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

Spin-Cot Textiles Private Limited, ... Respondent

Appearances:

Mr. Chirag Kamdar and 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, representatives ... For the Claimant

Mr. K.R. Koteswara Rao, Advocate with
Mr. K. Anand Kumar, Advocate

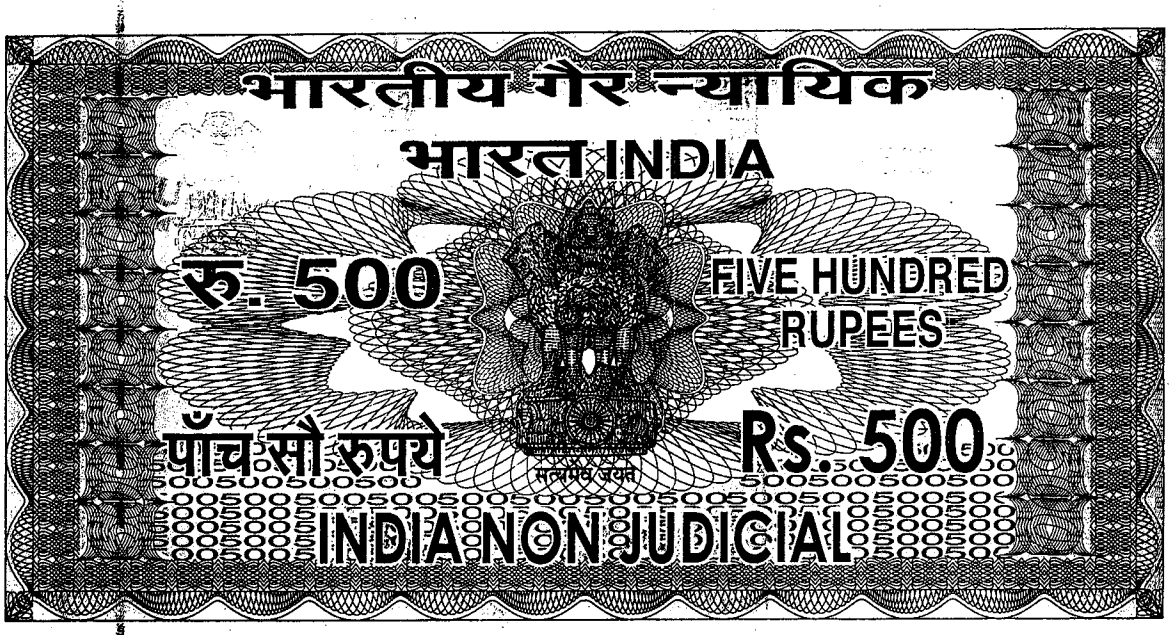
Mr. G. Kameswara Rao ... For the Respondent

AWARD

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

Justice Arvind V. Savant (Retd.)
Sole Arbitrator

Mumbai
26th March 2018



महाराष्ट्र MAHARASHTRA ◐ 2017 ◐ AG 486196

प्रधान मुद्रांक कार्यालय, मुंबई
प.मू.वि.क्र. ८०००२०
13 MAR 2018
सक्षम अधिकारी

BEFORE THE SOLE ARBITRATOR श्री. दि. क. गवई

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

Spin-Cot Textiles Private Limited,)
a Public Limited Company, incorporated under)
the provisions of the Companies Act 1956,)
having its registered office at D.No. 4-5-60/2A,)
Saibaba Road, Guntur 522006, Andhra Pradesh,)
India, and having its warehouse at Marriapalem)
Unnava Mandal, Guntur Dist., Andhra Pradesh,)
India.) ... Respondent

Appearances:

Mr. Chirag Kamdar and 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, representatives ... For the Claimant

Mr. K.R. Koteswara Rao, Advocate with Mr. K. Anand Kumar, Advocate

Mr. G. Kameswara Rao ... For the Respondent

AWARD

[DATE: 26th MARCH 2018]

1. Heard both the learned counsel at length; Mr. Chirag Kamdar for the Claimant and Mr. K.R. Koteswara Rao 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-2, exempting 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.

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. 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, Spin-Cot Textiles Private Limited, is a Private Limited Company incorporated under the Companies Act, 1956, having its registered office at the Guntur (A.P.) address mentioned above. It is a trading-cum-clearing member of the Claimant and has, inter alia, traded on the Claimant's platform in various commodities including cotton, which is the only commodity concerned in the present case, for itself and on behalf of its client, M/s. B.S.P.N. Exports Pvt. Ltd. All trades on the Claimant's platform are required by law to be in respect of delivery of commodities sold and purchased within the time permitted by the Contract.

5. The present proceedings relate to the claim to recover an amount of Rs.36,62,73,411.92 (Rupees Thirty Six Crores Sixty Two Lakhs Seventy Three Thousand Four Hundred Eleven and Paise Ninety Two only), together with interest at the rate of 18% per annum from 9th August 2013 onwards. This claim is only in respect of the unsettled trades viz. the trades where the 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 Merripalem, Mandal, Guntur, Andhra Pradesh. The amount of Rs.36,62,73,411.92 is worked out on the basis of the details mentioned in the ledger at Exhibit C-22, where the Respondent's liability towards the Claimant is worked out as Rs.38,25,86,449.92. This amount is repeatedly admitted by the Respondent to be due from it, as will be discussed later. Out of this admitted liability, Respondent had deposited in the Hon'ble Bombay High Court ("**High Court**") on 20th April 2015, Rs.1,63,13,038/- (Rupees One Crore Sixty Three Lakhs Thirteen Thousand Thirty Eight only); leaving the balance of Rs.36,62,73,411.92, which is the amount claimed. Respondent failed to honour its commitment to pay the said balance amount, leading to the initiation of present proceedings.

6. In view of the pleadings in the Statement of Claim ("**SoC**"), the voluminous documentary and oral evidence on record, Claimant has placed reliance on several admissions made by the Respondent in different letters, Minutes of Meetings, statements before the High Court, which can be summarized as under:

(i) Letter dated 1st August 2013 at Exhibit C-37, in which the Respondent has categorically admitted its liability to pay Rs.42,33,00,000/- (Rupees Forty Two Crores Thirty Three Lakhs only) to the Claimant. Respondent has further agreed

to pay a minimum amount of 5% of its dues every week on Friday, commencing from the next week and settle all its outstanding dues within a period of next 20 weeks. Respondent had also issued post-dated cheques in accordance with the agreed payment schedule and undertook to keep sufficient balance in its bank account and not to issue any stop payment instructions. Admittedly, the cheques were dishonoured;

(ii) Minutes of Meeting at Exhibit C-34, held between the parties on 28th August 2013, where the Respondent has admitted its liability to the tune of Rs.38,06,00,000/- (Rupees Thirty Eight Crores Six Lakhs only) as on the date of the signing of the Minutes and that it had failed to pay the first two weekly instalments of Rs.1,28,00,000/- (Rupees One Crore Twenty Eight Lakhs only) each;

(iii) Minutes of the Meeting at Exhibit C-35, held between the parties on 26th September 2013, where the Respondent has admitted its liability to the tune of Rs.38,00,00,000/-;

(iv) Order dated 22nd November 2013 at Exhibit C-24, passed by the High Court – R.D. Dhanuka J., where in paragraph 3, there is a reference to the categoric admission made by the Advocate for the Respondent of the liability to the tune of Rs.34.29 Crores towards the Claimant;

(v) Emails dated 6th December and 17th December 2013 at Exhibit C-25;

(vi) Minutes of the Meeting at Exhibit C-36, held between the parties on 17th February 2014, where the Respondent admits its liability and there is a reference to the suggestion to settle the matter on One Time Settlement ("**OTS**") basis;

(vii) Statement dated 21st July 2014 at Exhibit C-41, made by RW-1, Mr. Ghanta Kameswara Rao ("**G.K. Rao**"), the Promoter and Managing Director of the Respondent, recorded under Section 50 of the Prevention of Money Laundering Act, 2002, before the Assistant Director, Enforcement Directorate, Mumbai ("**E.D.**"), where there is a clear admission of liability made by RW-1;

(viii) Copy of the Order dated 20th November 2014 at Exhibit C-27, passed by the High Court – S.J. Kathawalla J., which records the admission of RW-1, G.K. Rao who appeared in person; and

(ix) Email dated 28th February 2017 at Exhibit C-45, sent by RW-1, G.K. Rao, which was produced during the course of his cross examination at Q/A 131 and 132.

7. In these facts, the Claimant has prayed for an Award calling upon the Respondent to pay an amount of Rs.36,62,73,411.92 (Rupees Thirty Six Crores Sixty Two Lakhs Seventy Three

Thousand Four Hundred Eleven and Paise Ninety Two only), along with interest at the rate of 18% per annum, or at such rate as the Tribunal deems appropriate from 9th August 2013, upto the date of the Award and for future interest thereafter. There is a further prayer for an Award on the basis of written admissions made by the Respondent, as referred to above, calling upon the Respondent to pay the amounts as above. The SoC dated 22nd October 2015, was filed on 23rd October 2015.

