finding on the question of either relevancy or necessity for the proper adjudication of the dispute pending before me.

23. Further in its Rejoinder, the Respondent has tried to widen the scope of its Application. Admittedly, the Rejoinder is not confined to the pleadings in the Application and there are no details as to how the list of 11 items mentioned in paragraph 8 has any relevance or connection with the 7 trading clients of the three trading members whose names are mentioned in paragraph 6 of the Application. This is also at random and vague.

24. During the course of arguments, Ms. Swadha UNS, learned Counsel for the Respondent, went to the extent of denying any association of the Respondent with the Claimant, in so far as the claim raised in the main proceedings is concerned. In reply, Mr. Chirag Kamadar, learned counsel for the Claimant, invited my attention to the specific averments in paragraph 5 of the SoD dated 17th March 2016 in the main proceedings, which reads as under:

> *"5. The Respondent submits that the Respondent sold traded sugar 5240 Mts to sugars delivery at Ex Patna for value of Rs.15,10,7,000/- under T+10 days contract on 29.03.2013 and vide mail dated claimant was informed of loading of the material and sough for buyers details which was provide by the claimant vide mail dated 09.04.2012. Further, the Respondent traded quantity of 2620 Mts of sugar and confirm the same vide mail dated 11.4.2012. Vide mail dated 16.4.2012, the Respondent confirmed availability of trdaed sugar and reqested for payout in advance. By mail dated 17.4.2012, the Respondent confirmed various thing including deposit of Rs.60 lacs with the Claimant. However, due to problem in the Sugar Industries, a small amount was left undelivered. Hereto annexed and marked documents/communication in realtion of trdae of sugar in 2012."*
>
> *(emphasis supplied)*

The same facts have been reiterated in paragraph 4 of the Affidavit of Evidence dated 12th December 2016 filed by RW-1 Mr. G. Kannababu whose evidence is being recorded. Further, Claimant also sought to rely upon Bye-law 3.5 of its Bye-laws, which is quoted in paragraph 4 of the Reply filed by the Claimant in the present Application. These are matters which will be considered at the final hearing. Hence, I cannot express any opinion on the contentions raised either by Mr. Swadha or Mr. Kamdar.

25. Mr. Kamdar has also contended that the Respondent is repeatedly indulging in dilatory tactics to delay and derail the proceedings and one of the reasons for this attitude of the Respondent is that it has refused to pay even its share of the costs of arbitration, including the fees payable to the Sole Arbitrator. It is true that after making one initial payment, the Respondent has taken a stand that it will not even pay its own share of fees. As a result of this, having regard to the mandate of the first Proviso to sub-section (2) of Section 38 of the Act, it is the Claimant which is obliged to pay the entire fees including the share of the Respondent. Hence, I do not think that the criticism made by Mr. Kamdar has any relevance for deciding the merits of this Application.

26. It is once again made clear that all the observations made in this Order are only for the limited purpose of disposal of this Application and they do not indicate any opinion on the merits of the dispute in the main proceedings.

27. In the view that I have taken, I find no merit in the Respondent's Application under Section 27 of the Act. Accordingly, the same is rejected. Respondent is directed to pay Rs.25,000/- to the Claimant towards the costs of this Application.

03/10/17

Justice Arvind V. Savant (Retd)
Sole Arbitrator 06.30 pm

Mumbai
3rd October 2017

Naik Naik & Company, Advocates
Email: ameetnaik@nnico.com; projectn@nnico.com

Shri. S.P. Bharti, Advocate
Email: bharti59@gmail.com

National Spot Exchange Limited
Email: nsellegal@nationalspotexchange.com

NSC Sugars Limited
Email: jagdishbyram@gmail.com; nnr@ncsgroup.in

Annexure 3

Annexure "1"

BEFORE THE ARBITRAL TRIBUNAL OF
Shri. Justice Arvind V. Savant, (Retd.)- Sole Arbitrator
(Former Chief Justice, High Court of Kerala)

In the matter of Arbitration between

National Spot Exchange Limited ... ... Claimant

And

NCS Sugars Limited ... ... Respondent

Appearances:

Mr. Chirag Kamdar and Mr. Yashesh Kamdar,
Counsel and Mr. Shashank Trivedi, Advocate
i/b M/s. Naik Naik & Company ... Advocates for the Claimant
Ms. Gagan Preet ... representative for the Claimant
Ms. Swadha UNS and Mr. Ganesh Kamath, Counsel
i/b. Mr. S.P. Bharti, Advocate ... Advocates for the Respondent

ORDER ON THE RESPONDENT'S APPLICATION DATED 17TH APRIL 2017 UNDER ORDER XI OF THE CODE OF CIVIL PROCEDURE, 1908

DATE : 6TH MAY 2017

1. Heard both the learned counsel; Ms. Swadha UNS for the original Respondent, who has filed the Application, and Mr. Chirag Kamdar for the original Claimant.

