* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 04th March 2025***
Pronounced on: 09thApril 2025

\+ **CS(COMM) 628/2022, I.A. 11827/2023 &I.A. 13667/2023**

ZHUHAI HANSEN TECHNOLOGY CO LTD .....Plaintiff

Through: Ms. Gurmeet Bindra, Adv. along with Ms. Manisha Singh, Advocate.

versus

AKSH OPTIFIBRE LIMITED AND ORS .....Defendants

Through: Mr. Vikas Goel, Mr. Ritesh Sharma, Mr. Vivek Gupta, Mr. Harmanbir Singh Sandhu, Mr. Wanglen Ngangom, Advocates.

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

I.A. 36412/2024 *(Application under Section 45 of Arbitration & Conciliation Act)* in **CS(COMM) 628/2022**

1. This application has been filed by defendant no.1 under Section 45 of the Arbitration & Conciliation Act, 1996 (‘***A&C Act’***). The plaintiff in the present case is a foreign entity. The suit has been filed by the plaintiff based on two contracts dated 17th January 2017 (‘***Contract-I***’) and 5th April 2017 (‘***Contract-***

II'). The agreement was to enable defendant no.1 to supply Optic Fiber Cables ('***OFC'***) in variant models in different quantities to the plaintiff.

2. *Clause-16* of *Contract-I* and *Clause-18* of *Contract-II* contain arbitration agreements, which are reproduced as under:

> "***Clause 16*: *Arbitration and Applicable Law:***
> *All disputes arising from the performance of this Contract shall, through amicable negotiations, be settled by the parties hereto. Should, through negotiations, no settlement be reached, the case in question should be submitted for arbitration to Hong Kong International Arbitration Centre according to the rules of this centre. The arbitration procedures shall be proceeded in Chinese and English bilingually at the same time.*
>
> *The award of the arbitration should be final and binding upon the parties hereto.*
>
> *This Contract shall be governed by and construed in accordance with the laws of the People's Republic of China.*"
>
> "***Clause 18*: *Arbitration and Applicable Law:***
> *All disputes arising from the performance of this Contract shall, through amicable negotiations, be settled by the parties hereto. Should, through negotiations, no settlement be reached, the case in question should be submitted for arbitration to Hong Kong International Arbitration Centre according to the rules of this centre. The arbitration procedures shall be proceeded in Chinese and English bilingually at the same time. The award of the arbitration should be final and binding upon the parties hereto.*
>
> *This Contract shall be governed by and construed in accordance with the laws of the People's Republic of China.*"

3. These arbitration clauses provide for settlement of disputes through arbitration under the aegis of the *Hong Kong International Arbitration Centre* (‘***HKIAC***’) and in the absence of a contract to the contrary, the seat of arbitration was *Hong Kong*.

4. Applicant/defendant no.1 relies upon *Article 14.1* of the *Hong Kong International Arbitration Centre Administered Arbitration Rules 2024*, effective 1st June 2024, which reads as under:

> “*The parties may agree on the seat of arbitration. Where there is no agreement as to the seat, the seat of arbitration shall be Hong Kong, unless the arbitral tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate.*”

5. The contracts are governed and exclusively construed in accordance with the laws of the *People’s Republic of China*.

6. Reliance on Section 45 of A&C Act is, therefore, placed to refer the matter to arbitration. Section 45 of A&C Act is extracted as under:

> “***45. Power of judicial authority to refer parties to arbitration.***
>
> *Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed.*”

7. For invoking jurisdiction under Section 45, the conditions referred to in Section 44 are of significance. Section 44 of A&C Act reads as under:

> "***44. Definition*** –
> *In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-*
> *(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and*
> *(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.*"

8. Applicant, therefore, submits that the differences between the parties arise out of a commercial relationship in pursuance to an arbitral agreement to which the *New York Convention* applies. *Hong Kong* has been declared a territory to which the *New York Convention* applies, as per the Central Government Gazette Notification dated 19th March 2012.

Case of the Plaintiff

9. The suit in question was filed by the plaintiff seeking recovery of money of *US$ 13,04,233/- (INR 88,844,351.96/-).* Plaintiff claims to be one of *China's* largest suppliers specializing in *coaxial cable pipes* and is a leading cable manufacturer in the Far East. Defendants deal in the business of designing, manufacturing, and selling OFC and similar products.