8. Respondent filed its Statement of Defence ("**SoD**") dated 4th January 2016 on 6th January 2016, denying most of the allegations made and contentions raised by the Claimant. Respondent also raised a Counter-Claim for Rs.25,75,00,000/- (Rupees Twenty Five Crores Seventy Five Lakhs only). In respect of the admissions referred to above, Respondent denied the said admissions of liability as under:

(i) In its SoD, in paragraph II(iii), it is contended that the letter dated 1st August 2013 at Exhibit C-37 was obtained from RW-1, G.K. Rao under duress and coercion and hence, was not binding on the Respondent. This plea is sought to be reiterated in paragraph II(ii)(xxiv);

(ii) In respect of the Minutes of the Meeting dated 28th August 2013 at Exhibit C-34, same plea as at (i) above, is taken in paragraph II(iii);

(iii) In respect of the Minutes of the Meeting held on 26th September 2013 at Exhibit C-35, there is no specific plea in the SoD;

(iv) In respect of the Order dated 22nd November 2013 passed by the High Court at Exhibit C-24, it is contended in paragraph II(iv) as under:- *"as the Respondent has not given any consent to make such admission before the Hon'ble High Court and in the subsequent proceedings, contents mentioned in the Order dated 22.11.2013 was denied vehemently"*;

(v) In respect of the emails dated 6th December and 17th December 2013 at Exhibit C-25, there is no specific denial in the SoD;

(vi) In respect of the Minutes of the Meeting held on 17th February 2014 at Exhibit C-36, there is no specific denial in the SoD;

(vii) In respect of Statement of RW-1, G.K. Rao dated 21st July 2014 at Exhibit C-41, before the Assistant Director, E.D., there is no specific denial in the SoD;

(viii) In respect of copy of the Order dated 20th November 2014 at Exhibit C-27, where the High Court has recorded the admission of liability made by RW-1, there is no specific denial by RW-1; and

(ix) In respect of Email dated 28th February 2017 at Exhibit C-45, there is no specific denial in the SoD.

It is, however, clarified that the documents at Sr.No. (vii) and (ix) referred to above, were not annexed to the SoC, but were produced during the course of evidence.

9. I will briefly deal with the relevant portions of the above admissions of liability while answering the Issues. In respect of the deposits made by the Respondent in the arbitration proceedings in the High Court, Respondent has contended that it did not amount to admission of its liability of Rs.36,62,73,411.92 (Rupees Thirty Six Crores Sixty Two Lakhs Seventy Three Thousand Four Hundred Eleven and Paise Ninety Two only) with interest at 18% per annum from 9th August 2013.

10. Both sides have led voluminous documentary evidence. Claimant has examined three witnesses: **(i)** CW-1, Santosh Dhuri who is its Assistant Manager, **(ii)** CW-2, Neeraj Sharma who is its Senior Vice President, Recovery Department, and **(iii)** CW-3, Ashok Patkar, Manager (Agricultural Services), SGS India Pvt. Ltd., which was an agency appointed by the Claimant to visit the warehouses designated by the Claimant at Merripalem, Mandal, Guntur, Andhra Pradesh for verification of the stock of cotton bales, if any, deposited by the Respondent. G.K. Rao, the Promoter and Managing Director of the Respondent has been examined as RW-1.

11. In the fourth meeting of the Arbitral Tribunal held on 4th May 2016, Mr. Koteswara Rao, learned counsel for the Respondent, orally sought leave to raise a specific issue under Section 16 of the Arbitration & Conciliation Act, 1996 (**"the 1996 Act"**) as to the arbitrability of the claims. Accordingly, an Application dated 24th May 2016 was filed by the Respondent on 6th June 2016 to be under sub-section (2) of Section 16 of the 1996 Act. Another Application was filed under sub-section (4) of Section 16 of the 1996 Act. Claimant filed its Joint Reply to both the Applications on 7th June 2016. Upon hearing both the learned counsel, by an Order dated 3rd September 2016, both the Applications were disposed of as withdrawn, since they were not pressed. A copy of the said Order dated 3rd September 2016, is at **Annexure "1"**. Since Annexure "1" is based on the detailed discussion and reasoning in the Order dated 4th May 2016 rejecting the similar contentions raised in a separate proceedings between the Claimant and NCS Sugars Limited, a copy of the Order dated 4th May 2016 is at **Annexure "2"**. Both these Annexures will form part of this Award.

12. Upon hearing both the learned counsel, by consent, Issues / Points for Determination were framed on 3rd September 2016. However, there were some typographical errors which were corrected upon hearing both the learned counsel, on 9th March 2018. The Issues so corrected are as under:

Issues arising out of the SoC:

(i) Whether the Claimant proves that the claims are within the period of limitation?

(ii) Whether the Claimant proves that the disputed transactions, which are the subject matter of the present arbitration, are in conformity with Notification No. SO No. 906(F) dated 5th June 2007, issued by the Ministry of Consumer Affairs, Food & Public Distribution, Government of India?

(iii) Whether the Respondent proves that the Claimant is not entitled to claim any amount from the Respondent, as a result of either fraud or mischief played by the Claimant, as pleaded in paragraphs I (xvii) and (xxviii) of its Reply at pages 10 and 14, in respect of the transactions entered into by the Respondent with a member of the Claimant?

(iv) Whether the Claimant proves that: **(a)** the letter dated 1st August 2013 at Exhibit "O", pages 175 and 176 of the SoC; **(b)** the Minutes of the Meetings held on: **(i)** 28th August 2013 (pages 176A and 176B of the SoC), **(ii)** 26th September 2013 (pages 176C and 176D of the SoC), and **(iii)** 17th February 2014 (pages 176E and 176F of the SoC); **(c)** the Order dated 22nd November 2013 passed by the Hon'ble Bombay High Court in Arbitration Petition (L) No. 1708 of 2013, constitute an admission of its liability on the part of the Respondent?

(v) If the answer to Issue No. (iv) is in the affirmative, whether the Claimant is entitled to an Award on admission for an amount of Rs.36,62,73,411.92Ps., along with interest thereon, at the rate of 18% per annum, from 9th August 2013 till the date of the Award?

(vi) Whether the Claimant proves that the Respondent is liable to pay to it, Rs.36,62,73,411.92Ps. along with interest thereon, at the rate of 18% per annum from 9th August 2013, till the date of the Award?

(vii) Whether the Respondent proves that it had deposited the cotton bales in its warehouses before executing the disputed transactions on the Claimant's platform?

(viii) Whether the Claimant is entitled to claim any amount from the Respondent, in view of the fact that the transactions were admittedly between the Respondent and another trading member of the Claimant and that there were no direct transactions between the Claimant and the Respondent?

(ix) What award, if any, is the Claimant entitled to, including the question as to interest and costs?

It is clarified that in view of Procedural Order (**"P.O."**) dated 1st March 2018, the proceedings in respect of the Respondent's

Counter Claim already stand terminated and the Counter Claim is struck off. This fact is reiterated at the end of paragraph 3 of P.O. dated 9th March 2018. Hence, what survives for my consideration is only the SoC.

13. Before answering the Issues, it is necessary to refer to the relevant definitions / provisions in the Bye-Laws and Rules of the Claimant. 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 1996 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."*

14. <u>The relevant definitions/provisions in the Rules are as under</u>:

"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*.

15. 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 cotton in bulk. It is clear from the pleadings and evidence that the trades entered by the Respondent on the Claimant's platform two kinds,: (a) T+2 Contract, as per the details at Exhibit C-8 and (b) T+25 Contract, as per the details at Exhibit C-9, for purchase and sale of cotton. 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 4th February

2013 are to be found at Exhibit C-8, and those of the T+25 delivery contracts launched for trading on 4th February 2013 are to be found at Exhibit C-9.

16. 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 / cotton, 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.

17. In the light of the above, I proceed to answer the Issues as under: **Issue No. (i): Whether the Claimant proves that the claims are within the period of limitation?** As per paragraph 9 of the SoC, Respondent's liability in respect of the trades carried out by it on the Claimant's platform arose after 2nd February 2013, when the Claimant issued the Circulars at Exhibits C-8 and C-9, both dated 2nd February 2013, permitting trading in cotton bales. Respondent has first admitted this liability, as stated in the letter dated 1st August 2013 at Exhibit C-37 (item (i) in paragraph 5 above) and the admissions of liability continued till 28th February 2017 (item (ix) in paragraph 5 above). As stated earlier, the SoC was filed on 23rd October 2015.