2. This Application is under Order XI of the Code of Civil Procedure, 1908 seeking relief in terms of paragraph 7 which reads as under :

> *"7. In view of the above submissions, the Respondent humbly prays before this Hon'ble Tribunal that the Claimant may be directed to produce the documents as specifically mentioned in Exhibit "A" herein."*

Exhibit "A" to the Application is a list of documents mentioned at Serial Nos. A to L which the Respondent wants the Claimant to produce.

3. Claimant has filed its Reply on 29th April 2017, opposing the said Application and praying that the same may be dismissed qua such of the items which the Claimant is contesting. It is necessary to mention at this stage itself that in respect of the documents covered by Serial Nos. D, E, F, G, H, K and part of C, the Claimant has already supplied two compilations of documents to the Respondent on 22nd April 2017. Copies of the said two compilations have been submitted to the Tribunal today.

4. In view of the above, what remains to be considered are the documents at Serial Nos. A, B, part of C, I, J and L in Exhibit "A" to the Respondent's Application.

5. In paragraph 2 of the Reply filed by the Claimant, it is contended as under:

> *"2. ..... The Claimant submits that the application has failed to address the most important aspect and requirement of the present application i.e. to justify the delay in making the present application. The Claimant submits that the application under reply is a weak attempt to delay the present proceedings."*

In respect of this contention, it needs to be stated that the first meeting of the Arbitral Tribunal was held on 26th September 2015 and it was directed in paragraph VII(4) as under :

> *"VII(4) ..... Parties to give inspection of documents and exchange their letters/affidavits of admission and denial of documents and to submit to the Arbitral Tribunal, a joint compilation of admitted documents, duly paginated and indexed. In the event of there being any disputed document/s of either side, parties to exchange their own compilations of such disputed document/s, duly paginated and indexed and submit the same to the Arbitral Tribunal. Parties to exchange Draft Issues / Points for*

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Determination, arising out of the pleadings by Monday, 1st February, 2016."

6. It is also necessary to mention that in the present arbitration proceedings, some interim applications were made and letters were submitted by the Respondent, on which detailed Orders have been passed from time to time rejecting the said interim applications / letters. Further, the parties had complied with the above quoted direction for giving inspection of documents and filed their letters / admission and denial of documents.

7. Notwithstanding the above, I have heard both the learned counsel in details on the present Application made by the Respondent. It is true that under Section 19 of the Arbitration & Conciliation Act, 1996 ("the Act"), an Arbitral Tribunal is not bound by the Code of Civil Procedure, 1908 and the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting the proceedings. Failing such an agreement, the Arbitral Tribunal may, subject to the provisions of Part I of the Act, conduct the proceedings in the manner it considers appropriate. Bearing in mind, the principles underlying the provisions of Order XI of the Code of Civil Procedure, 1908, under which the

Respondent has made the Application, I have considered it appropriate to deal with the Respondent's Application, in so far as the disputed items in Exhibit "A" to the Application are concerned.

8. At the outset, I may refer to the provisions of Order XI Rule 1 of the Code of Civil Procedure, 1908 which reads as under:

> *"XI.(1) – **Discovery by interrogatories** – In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or anyone or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons in required to answer:*
>
> *Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose:*
>
> *Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness."*

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In the light of the first Proviso to Order XI Rule, it is obvious that the Respondent could have delivered the interrogatories much earlier and not after the last meeting was held on 8th April 2017 which was the 23rd meeting of the Arbitral Tribunal. Further, the second Proviso makes a distinction between interrogatories, which do not relate to any matters in question in the proceedings, which are to be deemed as irrelevant notwithstanding that they might be admissible on the oral cross examination of a witness. In this behalf, I may make a reference to the decision of the Hon'ble Supreme Court in *Raj Narain vs. Smt. Indira Nehru Gandhi & Anr. : AIR 1972 SC 1302*, where after quoting Order XI Rule 1 in paragraph 26 of the judgment, the Court observed in paragraph 27 at page 1309 as under:

> *"27. Questions that may be relevant during cross-examination are not necessarily relevant as interrogatories. The only questions that are relevant as interrogatories are those relating to "any matters in question". The interrogatories served must have reasonably close connection with "matters in question". Viewed thus, interrogatories 1 to 18 as well as 31 must be held to be irrelevant."*
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> *(emphasis supplied)*

9. Coming to the disputed items viz. Serial Nos. A and B in Exhibit "A" to the Respondent's Application, it is not disclosed as to how they are relevant. In paragraph 9 of its Reply, Claimant has categorically stated that it has initiated the present proceedings for recovery of amounts due from the Respondent only on account of unsettled trades. The documents referred to at Serial Nos. A and B refer to settled trades between the parties in T+10 and T+7 trades respectively, which are not the subject matter of dispute before me. Further, it is obvious from Respondent's Application itself that Serial Nos. A and B are the invoices issued by the Respondent itself to its buyers. Obviously, these facts could not be disputed by the Respondent. That being so, it is really strange that the Respondent should make an application at this belated stage for production of the documents / sale invoices issued by itself to its buyers in respect of the said T+10 and T+7 trades respectively. Hence, the prayer in respect of Serial Nos. A and B of Exhibit "A" is rejected.

10. In respect of a part of Serial No. C of Exhibit "A" of Respondent's Application viz. invoices for the T+2 trades reflected at Serial Nos. 12 to 16, 31 and 33 of the Trade Summary, Exhibit C-23 of the affidavit of

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evidence dated 15th October 2016 filed by CW-1, the Claimant has already submitted the relevant documents as stated above. In respect of the remaining part viz. Serial Nos. 35, 37, 39 and 40, the invoices for the said T+2 trades have not been issued by the Respondent to its counterpart and therefore, copies of the same cannot be available with the Claimant. Hence, the prayer is rejected in so far as this part of Serial No. C is concerned.

11. As stated earlier, documents relating to Serial Nos. D, E, F, G, H and K have already been furnished to the Respondent on 22nd April 2017. What remains to be considered, therefore, are Serial Nos. I, J and L of Exhibit "A" to the Respondent's Application.

12. Serial No. I and J are considered together. These documents relate to 47 entries reflected in the Respondent's Trade File during the period 29th March 2012 to 26th July 2013. It is brought to my notice that these entries relate to approximately 20,000 transactions, some of which are already settled, with which admittedly, I am not concerned and some are unsettled, in respect of which alone the dispute is pending before me. During the course of examination of CW-1, from 17th December 2016 onwards, he has produced the Trade Summary at Exhibit C-23

which relates to as many as 91 trades effected by the Respondent on a single day viz. 21st June 2013. This was done on a sample basis to avoid delaying the proceedings and going into details of over 20,000 transactions whether relevant or irrelevant to the present proceedings.

13. Mr. Chirag Kamdar, learned counsel for the Claimant, also invited my attention to the specific averment in paragraph 5 of the Respondent's Statement of Defence wherein it is admitted as under :

> *"5. The Respondent submits that the Respondent sold tarded sugar of 5240 Mts of sugars delivery at Ex Patna for value of Rs.15,10,7,000/- under T+10 days contract on 29.03.2013 and vide mail dated Claimant was informed of loading of the material and sough for buyers details which was provide by the claimant vide mail dated 09.04.2012. ....."*

14. Counsel further contended that the Respondent, who claims to be aware of the entire procedure involved in its own business and dealing with the Claimant, is indulging in a roving enquiry to fish out information which may or may not be relevant, solely with a view to harass the Claimant and delay the disposal of the present proceedings. Reliance was placed on the first part of paragraph 5 of the judgment of

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the Orissa High Court in *M/s. J.S. Construction Pvt. Ltd. vs. Damodar Rout : AIR 1987 Orissa 207*, which reads as under :