10. Defendants and plaintiff were in a business relationship and, therefore, signed both *Contract-I* and *Contract-II* for the supply of optic cables in variant models and different quantities.

11. Since the defendants failed to deliver the products on time and failed to start the manufacturing process within 20 days despite receiving a 20% advance from the plaintiff, which was the condition precedent, the plaintiff cancelled the contracts and requested defendants to refund the advance payment.

12. In addition to the late delivery of products, plaintiff also noticed some quality issues in the cables which were supplied by defenants and requested them to fulfill the requirement to return all defective cables.

13. What follows is significant for the purposes of this application.

14. On 25th June 2018, Minutes of Meeting ('***MOM***') were signed between the parties, as per which, the parties agreed to '*short close*' the contracts. After reconciliation of accounts, defendants agreed to refund the sum of *US$ 15,01,870/-* towards the advance received by it and pay *US$ 3,80,528/-* and *US$ 2,361/-* towards the unqualified drums/OFC as detailed in the MOM.

15. The defendant, by letter dated 2nd August 2018, gave a payment plan to refund *US$ 15,04,231/-* in three installments of *US$ 5,01,410.33/-* each.

16. Defendant paid the first installment but defaulted in the payment of the balance two installments towards refund of the advance amount and also failed to pay other amounts towards the unqualified OFC as mentioned in the MOM. This led to the filing of the suit for recovery.

17. The nub of the issue is whether the recovery suit raises issues that amount to a '*dispute'* under the original contracts or otherwise the recovery is purely based

upon the MOM which amounts to a fresh agreement between the parties, and did not contain an arbitration clause.

18. The plaintiff's claim is that, despite confirming its obligation in the MOM, defendant has now raised an objection for the first time in the current suit in order to derail the same. The suit was filed in April 2022, whereas, the application was moved in August 2024.

19. Plaintiff relies on the following sequence of events, in order to buttress this point:

i. **02nd August 2018** – Letter issued by defendant no.1 confirming that an advance of *US$ 15,04,231/-* is refundable on account of the short closure of the contracts and gave payment plan of three installments which was accepted by plaintiff.

ii. **12th November 2018** – Letter written by defendant no.1 to *HDFC Bank* declaring that they need to refund the balance of advance payments of *US$ 5,01,401.33/-* without interest.

iii. **28th November 2018 –** Letter written by defendant no.1 to *HDFC Bank* declaring they need to refund the balance of advance payment of *US$ 5,01,401.33/-* in three installments.

iv. **24th December 2018** – Approval granted by the *Reserve Bank of India* (*'**RBI**'*) for refund of the advance amount in three installments.

v. **11th March 2019 –** Legal Demand Notice was issued on behalf of plaintiff to defendant no.1 seeking compliance of MOM.

vi. **2nd April 2019** – Response was received on behalf of defendant no.1 acknowledging the receipt of the Legal Notice stating that the process of receipt and refund in foreign currency is a regulatory requirement and they have initiated the process to determine the procedure. Plaintiff highlighted that there was no denial by defendant no.1 for the liability.

vii. **7th May 2019 –** Another response was received from defendant no.1 stating that they were standing firm on all the commitments and had the financial capability to fulfill the promises. But the process had been deferred post the Indian general elections which were scheduled.

20. Plaintiff, therefore, claimed that defendants had acted upon the MOM clearly showing the intention of the parties to close the contracts and refund the amounts. The MOM, as per the plaintiff had, therefore, clearly superseded the two original contracts and amounted to a fresh, separate, and standalone agreement.

21. The first installment of *US$ 5,01,410.33/-* was released on 10th January 2019, but the subsequent installments could not be released due to non-availability of funds.

22. Therefore, it was submitted that parties were absolved from all obligations under the original contracts and nothing is to be done under the original contracts. The cause of action for the suit was the MOM and not the original contracts and, therefore, the provision of Section 45 of A&C Act will not apply.

23. The plaintiff relied upon ***Larsen & Toubro Ltd. v Ireo Victory Valley (P) Ltd.*** 2024 SCC OnLine Del 2882, where a Civil Judge of this Court, relying upon

B.L. Kashyap And Sons Ltd. v Mist Avenue Private Ltd. 2023:DHC:3996, stated that a valid contract will stand extinguished if superseded by a subsequent settlement agreement.