18. On the point of bar of limitation, Respondent has contended in paragraph II (xxxviii) of the SoD that:

> *"Further, even as per their own Bye-Laws, the dispute has to be referred within six months from the date of payment. But in the instant case, dispute was referred to the Tribunal after a lapse of two years. Therefore, the Claim is barred by Limitation."*

Further, in paragraph II(xxxix) of the SoD, it is contended as under:

> *"(xxxix) In reply to Para-9 of the Claim Statement on Limitation, as submitted above, the transactions are pertaining to the February – March, 2013, whereas the Agreement between the Claimant and Respondent was entered on 06.06.2013 (Exhibit-I). On 26.06.2013 and in fact*

pursuant to the said contract agreement, no transactions were taking place. Therefore, the dispute before Hon'ble Tribunal cannot be adjudicated upon as the dispute is pertaining to prior to the contract period. Further, even as per the Bye Laws of the Claimant, the period to refer the dispute is six months from the date of occurrence of the trade or payment. In the instant case, the dispute was referred to this Hon'ble Tribunal after lapse of two years. Therefore, the dispute is hopelessly barred and by limitation, hence Claimant is not entitled for any claim as prayed for."

19. In this behalf, it is relevant to refer to the provisions of sub-section (1) of Section 43 of the 1996 Act which states that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court. Further, sub-section (2) makes it clear that for the purposes of Section 43 and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred in Section 21. Turning to Section 21, it reads as under:

> *"**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."*

20. Bearing in mind the above legal position, it is necessary to refer to the correspondence between the parties regarding *"Commencement of arbitral proceedings"*, to which my attention was invited by Mr. Chirag Kamdar, learned counsel for the Claimant. It consists of four letters as under: **(i)** letter dated 7th

February 2015 from Naik Naik & Co., Advocates for the Claimant, addressed to the Respondent, pursuant to the Order dated 22nd November 2013 passed by the High Court – Coram: R.D. Dhanuka J., — informing the Respondent that the Claimant was appointing me as the Sole Arbitrator; **(ii)** letter dated 6th March 2015 from Mr. K.R. Koteswara Rao, Advocate for the Respondent, in reply to the above letter, objecting to my nomination as the Sole Arbitrator; **(iii)** letter dated 5th September 2015 from Naik Naik & Co. to Mr. K.R. Koteswara Rao, inviting his attention to **(a)** Clause 11.11 of the Undertaking for Internet Based Trading dated 12th January 2013 at Exhibit C-7, and **(b)** Clause 6.3 of the Agreement dated 26th June 2013 between the parties at Exhibit C-11, under which the Claimant alone had the authority to nominate the Sole Arbitrator; and **(iv)** letter dated 15th September 2015 from Naik Naik & Co. informing me of my nomination as the Sole Arbitrator in terms of the above referred clauses. It is clear from these four letters that the commencement of arbitration proceedings is well within the statutory period of three years for raising a money claim. Even the filing of the SoC on 23rd October 2015, is well within the period of three years from the first written admission of its liability by the Respondent on 1st August 2013 as per Exhibit C-37.

21. Though the Respondent has not pointed out in its SoD as to how the *"Commencement of arbitral proceedings"* was barred by the law of limitation, Mr. Koteswara Rao, learned counsel for the

Respondent, tried to rely upon the provisions of Bye-Law 15.4 of the Bye-Laws. A perusal of Bye-Law 15 dealing with *"ARBITRATION"* shows that it relates to the in-house arbitration mechanism provided by the Claimant. Bye-Law 15.1 defines certain terms in respect of the said mechanism. Bye-Law 15.2 provides that the Bye-Laws and Regulations of the Claimant relating to arbitration shall be consistent with the provisions of the 1996 Act. Bye-Law 15.3 mandates the Relevant Authority of the Claimant to constitute a panel of not less than 10 arbitrators, at least 50% of whom shall be drawn with professionals conversant with the trading at a commodity exchange and its Bye-Laws, Rules, etc. all having expertise in such areas like law or commodity economics, finance, commodity services and appraisals, commodity physical trade, etc. Further, it requires that at least 25% of such members of the panel shall be surveyors of the Exchange who shall adjudicate any dispute relating to quality. Bye-Law 15.4 deals with *"Reference to Arbitration"* and it is in respect of such a reference to the in-house arbitration of the Claimant, that there is a limitation of the period of six months under Bye-Law 15.11 dealing with *"Limitation Period for Reference to Arbitration"*. There are further sub-Bye-Laws of Bye-Law 15 which make it clear that the entire scheme of Bye-Law 15 is for the in-house arbitration mechanism provided by the Claimant. For instance, 15.13 provides for procedure for appointment of arbitrators, 15.20 provides for place of arbitration to be the office of the Claimant; 15.22 imposes a

complete bar on appearance through lawyer under the heading *"Appearance by Counsel, Attorney or Advocate not permitted"*. There are other elaborate provisions which leave no manner of doubt whatsoever that Bye-Law 15 applies to the in-house arbitration mechanism provided by the Claimant and not to the present arbitration under the 1996 Act, where the question of limitation has to be decided on an interpretation of the provisions of Section 43 read with Section 21 of the 1996 Act, in the light of the provisions of the Indian Limitation Act, 1963.

22. Mr. Chirag Kamdar has also invited my attention to the judgment of the Hon'ble Supreme Court in *Union of India & Anr. Vs. Indusind Bank Limited & Anr. : (2016) 9 SCC 720*, paragraph 18 at page 731, which reads as under:

> *"18. What emerges on a reading of the Law Commission Report together with the Statement of Objects and Reasons for the Amendment is that the Amendment does not purport to be either declaratory or clarificatory. It seeks to bring about a substantive change in the law by stating, for the first time, that even where an agreement extinguishes the rights or discharges the liability of any party to an agreement, so as to restrict such party from enforcing his rights on the expiry of a specified period, such agreement would become void to that extent. The amendment therefore seeks to set aside the distinction made in the case law up to date between agreements which limit the time within which remedies can be availed and agreements which do away with the right altogether in so limiting the time. These are*

obviously substantive changes in the law which are remedial in nature and cannot have retrospective effect."

(emphasis supplied)

Relying upon the above ratio, Mr. Kamdar contended that even if the Bye-Laws of the Claimant were to restrict the statutory period of limitation under the Limitation Act, 1963, to that extent, the agreement between the parties viz. the Bye-Laws, would be hit by the provisions of Section 28 of the Contract Act. I find merit in the counsel's submission. However, in the view that I have taken of the in-house arbitration mechanism provided by the Claimant, it is not necessary for me to elaborate this aspect.

23. In view of the above, there is no substance in the feeble plea of bar of limitation raised by the Respondent, which is wholly misconceived. Accordingly, I answer Issue No. (i) in the affirmative viz. that the claims are within the period of limitation.

24. Issue Nos. (ii) to (viii) are connected and the pleadings and evidence in respect of these Issues is overlapping. Hence, with a view to avoiding repetition, they are discussed together as under:

Issue No. (ii): Whether the Claimant proves that the disputed transactions, which are the subject matter of the present arbitration, are in conformity with Notification No. SO No. 906(F) dated 5th June 2007, issued by the Ministry of Consumer Affairs, Food & Public Distribution, Government of India?

Issue No. (iii): Whether the Respondent proves that the Claimant is not entitled to claim any amount from the Respondent, as a result of either fraud or mischief played by the Claimant, as pleaded in paragraphs I (xvii) and (xxviii) of its Reply at pages 10 and 14, in respect of the transactions entered into by the Respondent with a member of the Claimant?

Issue No. (iv): Whether the Claimant proves that: (a) the letter dated 1st August 2013 at Exhibit "O", pages 175 and 176 of the SoC; (b) the Minutes of the Meetings held on: (i) 28th August 2013 (pages 176A and 176B of the SoC), (ii) 26th September 2013 (pages 176C and 176D of the SoC), and (iii) 17th February 2014 (pages 176E and 176F of the SoC); (c) the Order dated 22nd November 2013 passed by the Hon'ble Bombay High Court in Arbitration Petition (L) No. 1708 of 2013, constitute an admission of its liability on the part of the Respondent?

Issue No. (v): If the answer to Issue No. (iv) is in the affirmative, whether the Claimant is entitled to an Award on admission for an amount of Rs.36,62,73,411.92Ps., along with interest thereon, at the rate of 18% per annum, from 9th August 2013 till the date of the Award?

Issue No. (vi): Whether the Claimant proves that the Respondent is liable to pay to it, Rs.36,62,73,411.92Ps. along with interest thereon, at the rate of 18% per annum from 9th August 2013, till the date of the Award?

Issue No. (vii): Whether the Respondent proves that it had deposited the cotton bales in its warehouses before executing the disputed transactions on the Claimant's platform?

Issue No. (viii): Whether the Claimant is entitled to claim any amount from the Respondent, in view of the fact that the transactions were admittedly between the Respondent and another trading member of the Claimant and that there were no direct transactions between the Claimant and the Respondent?