> *"5. From the relevant portion of the impugned order quoted earlier, it is clear that the direction of the trial court for production of the documents by the petitioner comes within the purview of O. 11, R. 14, C.P.C. The power of the court to direct production of the document by any party at any time during the pendency of the suit cannot be questioned. But before giving a direction to a party to make discovery of document in his possession or power or for production of document, the court has to be satisfied that the document in question is relevant for proper adjudication of the matter involved in the suit. The privilege vested in a party to the suit by the provisions under O. 11, Rr. 12 and 14 of the Code is not intended to enable him to cause a roving enquiry to fish out information which may or may not be relevant for disposal of the suit. No doubt, the party seeking discovery or production of the document need not satisfy the court that the document in question is admissible as evidence in the suit it would be sufficient to show that the contents of the document would throw light on the subject-matter of the suit. Unless these basic requirements are insisted upon by the court before issuing a direction under the aforesaid provisions, the provisions are likely to be utilized for harassing the other party instead of helping in proper adjudication of the dispute in the case. ....."*
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> *(emphasis supplied)*

15. In reply, Ms. Swadha UNS, learned counsel for the Respondent, invited my attention to the judgment of the Hon'ble Supreme Court in *K.P. Poulose vs. State of Kerala : AIR 1975 SC 1259*, where it was held that if the arbitrator had recorded inconsistent conclusions and arrived at a decision by ignoring very material documents which throw abundant light on the controversy, it would amount to the arbitrator misconducting himself within the meaning of Section 30(a) of the Arbitration Act, 1940. The relevant portion of paragraph 6 of the judgment at page 1261 reads as under :

> *"6. Under Section 30 (a) of the Arbitration Act an award can be set aside when an Arbitrator has misconducted himself for or the proceedings. Misconduct under Section 30 (a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision. It is in this sense that the Arbitrator has misconducted the proceedings in this case. We have, therefore, no hesitation in setting aside such an award in the result the judgment of the High Court is set aside and that of the Subordinate Judge is restored. ....."*
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> *(emphasis supplied)*

There can be no doubt about the proposition of law laid down by the Hon'ble Supreme Court. However, in my view, the ratio of the above judgment has no application to the facts of the present case. In the first place, I am at the stage of recording evidence. Secondly, the Respondent is not sure as to which documents are relevant and which are not. Thirdly, in respect of the transactions traded by the Respondent on the Claimant's Exchange on 21st June 2013, complete details of all the 91 entries are produced before me on 8th April 2017 in the form of three long sheets which are taken on record and marked Exhibit R-13. Each entry has as many as 22 columns giving minute to minute details of all the 91 transactions traded by the Respondent on 21st June 2013 on the Claimant's Exchange. The Respondent's counsel has exhaustively cross examined CW-1 on this aspect. In the circumstances, I find it futile to direct CW-1 to produce the details of over 20,000 transactions, whether relevant or irrelevant, traded between 29th March 2012 and 26th July 2013 and to delay the proceedings further.

16. In this behalf, it is also necessary to refer to the document produced by CW-1 at Exhibit R-8 while answering question 138 on 8th April 2017. Pages 457 to 462 give the minute details of all the transactions traded by the Respondent with its counterparts on Claimant's Exchange. Respondent is at liberty, if so advised, to cross examine CW-1.

17. Further, Claimant has also contended in paragraph 11 of its Reply that it is not in possession of the alleged bank statements of settlement of accounts of the Respondent's buyers, which are admittedly not the subject matter of dispute before me.

18. In view of the above, no case is made out for directing the production of the documents covered by Serial Nos. I and J in Exhibit "A" of the Respondent's Application. The said prayer is accordingly rejected.

19. Coming to the last Serial No. L in Exhibit "A" of the Respondent's Application, Claimant's Reply in paragraph 13 is that no such document is required to be issued and, therefore, it does not exist. The prayer is also vague. Accordingly, the same is rejected.

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20. It is made clear that the observations made in this Order are limited for the purpose of disposing off the Respondent's Application dated 17th April 2017 under Order XI of the Code of Civil Procedure, 1908 and that there is no expression of opinion on the merits of any of the issues involved in the main proceedings.

21. The Respondent's Application dated 17th April 2017 is accordingly disposed off in terms of this Order. There will be no order as to costs of this Application.

06-05-17

Justice Arvind V. Savant (Retd)
Sole Arbitrator

Mumbai
6th May 2017

Naik Naik & Company, Advocates
Email: ameetnaik@nnico.com; projectn@nnico.com

Shri. S.P. Bharti, Advocate
Email: bharti59@gmail.com

National Spot Exchange Limited
Email: nsellegal@nationalspotexchange.com

NSC Sugars Limited
Email: jagdishbyram@gmail.com; nnr@ncsgroup.in