Rejoinder by defendant no.1

24. Defendant no.1 instead relied upon the judgment of the Supreme Court in ***Sasan Power Ltd. v North American Coal Corpn. (India) (P) Ltd.*** (2016) 10 SCC 813, to contend that the inquiry in Section 45 of A&C Act is confined to whether the arbitration agreement is "*null and void or inoperative or incapable of being performed*", but not the legality and validity of the substantive contract. It precluded the Civil Court from examining whether the dispute was truly covered by the arbitration agreement. It was, therefore, contended that the MOM only recorded the manner in which the contracts would be foreclosed in the future, as evidenced by the communications exchanged between the parties, including the one dated 25th October 2008.

25. *Prayer 'D'* of the suit which sought a direction to pay 5% of the value of the dispatched material on account of late delivery was also something which did not arise under the MOM and was related to the contracts. To this, counsel for plaintiff had stated, that they were willing to give up this prayer.

26. Reliance was also placed on *paragraph 17* of the plaint, where the plaintiff stated that the present suit is based on the aforementioned contracts and subsequently, on the MOM. It was contended that even assuming that there was a discharge of obligations under the substantive contracts, it cannot mean that

parties intended to relieve each other of the obligation to settle any disputes through arbitration.

27. Reliance was further placed on ***SBI General Insurance Co. Ltd. v Krish Spinning*** 2024 SCC OnLine SC 1754 where the Supreme Court held that written confirmation of discharge by "*accord and satisfaction*" would not mean that the arbitration agreement too would come to an end, unless the parties expressly agree. The intention of parties in discharging a contract by "*accord and satisfaction*" is to relieve each other of existing or new obligations under the contract but not relieve each other of their obligation to settle any dispute pertaining to the original contract.

Analysis

28. The crux of the dispute relates to the scope of the MOM executed between the parties on 25th June 2018 at a meeting in *Zhuhai, China* which is not disputed. While the defendant no.1/applicant claims that the MOM is essentially a continuation of the contracts executed on 17th January 2017 and 5th April 2017 and, therefore, continued applicability of the arbitration agreement, the plaintiff states that the MOM supersedes the prior agreement including that of arbitration, and amounts to a fresh agreement which has not been complied with, therefore, the recovery would subsist in the civil suit.

29. The civil suit is within the jurisdiction of this Court, considering that the defendant was based here. For this purpose, it would be apposite to first extract the MOM, which is the fulcrum of the dispute:

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Meeting at Zhuhai Hansen, China – 25th Jun' 18

Minutes of Meeting

Zhuhai Hansen Technology Co. Ltd	Aksh Optifibre Ltd
Teeny Tang	Ramgopal Yadavalli
Wu Daogeng	Shashank Saxena
Li Hui	
Shou Hao	

AFF -PW-1/E

1. **Return of Unqualified Drums (188 No's) :**
   a) It has been agreed between both parties to have the unqualified drums returned as a new sale to either (i) Jiangsu Electrum Import and Export Company Ltd, China or (ii) Aksh Composites Pvt Ltd, Silvassa, (ACPL, Silvassa) India
   b) Hansen stated that making a sale to Electrum, China is not a recommended option due to Tax implication of 16% to Buyer and hence, suggested for making a sale to ACPL, Silvassa (Buyer) that has 'zero' tax implication within China
   c) Also, it has been agreed to have re-packing of 50 drums for an approx total amount of US$ 1000 that shall be borne by the Buyer
   d) The Buyer has to complete receipt of these 188 drums not later than Sep' 18 on Ex-Works basis. Fees of Transportation, Custom Clearance and Insurance shall be borne by Buyer
   e) If option vide 1b is not completed within this period then, Aksh Optifibre Ltd will have to take back these 'Unqualified Drums' and refund the applicable amount to Hansen by Sep' 18
   f) The price for these 188 drums would be as per the e-mail sent by Hansen dated 12th Jun' 18
   g) 100% Payment against the unqualified drums will be paid by Buyer on receipt of material at Site vide LC at Sight and LC is to be opened by the Buyer before dispatch of goods