25. Having regard to the several written admissions made by the Respondent, as referred to in paragraphs 6 and 8 above, I will answer these Issues in two parts. Part A will deal with the written admissions made by the Respondent and Part B will deal with the other evidence on record.

26. **Part A – Findings on Issue Nos. (ii) to (vii) based on the written admissions of liability ("admission") made by the Respondent.**

27. The first admission is contained in the letter dated 1st August 2013 at Exhibit C-37. This letter addressed to the Claimant is on the printed letterhead of the Respondent. The opening portion, along with the three paragraphs, reads as under:

> *"August 1, 2013*
> *The National Spot Exchange Limited,*
> *Suren Road,*
> *Andheri East,*
> *Mumbai.*
>
> *Sub: Settlement of our outstanding dues against Exchange settlement obligations pursuant to suspension of trading announced by the Exchange*
>
> *Dear Sir,*
> *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. 42.33Crores.*
>
> *3. We hereby agree to pay a minimum amount of 5 % of our dues every week on Friday commencing from 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.*
>
> *xxx"*

(emphasis supplied)

The vague and bald contention of RW-1 as to the alleged duress and coercion, under which he signed Exhibit C-37, is not supported by any convincing material corroborating it. In the first place, the plea of duress and coercion does not satisfy the requirements of the principle underlying the provisions of Order VI Rule 4 of the Code of Civil Procedure, 1908 which reads as under:

> *"**O.VI PLEADINGS GENERALLY***
>
> *3. **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. ..."*

Secondly, in his oral evidence, RW-1 has clearly admitted that he has no evidence of the alleged duress or coercion. This will be evident from the following Question and Answer ("Q/A"):

> *"Q. 121 I put it to you that you have at various places in your affidavit of evidence including paragraphs 5, 7 and 31(iii) alleged that you were coerced or compelled under duress to sign several documents. However, you have not given any details in your affidavit nor produced any evidence nor material particulars nor produced any letter of complaint or police complaint as regards the alleged duress and coercion or compulsion.*
>
> *Ans.* *I do not have such evidence, but I was compelled to sign.*
>
> *Q. 149. Can you tell us what steps did you take after signing this letter in relation to your allegation of*

threat, coercion and/or force having been applied on you for that purpose?

Ans. *There was no time to take any further steps in this regard because all government agencies like income tax raid, EOW raid and ED raid took place continuously attending and now also I am attending every week in Mumbai meetings either in EOW or NSEL.*

In view of the above documentary and oral evidence, I have no hesitation in rejecting the plea of alleged duress and coercion. Accordingly, the said plea is rejected and Exhibit C-37 is held to be a clinching document executed by the Respondent unequivocally admitting its liability to pay in instalments, so as to pay the entire amount before 20 weeks from 1st August 2013.

28. The second admission is contained in Exhibit C-34, which is the Minutes of the Meeting held on 28th August 2013. The meeting was held at the Claimant's office at Mumbai where, on behalf of the Respondent, RW-1 himself had attended and has signed the minutes. Further, Mr. Purushottam Naidu ("**Naidu**"), Promoter and Managing Director of M/s. B.S.P.N. Exports Pvt. Ltd., which Company was the Respondent Client in respect of all the unsettled cotton trades and was the Respondent's alleged financer from Hyderabad, who had allegedly offered to deposit Rs.20 Crores in the Respondent's account to help it tide over its financial crisis, was also present and has signed the Minutes. Another representative of the Respondent, Mr. K. Ravichandra was also present and has

signed the Minutes at Exhibit C-34. The first two items and the sixth item of the Minutes may be reproduced as under:

"DISCUSSION

1. Total outstanding dues from Spincot is Rs. 38.06 Cr as on date and they have not paid their first two weekly payins. Spincot's weekly payment schedule is for Rs. 1.28 Cr.

2. Spincot has taken bank loan of Rs. 53 Cr from IOB & PNB and total value of the mill along with the land is estimated to be around Rs. 108 Cr.

3. xxx

4. xxx

5. xxx

6. Spincot does not have any commodities to be given to NSEL."

Respondent's defence in respect of Exhibit C-37 is the same as in respect of the letter Exhibit C-34 viz. alleged duress and coercion. It is relevant to note that regarding the plea of alleged duress and coercion practiced upon RW-1, he has not whispered any grievance to anyone, much less has he lodged any First Information Report to the Police or filed any Complaint to any Magistrate or at least to the Forward Markets Commission established under Section 3 of the Forward Markets Regulations Act, 1952. Further, there is nothing stated as to who practiced the alleged duress and coercion on him and how and where was it

practiced. Hence, the plea is rejected and Exhibit C-34 is held to be valid and a binding admission of liability.

29. The third admission is contained in the Minutes of the Meeting at Exhibit C-35, held on 26th September 2013. This meeting between the parties were also attended by RW-1, G.K. Rao. Under the head "DISCUSSIONS", item 1, 2 and 5 read as under:

> *"1. Mr. Kameshwara Rao submitted that the amount of Rs.38 crores approx., which had been outstanding in the name of M/s. Spin-Cot Textiles Pvt. Limited in the books of NSEL had been utilized by him in paying to his bankers for reducing the liabilities of the company.*
>
> *2. Mr Kameshwara Rao informed that certain investors of NSEL are interested in clearing the default amounts outstanding in the name of M/s. Spin-Cot Textiles Pvt Ltd.*
>
> *3. xxx*
>
> *4. xxx*
>
> *5. He also informed that simultaneously, he is working on disposing off the assets including Land & Machinery, for which he agreed to submit the advertisement to NSEL before getting it published in the National Dailies."*

In respect of Exhibit C-35, there is neither any specific plea taken in the SoD nor has RW-1 satisfactorily explained it in his evidence.

30. The fourth admission is contained in the Order dated 22nd November 2013 at Exhibit C-24, passed by the High Court – R.D. Dhanuka J. — Paragraphs 3 and 4 of the said Order read as under:

> *"3. The learned counsel appearing on behalf of respondents, on instructions, states that the respondent admits the liability of the petitioner to the extent of Rs.34.29 Crores. The learned counsel states that in so far as assets described at Sr. No. I to V and VIII of Exh. Z are concerned, the respondents have no objection if second charge in respect of these properties is created in favour of the petitioner. It is further stated that the respondents would deposit sum of RS. 50 lacs, in this court every month till the disposal of the arbitration proceedings, the first of such installment shall commence on 10th December, 2013 and the remaining installments shall be paid on or before 10th of each succeeding month.*
>
> *4. The learned counsel appearing for the respondents on instructions undertakes to create second charge in respect of the properties described aforesaid in favour of the petitioner within two weeks from today."*
>
> (emphasis supplied)

Surprisingly, in respect of the statement solemnly made by the Respondent's Advocate, it is contended in paragraph II(iv) of the SoD as under: *"as the Respondent has not given any consent to make such admission before the High Court and in the subsequent proceedings, contents mentioned in the Order dated 22.11.2013 was denied vehemently"*. The learned Judge has in paragraphs 3 and 4 specifically referred to the fact that the learned

counsel appearing for the Respondent had, on instructions, made the said statements. Further, in reply to Q.130, RW-1 has stated as under:

> ***"Shown Exhibit C-27 at page 557-558 of Vol. II of the affidavit of documents tendered by CW-1.***
>
> *Q. 130 By the time you appeared on 20th November 2014, i.e. one year after the Order was passed at Exhibit C-24, were you aware that your Advocate, Mr. Naveen Chomal had, on instructions, admitted the liability of the Respondent to the Claimant to the extent of Rs.34.29 Crores and had also offered to deposit a sum of Rs.50 Lakhs every month in Court towards this admitted liability?*
>
> *Ans. Yes, I was aware as per my earlier Advocate, Mr. Naveen Chomal's instructions after November 2013 Order and to honour the High Court's Order, we had paid three installments through our Advocate. But it does not mean that the Respondent had admitted its liability to pay to the Claimant and the same was represented before the Three-Member-Committee appointed by the High Court by the Respondent's present Advocate, Mr. K.R. Koteswara Rao."*
>
> (emphasis supplied)

It is interesting to note that Mr. Naveen Chomal, the Advocate for the Respondent, had appeared before the Hon'ble High Court on 22nd November 2013. Though Respondent has now tried to disown the said statement made by its Advocate, even on the subsequent document viz. Exhibit C-36 dated 17th February

2014, the same Advocate, Mr. Naveen Chomal, has signed along with RW-1 himself admitting the liability. What is still worse for the Respondent is even in respect of the contents of paragraph 12 of his Affidavit of Evidence dated 22nd November 2016, RW-1 has stated in reply to Q.17 that he had stated the same on Mr. Chomal's advice. Q/A 17 reads as under:

> *"Q. 17 Can you answer question 16 now?*
>
> *Ans. Yes, I can today answer upto paragraph 30. The contents of paragraphs 1 to 5 and 8 to 11, 14, 16, 19, 22, 23, 24, 25, 26, 28, 29 and 30 are based on my personal knowledge. The contents of paragraphs 6, 7 and 13 are based on the records available from Shri B.P. Naidu's office. He is the M.D. of M/s. BSPN Exports Pvt. Ltd., which is a client of the Respondent. The contents of paragraph 12 are based on the information / advice given to me by my Advocate, Mr. Naveen Chomal. The contents of paragraphs 15, 17 and 27 are based on the records pertaining to the investigation carried on by EOW. The contents of paragraphs 18 and 20 are based on the documents downloaded from the internet. The contents of paragraph 21 are based partially on the records obtained from Shri B.P. Naidu's office and rest of the contents are on my personal knowledge.*
>
> (emphasis supplied)

Paragraph 12 of the Affidavit of Evidence of RW-1 relates to the proceeding before the High Court on 22nd November 2013, where the above quoted statement of Mr. Naveen Chomal was

recorded by the High Court. In view of the above, it is not only impermissible but it is shocking on the part of the Respondent to now contend that it had not given any such instructions. Respondent's contention is rejected as thoroughly baseless and the admissions contained in the Exhibit C-24 are held to be valid and binding on it.

31. The fifth admission is contained in the email dated 17th December 2013 sent by the Respondent in reply to the Claimant's email dated 6th December 2013, regarding which there is no explanation by the Respondent. Both the emails form part of Exhibit C-25. On the contrary, in reply to Q.113 and Q.114, RW-1 has clearly admitted as under:

> ***"Shown Exhibit C-25, email dated 17th December 2013 at page 432 of Vol. II of the affidavit of documents tendered by CW-1.***
>
> *Q. 113 Was this email addressed to you and your Advocate by the Claimant?*
>
> *Ans. Yes.*
>
> *Q. 114 Is the email address 'cmd@spincotindia.com' yours?*
>
> *Ans. Yes, it was email address upto 2013."*

In view of the above, this admission is valid and binding on the Respondent.

32. The sixth admission is contained in Exhibit C-36 viz. the Minutes of the Meeting held between the parties on 17th February

2014, where the Respondent not only admits its liability but also suggests an OTS for Rs.15 Crores. These Minutes are signed not only by RW-1 but also by the Respondent's Advocate, Mr. Naveen Chomal, who has made the statement before the High Court as recorded in Exhibit C-24 (item (iv) above). Both RW-1 and Mr. Chomal were present at the said meeting. Hence, this admission is valid and binding on the Respondent.

33. The seventh admission is contained in Statement dated 21st July 2014 at Exhibit C-41, made by RW-1, G.K. Rao, the Promoter and Managing Director of the Respondent, recorded under Section 50 of the Prevention of Money Laundering Act, 2002, before the Assistant Director, Enforcement Directorate, Mumbai, where there is a clear admission made by RW-1 that it had traded with the Claimant and had received funds from it. In reply to Q.1 in Exhibit C-41, RW-1 has stated as under:

> *"Q1. Please explain the month-wise receipts and the utilization of the NSEL funds received by M/s. Spincot Textiles Pvt Ltd.*
>
> *A1. I have to state that from the period of February 2013 to July 2013, M/s. Spincot Textiles Pvt Ltd had received funds to the tune of Rs. 133.95 Crores for the T+2 transactions undertaken on the exchange. Funds to the tune of Rs. 96.46 Crores were repaid back to NSEL towards the T+25 transactions undertaken by us. In effect, the net amounts received by us was to the tune of approx. Rs. 37.48 Crores. For the trades conducted by us on the NSEL*

exchange, we had deposited margin money from time to time. In July 2013, such margin money amounted to Rs. 3.75 Crores which was held back by NSEL and later adjusted against our pending dues. As such the net funds received by M/s Spincot Textiles Pvt. Ltd. was Rs. 33.74 Crores. The funds were utilized in the following manner:

Sr.No.	Utilization	Amount
1.	Bank Loan repayment to Indian Overseas Bank	Rs. 11,09,50,000/-
2.	Bank Loan repayment to Punjab National Bank	Rs. 8,47,75,000/-
3.	Paid to Swagruha Group	Rs. 92,50,000/-
4.	Utilized for working capital	Rs. 12,42,90,423/-

I am submitting herewith a chart detailing the month-wise receipt, debit and net receipts of funds from NSEL and the utilization of the said funds. I have put my dated signature on the said document in token of my submitting the same."

In respect of this document at Exhibit C-41, RW-1 has only stated that he was not aware of the said commodity trades. Q/A 112 reads as under:

"Q. 112 I put it to you that you were always aware that commodity trades were executed on the Claimant's platform and that the Respondent had received monies for the same.

Ans. No, I am not aware of the said commodity trades."

There is no substance in the Respondent's denial and I hold that the admissions contained in Exhibit C-41 are valid and binding.

34. The eighth admission is contained in Exhibit C-27 viz. copy of the Order dated 20th November 2014, passed by the High Court – S.J. Kathawalla J., which records the admission of RW-1, G.K. Rao. This is another clinching circumstance where RW-1 who is the Promoter and Managing Director of the Respondent was himself present in the Court and made the statement in paragraph 1 of the Order as under:

> *"CORAM: S.J. KATHAWALLA, J.*
> *DATE: 20TH NOVEMBER, 2014*
>
> *P.C.:*
>
> *1. Mr. G. Kameswara Rao, the Managing Director of the Respondent is present. He states that pursuant to the order dated 22nd November, 2013 Respondent has no objection if the amount of Rs. 2 Crore is handed over to the Petitioner (NSEL) with interest accrued thereon to be deposited in the Escrow account maintained by the Petitioner. The statement is accepted."*
>
> (emphasis supplied)

In view of the above, I find the admission to be completely binding on the Respondent.

35. The ninth admission is contained in Exhibit C-45 viz. email dated 28th February 2017, sent by RW-1, G.K. Rao, which was produced during the course of his cross examination at Q/A 131 and 132. In respect of Exhibit C-45, the relevant Q/A 131 and 132 are as under:

"Per Tribunal:

At this stage, Mr. Chirag Kamdar, learned counsel for the Claimant, seeks permission to produce a copy of the email dated 28th February 2017 sent by Mr. G. Kameswara Rao, the Respondent's CMD to the Claimant's recovery team.

Upon taking instructions from Mr. G. Kameswara Rao, Mr. Anand Kumar, learned counsel for the Respondent, says that he has no objection to the document being exhibited.

Accordingly, the same is taken on record and marked as Exhibit "C-45" (colly).

Shown Exhibit C-45 (colly).

Q. 131 Was this email sent by you?

Ans. Yes.

Q. 132 Can you say why you have once again admitted your liability, this time to the extent of Rs.10 Crores, even after the present arbitration proceedings were filed, if in fact, no amounts are payable by the Respondent to the Claimant?

Ans. Yes, I had sent this email to explain the status of the valuation of the fixed assets of the Respondent deteriorating day by day because of the litigation filed by the Claimant and related parties in various Government agencies and distressed valuation of the Respondent has come down by Rs.25 Crores in 2017 from Rs.88 Crores in 2013. In that matter, I proposed some sort of compromise from the banks if all the litigations have been lifted from the Claimant, so that if any amount is available after

the first charge holder having Rs.56 Crores liability as on 11th November 2014, we can offer to the Claimant because of this litigation we are facing due to cheating by Shri B.P. Naidu and it does not mean that the Respondent is agreeing for the liability of the Claimant."

(emphasis supplied)

36. **Conclusion of the discussion in Part "A":** In view of this clinching evidence in the form of 9 documents, 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.36,62,73,411.92 (Rupees Thirty Six Crores Sixty Two Lakhs Seventy Three Thousand Four Hundred Eleven and Paise Ninety Two only) towards its liability, I answer Issue Nos. (ii), (iv), (v), (vi) and (viii) in the affirmative 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.36,62,73,411.92 (Rupees Thirty Six Crores Sixty Two Lakhs Seventy Three Thousand Four Hundred Eleven and Paise Ninety Two only) claimed in Issue Nos. (v) and (vi) concerned, the same will be discussed while answering Issue No. (ix). Further, the finding on Issue No. (iii) regarding the Respondent's allegation of alleged fraud or mischief played by the Claimant is in the negative and against the Respondent. Similarly, the finding on Issue No. (vii) regarding the deposit of cotton bales

by the Respondent in its warehouse is in the negative and against the Respondent.

37. **Part B:** Other documentary and oral evidence: Without prejudice to and independent of the above findings on Issue Nos. (ii) to (ix), I will now discuss the other documentary and oral evidence relating to the Issue Nos. (ii) to (viii) as under:

38. The Respondent has submitted an Application dated 12th January 2013 at Exhibit C-6 for becoming a Trading-cum-Clearing Member of the Claimant, which Application contains Undertakings to be bound by the Bye-laws of the Claimant. A separate Undertaking has been executed by the Respondent on the same date, 12th January 2013, which is at Exhibit C-7. The relevant Q/A in the deposition of RW-1 are Q/A 44 to 48, which are reproduced below:

> *"(Shown Exhibit 'C-4' at page 153 of Vol.I of the Affidavit of Documents of CW-1 and particularly the opening paragraph after the words 'Dear Sir' reading 'I am/we are desirous of ... reserve all rights of disciplinary action for any non-compliance by me/us').*
>
> *Q. 44* *In view of the above, did you not think it necessary to ask for a copy of the Memorandum and Articles of Association, as well as the Rules, Bye-Laws and Regulations of the Claimant at the time of signing this document at Exhibit 'C-4'?*
>
> *Ans.* *No. First of all, no person had come to me to take my signature on the said document at Exhibit 'C-4'*

and it was the signature taken by Mr. B.P. Naidu along with my Axis Bank Current Account Opening Form. Moreover the Respondent being declared NPA in October 2012 and during that crisis, one investor viz. Shri B.P. Naidu came to me with proposal to invest Rs.20-25 crores. Naturally, that time we never enquired about the credibility of such an investor and signed whatever documents he wanted us to sign to bail out our NPA problem.

Q. 45 *Is it the regular practice of the Respondent to sign documents without verifying the contents of the document or without verifying the credibility of the persons asking for those documents to be signed?*

Ans. *No. But, generally it is not possible to verify all the papers when an investor approaches you or even when you approach a bank for a car loan or for housing loan.*

(Shown Q/A. 44 particularly the portion reading 'Naturally, that time we never enquired about the credibility of such an investor and signed whatever documents he wanted us to sign to bail out our NPA problem').

Q. 46 *Would your answer to Q.44 also apply to the documents at Exhibits 'C-6' at pages 160 to 166 of Vol.I, 'C-7' at pages 167 to 183 of Vol.I, 'C-10' at pages 204-210 of Vol.I and 'C-11' at pages 208 to 215 of Vol.I?*

Ans. *Yes. Shri B.P. Naidu had already promised us to invest a sum of Rs.20-25 crores in the Respondent and also attended the consortium meetings with the banks in November 2012 and signed the Minutes of the Meetings before I signed these*

papers viz. Exhibits 'C-4', 'C-6', 'C-7', 'C-10' and 'C-11' in December 2012/January 2013.

Q. 47 *Did you read the said documents, viz. Exhibits 'C-4', 'C-6', 'C-7', 'C-10' and 'C-11' before signing the same?*

Ans. *No. I signed them since I had full confidence on Shri B.P. Naidu because he had also committed with our bankers.*

Q. 48 *When did you realize that the documents at Exhibits 'C-4', 'C-6' and 'C-7' were executed by the Respondent for the purpose of becoming a member of the Claimant?*

Ans. *I realized it when the Claimant filed Arbitration Petition (L) No.1708 of 2013 in the Bombay High Court in October/ November 2013."*

39. The Respondent has executed on 12th January 2013, Exhibit C-7, the Undertaking for Internet Based Trading (known as "**Terms**") on a non-judicial stamp paper of Rs.300/- in which Clauses 11.7 and 11.8 show that the Respondent is clearly bound by the Bye-laws and Rules of the Claimant.

40. From the oral and documentary evidence on record, it is clear that the Respondent had represented to the Claimant that it had sufficient stock of goods – Cotton Bales – in its godown at Marripalem, Mandal Guntur, Andhra Pradesh. However, when the Inspecting Agency appointed by the Claimant, viz., SGS India Pvt. Ltd., carried out the inspection on 19th August 2013, the goods

were not sufficient to meet the commitments made by the Respondent to the Claimant. In this behalf, it is relevant to note Q/A 30, 75, 124 and 125 in the evidence of RW-1 which reads as under:

"Q. 30 *Can you name the Supervisor(s) in charge of the godown between the period January to December 2013?*

Ans. *I will check and revert.*

Q. 75 *Can you answer question 30 today?*

Ans. *Yes. Mr. B. Ramaiah was our godown in charge at that particular time and now nobody is there in our factory premises since last three years because the entire operations were stopped due to litigations with the Claimant and bankers.*

Q. 124 *I put it to you that this site report as also the report submitted by SGS India Pvt. Ltd. at Exhibit C-31 clearly demonstrates that there was insufficient stock of commodities of the specified quality in the godown of the Respondent at the time when the respective inspections were carried out.*

Ans. *Yes, it is the report of November 2013. There was a four months' gap between collapse of the Claimant's platform in July 2013 and the site report.*

Q. 125 *I put it to you that it was because there was no available stock of commodities of the specified quality in the godown of the Respondent, through*

you, the Respondent has made repeated admissions of its liability towards the Claimant for the outstanding commodity trades executed on the Claimant's platform and has also made repeated offers to repay the amounts outstanding in installments.

Ans. *No, I deny your suggestion. Respondent had sufficient stocks upto July 2013. The Respondent has provided the evidence as Exhibit R-24. Thereafter, the remaining stocks were taken back by the creditors who had supplied to the Respondent due to the collapse of the Claimant's platform and legal cases were filed on the Respondent as well as against the Claimant and this was published in all the newspapers and on the news channels in the entire country."*

41. In this behalf, it is also relevant to note that the Court Receiver appointed by the High Court in Suit (L) No. 927 of 2013 with Notice of Motion (L) No. 2052 of 2013, between MMTC Ltd. as the Plaintiff and the Claimant and others as the Defendants had visited the said godown at Merripalem, Mandal, Guntur, Andhra Pradesh on 6th November 2013, The visit was for making an inventory of the stock of cotton bales available, RW-1, G.K. Rao was present and has signed below the hand written inventory at 1.50 p.m. on 6th November 2013. The inventory shows that the stock available in the godown was not at all sufficient to meet the commitments of the Respondent to honour its trades with the Claimant.

42. It is of further significance to note that from some of the documents annexed by the Respondent to its SoD, it is clear that all the properties of the Respondent were either mortgaged or hypothecated to the consortium of the two Banks – Indian Overseas Bank, Chandramauli Nagar Branch, Guntur, (A.P.), or the Punjab National Bank, Station Road Branch, Guntur, (A.P.). The month-wise stock statements at Exhibit R-24 produced by the Respondent along with its SoD clearly show that, not only all the immovable properties were mortgaged, but also the goods in the godown were hypothecated with the said two banks. Hence, the same could not have been available to the Respondent to settle its trades with the Claimant until the Respondent had cleared its liabilities to both the banks. Claimant had declared Respondent to be a defaulter under Bye-Law 10.18 on 22nd August 2013, as per Exhibit C-20. The date wise list of the trades, in which the Claimant had defaulted, is attached at Exhibit C-21. Soon thereafter i.e. to say on 30th September 2013, the consortium of the 2 banks had declared the Respondent as NPA as per Exhibit R-31 to the SoD. It shows that as on 11th November 2013, in respect of the Indian Overseas Bank, Guntur, Respondent's outstanding debt was Rs.31,76,08,028/-, and in respect of the Punjab National Bank, Guntur, it was Rs.27,66,35,696/-. Thus, a total of Rs.59,41,43,723/- was outstanding. This picture emerges from the documents annexed to the SoD itself.

43. Mr. Koteswara Rao, learned counsel for the Respondent, tried to contend that the Claimant had not strictly followed the provisions of the Evidence Act 1872 to prove all the documents, bank statements, trade summaries, ledger entries etc. beyond the pale of doubt. It is difficult to accept this contention in arbitration proceedings. The evidence of the three witnesses examined by the Claimant is satisfactory and there is nothing elicited in their cross examination to discard the documents to which they have deposed. Apart from the fact that Section 19 of the 1996 Act makes it clear that an Arbitrator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, I have followed the proper procedure of hearing the parties before taking the documents on record, in respect of which, the oral evidence is also satisfactory. Further, apart from the documents produced by the Claimant, the documents produced by the Respondent show that **(a)** it had traded on the Claimant's platform and that **(b)** it had failed to settle the said trades either by paying for the goods purchased or accounting for the stock of the goods in the godown, which it had agreed to sell to the Claimant.

44. The role of Naidu whose Company was the Respondent's client in respect of all the unsettled cotton trades, which are the subject matter of the present proceedings, is referred to in the SoD in paragraph I sub-paragraphs (ii) to (vi), (viii), (xi) and (xii). Further, RW-1 has, in his Affidavit of Evidence in paragraphs 2 to 6, referred to the fact that Naidu had offered to deposit Rs.20

Crores in the account of the Respondent in the Indian Overseas Bank at Hyderabad and had requested that he should be made a Director in the Respondent. RW-1 himself says that due to the power shortage problem in Andhra Pradesh during the relevant period, Respondent was facing economic crunch and, therefore, Naidu had approached RW-1. It is important to note that in its SoD, Respondent itself has alleged in paragraph I(iii) that, in the past, Naidu's brother had regular transactions of over Rs.200 Crores in the commodity trades.