2. **Short Closure of Contract # : Contract 2017040501, Contract 2017011701**
   a) Both parties agreed to short close the above contract and the balance money held by AKSH has to be returned to Hansen by Dec' 18
   b) In the interim, Aksh Optifibre Ltd shall return the balance money through the below solution but not limited to this solution: Aksh Optifibre Ltd issue a BG (any Indian Bank) with 6 months validity for the above amount indicated in point 2a, failing which the BG shall be encashed by Hansen. The draft of the BG shall be shared with Hansen by 15th Jul' 18 and the final BG as approved shall be issued by 25th Jul 18

3. **Reconciliation of Accounts :**
   Bothe parties have reconciled the accounts as on date and have agreed on the outstanding amounts as indicated below:
   a) Unqualified OFC (188 Drums) – US$ 380528
   b) Refund of Advance – US$ 1501870

4. **Returning Fee of earlier 4 Unqualified Drums :**
   Aksh optifibre ltd has agreed to pay the returning fee of US$ 2361 along with amount being repaid vide 3b

Signed

Wu Paogeng
Zhuhai Hansen Technologies Co Ltd

(Y Ramgopal)
Aksh Optifibre Ltd

Page 1 of 1

Jenny Jang

Document belongs to AKSH and received on mail
Wu Paogeng
Supplier manager

30. Various components of this agreement were as under:

i. Return of *188 unqualified drums* to either the company in China or back to defendant no.1;

ii. Since the sale to the Chinese company was not recommended, it was agreed that defendant no.1 would take the receipt of *188 drums* no later than September 2018 on an *ex-works* basis;

iii. Fee of transportation, customs clearance, and insurance would be borne by defendant no.1;

iv. Re-packing of *50 drums* for a total amount of *US$1000* should be borne by the defendant no.1;

v. The price for *188 drums* would be, as per the email sent by plaintiff dated 12th June 2018;

vi. *100% payment* of these unqualified drums would be paid by defendant no.1 on receipt of material at site *vide* LC at site;

vii. **Both the parties agreed to short close the contracts**;

viii. Balance money held by defendant no.1 was to be returned to plaintiff by December 2018;

ix. In the interim, defendant no.1 shall issue a Bank Guarantee ('***BG***') with an Indian bank with 6 months validity for the amounts of refund failing which the BG could be encashed by plaintiff. Draft of the BG would be shared with plaintiff by 15th July 2018, and the final BG shall be approved by 25th July 2018.

x. Parties had, therefore, reconciled their accounts and agreed to the price for unqualified OFC (*188 drums*) at *US$ 3,80,528/-* and refund of advance at *US$ 15,01,870/-;*

xi. Defendant No.1 had agreed to pay a returning fee of *US$ 2,361/-* along with the refund of the advance.

31. What is also of importance is the communication that follows, which is as under:

i. On 2nd August 2018, defendant no.1 wrote to the plaintiff giving the refund plan for the amount of *US$ 15,04,231/-* in three installments effective on 15th October 2018, 15th November 2018, and 15th December 2018. It was specifically noted that parties had agreed to "*short close the contract*".

ii. This was acknowledged by the plaintiff on 25th October 2018 reiterating the agreement to "*short close the contract*".

iii. On 12th November 2018, in a letter addressed to *HDFC Bank*, the same issue was again reiterated noting that parties had mutually agreed to "*short close the contract*".

iv. On 28th November 2018, yet another communication was addressed to *HDFC Bank*, and the same was reiterated, and the obligation of defendant no.1 to pay the refund amount.

v. On 24th December 2018, approval was received for transferring the three installments from the RBI.

vi. By letter dated 2nd April 2019, in response to the Legal Notice, defendant no.1 did not deny that they had an obligation to pay, in fact, reiterated the same.

vii. On 7th May 2019, in yet another response to the Legal Notice, it was stated that defendant no.1 was firm on all commitments but temporarily delayed in paying the money due to financial crunch.

It would be imperative to now examine and assess the legal position.