45. In fairness to Mr. Koteswara Rao, learned counsel for the Respondent, it must be said that he conceded that the Respondent has taken two alternate pleas in this case and that one of them should be accepted by this Tribunal: **(a)** Respondent had not at all traded with the Claimant and hence it is not liable at all, or **(b)** Naidu, a financer from Hyderabad had misled, if not practiced fraud on RW-1, G.K. Rao. As far as plea (a) is concerned, in the light of the voluminous evidence, particularly the admissions as discussed in Part A above, there is no substance at all. In respect of the alternate plea (b), it is the Respondent's own case in its SoD that in view of the unforeseen power shortage in Andhra Pradesh during the relevant period, Respondent had faced acute financial problems. It was at that stage that Naidu, who was the Managing Director of the Respondent's client, M/s. B.S.P.N. Exports Pvt. Ltd., Hyderabad approached RW-1 and agreed to invest Rs.20,00,00,000/- (Rupees: Twenty Crores Only) with the

Respondent, with the hope that he would be made a Director in the Respondent. RW-1 had even authorised Naidu on 3rd February 2015 to sign cheques on behalf of the Respondent. It was sometime later, when Rs.20 Crores promised by Naidu did not come in the Respondent's bank account, that RW-1 cancelled the authority given to Naidu on 3rd February 2015 to sign the cheques. In this backdrop, it is strange that RW-1 has thrown the entire blame on Naidu for the mess in which RW-1 finds himself. In this behalf, I may refer to few Q/A of RW-1.

"Q. 21 Is it your evidence that Shri B.P. Naidu was never appointed as a Director of the Respondent?

Ans. Yes, we never appointed Shri B.P. Naidu as a Director, but it was our proposal to do so in the year 2012, since as he approached us with a proposal to invest Rs.25 Crores with the Respondent after the Respondent became a non-performing assets for both the banks, IOB and PNB to the tune of Rs.73 Crores in October 2012.

Shown paragraph 4 and the portion in the fourth line reading "After opening the account, ... in favor of Claimant Company ..."

Q. 34 Can you tell us why did you issue "cheque issue power" to Shri B.P. Naidu if he was never made a director or employee of the Respondent?

Ans. As per Exhibit R-19, Shri B.P. Naidu proposed to invest Rs.20-25 Crores in the Respondent. So, as per the oral permission from the Respondent's bankers, the Respondent has allowed cheque issue power in Axis Bank, Hyderabad which is not in the

Respondent's consortium banking, for safeguarding his proposed investment of funds and to protect the same from NPA of the Respondent.

Q. 54 *Was the alleged complaint filed by you with the EOW, Mumbai, referred to in your above answer, contemporaneous with the date on which the MoU (Exhibit 'R-20') was executed i.e. 13th February 2013, or was the alleged complaint filed by you after you were declared as a defaulter by the Claimant?*

Ans. *I will check and revert.*

Q. 61 *When did you come to know that the amounts received by the Respondent in its account at Axis Bank, Hyderabad were against commodity trades executed on the Claimant's platform?*

Ans. *The Respondent came to know of the same in April 2013, particularly when NSEL called upon the Respondent to repay the outstanding dues on daily basis.*

Q. 62 *What steps did you take against Shri B.P. Naidu in April 2013 when you came to know of the aforesaid?*

Ans. *We cancelled the cheque issue power of Shri B.P. Naidu and we also taken promissory notes and cheques from him for the amounts utilized by him to the tune of Rs.6.50 crores. We also lodged complaint against Shri B.P. Naidu with the EOW, Mumbai. I will check and revert regarding the date of complaint made to the EOW.*

(Show the 1st sentence of paragraph 5 of his Affidavit)

Q. 63 *Is it your case that you cancelled the cheque issue power of Shri B.P. Naidu twice i.e. on or about 5th February 2013 and once again in April 2013?*

Ans. *No. We cancelled the said power only once i.e. in February 2013.*

Q. 77 *Can you answer question 54 today?*

Ans. *Yes. After the Respondent realized that Shri B.P. Naidu had failed to honour his commitment to invest Rs.20-25 Crores in the Respondent, and further that he had drawn from the funds of the Respondent, and also the fact that the Claimant's funds had come to the Respondent's account in the Axis Bank at Hyderabad, the Respondent filed a complaint to the Claimant in May 2013 and thereafter, a complaint was filed to the E.O.W.*

Q. 78 *Are the complaints referred to by you in your aforesaid answer on the record of this Tribunal?*

Ans. *No.*

Q. 79 *Can you answer question 62 today?*

Ans. *The Respondent has made two complaints viz. on 11th August 2013 and 26th September 2014. The Respondent got acknowledgement from the E.O.W. of the complaint dated 26th September 2014.*

Q. 80 *Is it your case that you have no acknowledgment from the E.O.W. for the alleged complaint filed by you on 11th August 2013?*

Ans. *Yes, I have no such acknowledgment.*

Shown Q/A 77.

Q. 81 *Can you produce a copy of the alleged complaint filed by you with the Claimant in May 2013?*

Ans. *No, I do not have any such copy.*

Shown paragraph 9 of his affidavit of evidence.

Q. 82 *From whom did Shri B.P. Naidu obtain the documentary evidence referred to by you in the aforesaid paragraph, that you say was forwarded by him to the Claimant?*

Ans. *Yes, it was obtained by him from my office for the purpose of opening the current account in Axis Bank, Hyderabad mainly to park his proposed investment funds.*

Q. 106 *Is it your case that Shri B.P. Naidu has advanced to the Respondent the monies received by it in the Axis Bank account at Hyderabad as finance towards regularization of the NPA status of the Respondent?*

Ans. *Yes, the Respondent assumed like that.*

Q. 107 *Has the Respondent repaid this amount?*

Ans. *No. It was adjusted towards Shri B.P. Naidu's commitment towards the bankers.*

Q. 108 *Have you produced any document on record to show this adjustment?*

Ans. *It is not there before the Tribunal, but it is with the Respondent.*

Q. 110 *I put it to you that all alleged actions of Shri B.P. Naidu were done in the name of the Respondent and for and on behalf of the Respondent.*

Ans. *Yes."*

In the light of the above, it is impossible to accept Respondent's alternate plea (b) as well.

46. To sum up, the present claim is only in respect of the unsettled trades, where the 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 Merripalem, Mandal, Guntur, Andhra Pradesh. The modus operandi of the Respondent in its trades on the Claimant's platform was **(i)** to sell the goods alleged to be in its warehouse, for which Respondent received full consideration; and **(ii)** to purchase the alleged same goods back for which Respondent failed to honour its payment obligation for the trades executed on the Claimant's platform and violated contractual commitment towards the Claimant by entering into transactions on the Claimant's platform by not accounting / keeping / removing the actual stock of goods in its warehouse. In this behalf, the Report at Exhibit C-44 submitted by the independent Auditors viz. Sharp & Tannan Associates and copy of the Respondent's ledger account in the Claimant's books, Exhibit C-22, clearly support the Claimant's version.

47. In view of the above discussion, I answer Issue Nos. (ii), (iv), (v), (vi) and (viii) in the affirmative and in favour of the Claimant. Issue Nos. (iii) and (vii) are answered 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.36,62,73,411.92 claimed by the Claimant in Issue Nos. (v) and (vi) is concerned, the same will be discussed while answering Issue No. (ix).

48. **Issue No. (ix): What award, if any, is the Claimant entitled to, including the question as to interest and costs?**

As discussed earlier in details, Respondent has unequivocally admitted its liability to pay a total amount of Rs.36,62,73,411.92 (Rupees Thirty Six Crores Sixty Two Lakhs Seventy Three Thousand Four Hundred Eleven and Paise Ninety Two 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.36,62,73,411.92 (Rupees Thirty Six Crores Sixty Two Lakhs Seventy Three Thousand Four Hundred Eleven and Paise Ninety Two Only).

49. 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 Bye-law 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 C-37, as discussed above. However, the Claimant has claimed interest at the rate of 18% per annum from 9th August 2013. The trades / transactions on the Claimant's platform were purely commercial transactions. Hence, 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.36,62,73,411.92 (Rupees Thirty Six Crores Sixty Two Lakhs Seventy Three Thousand Four Hundred Eleven and Paise Ninety

Two only) with effect from 9th August 2013 till the date of payment.

50. **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.1,27,88,000/- (Rupees One Crore Twenty Seven Lakhs Eighty Eight Thousand only). It consists of four items which are as under:

Sr No.	Particulars	Amount (Rs.)	Annexure
1	Arbitrator Fee	87,50,000/-	A
2	NNCo lawyer Fee	30,81,000/-	B
3	Counsel Fee	5,76,750/-	C
4	Conference Room Charges	3,79,750/-	D
	Grand Total	1,27,88,000/-	

51. As far as Serial No. 1 *"Arbitrator's Fees"* is concerned, the claim is supported by the Procedural Orders passed from time to time and the details in Annexure "A". As far as Serial No.2 *"NNCO lawyer Fee"* is concerned, the claim is supported by the details furnished as per Annexure "B". As far as Serial No. 3 *"Counsel Fee"* is concerned, I find that certain items do not relate to the arbitration proceedings before me. They are as under:

S.No.	Counsel's Name	Memo No. & Date	Amount (Rs.)
1.	Mr. S.U. Kamdar	507 dated 01.10.2015	1,50,000/-
2.	Mr. Chirag Kamdar	15.10.2015	7,500/-
3.	Mr. Chirag Kamdar	31.03.2016	7,500/-
		Total:	1,65,000/-

Hence, the above three items totaling to Rs.1,65,000/- are rejected and the claim of Rs.5,76,750/- in Annexure "C" is liable to be reduced to Rs.4,11,750/- (Rs.5,76,750/- less Rs.1,65,000/- = Rs.4,11,750/-).

52. As far as the last item *"Conference Room charges"* is concerned, the same is supported by the vouchers as per Annexure "D".

53. Having regard to the complexity of the issues involved and the time taken, I find that the claim made by the Claimant under the various heads is reasonable, subject to what is stated above regarding Annexure "C". Hence the same is allowed as above. In the result, the total amount of cost to which the Claimant is entitled is as under:

S. No.	Particulars	Ann.	Claimed (Rs.)	Allowed (Rs.)
1	Arbitrator Fee	A	87,50,000/-	87,50,000/-
2	NNCO lawyer Fee	B	30,81,000/-	30,81,000/-
3	Counsel Fee	C	5,76,750/-	4,11,750/-
4	Conference Room Charges & Steno Charges	D	3,79,750/-	3,79,750/-
	Grand Total		1,27,88,000/-	1,26,22,500/-

54. It is relevant to mention here that in the present proceedings, except one initial payment of Rs.2,00,000/-, Respondent has refused to pay any fees or expenses incurred for the arbitration proceedings. Consequently, an Order was passed on 2nd December

2017, 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.

55. Summary of the Award

(i) Issue No. (i) is answered in the affirmative and in favour of the Claimant as per the discussions in paragraphs 17 to 23.

(ii) Issue Nos. (ii), (iv), (v), (vi) and (viii) are answered in the affirmative and in favour of the Claimant. Issue Nos. (iii) and (vii) are answered in the negative and against the Respondent as per the discussions in paragraphs 24 to 47.

(iii) Issue No. (ix) is answered as per the discussion in paragraphs 48 to 54.

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

(A) The Claimant is entitled to an amount of Rs.36,62,73,411.92 (Rupees Thirty Six Crores Sixty Two Lakhs Seventy Three Thousand Four Hundred Eleven and Paise Ninety Two only) from the Respondent, with interest thereon at the rate of 18% per annum, with effect from 9th August 2013 till the date of payment;

(B) Respondent is further called upon to pay the amount of Rs.1,26,22,500/- (Rupees One Crore Twenty Six Lakhs Twenty Two Thousand Five Hundred 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.

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

Justice Arvind V. Savant (Retd.)
Sole Arbitrator

Mumbai
26th March 2018

Annexure 1

Annexture – 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

Spin-Cot Textiles Private Limited ... ... Respondent

Appearances:

Mr. Chirag Kamdar a/w. Ms. Anuja Jhunjhunwala,
Ms. Ashwini Hariharan and Mr. Asadulla Thangal, Advocates
i/b M/s. Naik Naik & Co., ... Advocates for the Claimant

Mr. Abhijit Aher, Claimant's representative ... for the Claimant

Mr. Koteshwar Rao, Advocate ... Advocate for the Respondent

Dated: 3rd September 2016

Common Order on the 2 Applications filed by the Applicant — Spin-Cot Textiles Private Limited — under Section 16(2) and 16(4) of the Arbitration & Conciliation Act, 1996 ("the 1996 Act").

1. Heard both the learned counsel; Mr. Koteshwar Rao for the Applicant Spin-Cot Textiles Private Limited, on the Application dated 24th May 2016, filed on 6th June 2016, purporting to be under sub-section (2) of Section 16 of the Arbitration & Conciliation Act, 1996 ("the 1996 Act"), and Mr. Chirag Kamdar for the Respondent. There is also a separate Application filed by the said Applicant on the same day, purporting to be

under sub-section (4) of Section 16 of the 1996 Act. Claimant — National Spot Exchange Limited — has filed its joint Reply to the said Applications on 7th June 2016.

2. Perused Procedural Order No. 6 dated 6th August 2016 and in particular, the contents of paragraph 8 thereof, which refer to an identical contention that was raised by the Respondent — NCS Sugars Limited — in a separate arbitration proceedings before me. Relying upon the judgments of the Hon'ble Supreme Court of India and of the Bombay High Court, I have, by a detailed judgment and Order dated 4th May 2016 rejected the contention that was raised by the said Respondent, NCS Sugars Limited. When this was pointed out by Mr. Chirag Kamdar, Mr. Koteshwar Rao, prayed for some time to consider the identical stand taken by the present Applicant. On that day, it was contended by Mr. Koteshwar Rao that, there may be some distinguishing feature in the case of the present Applicant and if such a distinguishing feature was available to him, the reasoning in the said judgment and Order dated 4th May 2016, may not be applicable to the present case.

3. At today's hearing, in fairness to Mr. Koteshwar Rao, it must be stated that he has frankly stated that there is nothing to distinguish the

present case, from that of NCS Sugars Limited, in so far as the limited plea raised at this stage is concerned. Both the learned counsel, therefore, stated before me today that they repeat the same contentions as were advanced in the case of NCS Sugars Ltd., decided by the Order dated 4th May 2016. In this view of the matter, it is unnecessary to repeat the same contentions of both the learned counsel for passing the same Order, as in the case of NCS Sugars Limited. In the circumstances, I do not think it necessary to burden this order with a detailed discussion, as in the Order dated 4th May 2016 running into 53 pages.

4. At this stage, after making some submissions on the merits of the present Applications under Section 16(2) and Section 16(4) of the 1996 Act, Mr. Koteshwar Rao, learned counsel for the Respondent, statd that he is not pressing the said Applications. Accordingly, the said Applications are withdrawn as not pressed.

5. At this stage, Mr. Koteshwar Rao makes a further statement that save and except the issues of **(a)** the existence of the arbitration agreements and **(b)** the arbitrability of the claims and counter claims raised by either party, all other issues on the merits of the claims and

counter claims are left open. Mr. Chirag Kamdar, learned counsel for the Claimant, has no objection to this. It is ordered accordingly.

ORDER

(i) Both the Applications dated 24th May 2016, filed on 6th June 2016, by the Applicant — Spin-Cot Textiles Pvt. Ltd. — are disposed of as withdrawn.

(ii) Save and except the issues as to **(a)** the existence of the arbitration agreements and **(b)** the arbitrability of the claims and counter claims raised by either party, all other issues on the merits of the claims and counter claims are left open.

(iii) There will be no order as to costs of the 2 Applications.

Justice Arvind V. Savant (Retd.)
Sole Arbitrator

Mumbai,
3rd September 2016

Naik Naik & Company, Advocates
116-B, Mittal Tower, Nariman Point,
Mumbai – 400 021
Email: ameetnaik@nnico.com; projectn@nnico.com

Shri. K.R. Koteswara Rao, Advocate
Plot No. 134, Road No. 1,
Nr. Ganesh Temple, Dhanalaxmi Colony
Mahendral Hills, Secunderabad – 500 026
Email: ram_kolluri@yahoo.co.in

National Spot Exchange Limited
FT Towers, CTS No. 256 & 257,
4th Fl., Suren Rd., Chakala,
Andheri, (E), Mumbai – 400 093
Email: nsellegal@nationalspotexchange.com

Shri. Kameshwara Rao, C.M.D.
Spin-Cot Textiles Private Limited
D. No. 4-5-60/2A, Sai Baba Road,
Guntur – 522 006
Email: ghantakameswararao@gmail.com

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

79

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.*

81

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

83

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."

85

(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

87

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**

89

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.

91

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

k

93

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.

95

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

97

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

99

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.

101

(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

105

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.]

107

(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

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

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

113

(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-

115

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*

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:

119

*"**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*

121

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."*

123

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

125

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,

127

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

129

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