Cases cited by the plaintiff

32. ***Larsen & Toubro Ltd. v Ireo Victory Valley (P) Ltd.*** 2024 SCC OnLine Del 2882:

a. Plaintiff had filed a suit seeking compensation with respect to a settlement agreement, having been awarded a contract for the development of a housing society for the defendant. Work orders were issued but a substantial sum remained outstanding despite completion of works. The settlement agreement was arrived at by foreclosing the contracts and agreeing to some payment terms. Application was filed under Order XIIIA of the Code of Civil Procedure, 1908 seeking summary judgment. Defendants claimed that the settlement agreement was within the contract and not outside and, therefore, the arbitration clause would be applicable.

b. The Court held in favour of the plaintiff noting that the nature of the settlement agreement was different. While the original contract was to render services by the plaintiff to the defendant. Reliance was placed on ***The Union Of India v Kishorilal Gupta And Bros.*** 1959 SCC OnLine SC 6**,** where it was observed that arbitration clause perished with the original contract and the parties did not intend its survival even after the contract was mutually rescinded and substituted by a new agreement.

c. Reliance was also placed on ***Damodar Valley Corp. v KK Kar*** 1973:INSC:205 that with a full and final settlement under the contract, rights, and obligations under the contract do not subsist and consequently, the arbitration clause also perishes. Supreme Court relied on Section 62 of the Contract Act, 1872 to highlight the principle that parties to a contract can agree to substitute a new contract or to rescind or alter it and the original contract may not be performed.

d. The Court observed that in case of unilateral termination of a contract, claim of damages can still be made under the arbitration clause. The question of whether the arbitration clause survives or perishes would depend upon the controversy and nature of its effect. The Court noted the above in *paragraph 19,* which is extracted as under:

> "*19. In Damodar Valley (supra) the entire law on the subject was discussed and it was categorically held that if there has been termination of a contract unilaterally, the claim of damages can be made under the Arbitration Clause. The Court has also observed that the question whether Arbitration Clause survives or perishes, would depend upon the nature of the controversy and its effect. <u>If the parties are in lis in respect of breach of the contracts and whether future performance has been discharged or not, it may be an arbitral dispute. However, the observation in para 9 of the above decision would be relevant that the Arbitration Clause would itself fall if the contract</u>*

has come to an end and has been so agreed by virtue of a settlement."

(emphasis added)

e. The Court also relied upon ***Nathani Steels Ltd. v Associated Construction*** 1995 Supp (3) SCC 324, where the Court observed that once a dispute is amicably settled by way of final agreement between the parties, one party cannot invoke arbitration clause and if the same is allowed, the sanctity of the settlement agreement may be lost.

f. Reliance was also placed on ***Young Achievers v IMS Learning Resources (P) Ltd.*** 2013:INSC:555, wherein Exit Paper was held to indicate that it was a mutually agreed document containing comprehensive terms and does not contain an arbitration clause. The issue involved was, therefore, not of "*accord and satisfaction*" but entering into the fresh contract not indicating any dispute arising under the original contract, nothing but pure and simple novation of the original contract with mutual consent.

g. After examining these decisions, the Court held as under:

> *"24. A perusal of the above judgments would show that the settled legal position is that if a mutual settlement supersedes the original contract, the original arbitration clause would not survive. If there is unilateral repudiation, then the arbitration clause may survive depending on the facts. In the present case there is no arbitrable dispute left between the parties as the Settlement Agreement states that the agreement is in complete satisfaction*

of claims and demands under the Contract. The said clause of the Settlement reads as under:

> *"F. The above settlement is concluded and shall be treated as Full & Final Settlement without any pending claims/Counter claims etc. with clear understanding of not raising any future claims/counter claims on any account whatsoever.*"

> *25. Therefore, if all the claims are dealt with, and settled no issues under the original contracts are left to be adjudicated upon in arbitration. The Settlement Agreement is binding between the parties and the Defendant has in fact acted upon the settlement, by referring to the settlement as a final settlement in repeated correspondence and returning the original expired Bank Guarantees as per clause 'C' of the Settlement Agreement.*"

(emphasis added)

h. The Court further noted that the settlement agreement amounted to a foreclosure of the previous contract, and there was no reference to the original project in the e-mail or the various correspondences between the parties, which only indicated that the settlement agreement was to be given effect to. The Court, therefore, held as under:

> "*30. The above Settlement Agreement and the email shows that the Defendant had understood the same to be in complete supersession of the earlier contract. The terminology used by the Defendant 'Final Settlement of issues' leave no manner of*

doubt as to the nature of the Agreement. The arbitration clause is not mentioned even once in the said email correspondence.

31. Moreover, effort ought to be made to not unnecessarily linger or protract dispute resolution processes, as alternate dispute resolution mechanisms were brought in to resolve disputes at a faster pace and not to re-open settled disputes. In addition, the Court found it curious that the Defendant insists on going to arbitration while not denying the existence of the Settlement Agreement. Arbitration proceedings are meant to expedite the adjudication of disputes and cannot be used as a straw to delay the adjudication and escape liabilities and obligations under a duly executed Settlement Agreement."

(emphasis added)

i. The Court thereafter relies upon ***B.L. Kashyap & Sons Ltd. v Mist Avenue (P) Ltd.*** 2023:DHC:3996, wherein the principles were laid down as to cases in which arbitration clause can be invoked from the original contract. Relevant paragraphs of the said judgment are extracted as under:

"*32. In **B.L. Kashyap And Sons Ltd. v Mist Avenue Private Ltd**., 2023:DHC:3996, the Court laid down the principles as to cases in which the arbitration clause can be invoked from the original contract. The said principles are as under:*

"23. For the purposes of the present case, the following principles emerge from these authorities:

a. An arbitration clause contained in an agreement which is void ab initio cannot be enforced as the contract itself never legally came into existence.
b. A validly executed contract can also be extinguished by a subsequent agreement between the parties.
c. If the original contract remains in existence, for the purposes of disputes in connection with issues of repudiation, frustration, breach, etc., the arbitration clause contained therein continues to operate for those purposes.
d. Where the new contract constitutes a wholesale novation of the original contract, the arbitration clause would also stand extinguished by virtue of the new agreement.

24. An application of these principles requires an interpretation of the subsequent agreement between the parties- in this case, the MoU-to determine whether the arbitration clause in the original agreement remains enforceable."

33. The above stated judgment holds that in cases where there is a subsequent Settlement Agreement, a valid contract can be extinguished. The Settlement Agreement in the present case is the subsequent agreement, whose interpretation would show that the arbitration clause in the original agreement would not be enforceable as this is a full and final settlement with respect to the contract and will be treated as a foreclosed document. The text of the Settlement Agreement is clear to the effect that this is a final settlement and MoU, with

respect to the disputes and claims that arose between the parties in consideration to the contract and that there are no pending claims, neither any future claims were permitted to be raised.

34. In the present case, the decision of Branch Manager, Magma Leasing and Finance Ltd. v. Potluri Madhavilata, (2009) 10 SCC 103 would not be applicable as the question that was raised therein was in respect of a hire-purchase agreement where the recovery of possession of the vehicle was sought. Certain claims of the finance company, arising out of the hire purchase agreement, continued to remain, which the Supreme Court referred finally to arbitration. The decision in Unique Decor (India) Pvt. Ltd. v. Synchronized Supply Systems Ltd., (2023) 3 HCC (Del) 456 also was a case where there was a question as to whether the contract was novated/superseded or not.

35. Currently, there are no claims raised by the Plaintiff, which arise out of the original contract at all. The only claims are in terms of the Settlement Agreement, which the Defendant has acknowledged, implemented and not refuted. In the present case, there is no doubt left in view of the clauses in the Settlement Agreement and the emails that the original contract stood superseded in terms of the Settlement Agreement. The foreclosure itself is evidence of that fact."

(emphasis added)

j. Considering that the decision in ***Larsen & Toubro Ltd.*** (*supra*) relies upon the previous decisions in ***B.L. Kashyap*** (*supra*),

Damodar Valley Corp. (*supra*), ***Young Achievers*** (*supra*), ***Nathani Steels Ltd.*** (*supra*), ***The Union Of India v Kishorilal Gupta and Bros.*** (*supra*) there is no purpose in re-assessing these decisions.

33. A few other decisions, which might be relevant for assessment and not cited by the parties, are as under:

i. ***Lata Construction & Ors. v Dr. Rameshchandra Ramniklal Shah & Anr.*** *(2000) 1 SCC 586*:

The Supreme Court while dealing with the issue of novation of contract under Section 62 of the Contract Act, 1872, stated as under:

> "*10. One of the essential requirements of "novation", as contemplated by Section 62, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract.*"
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> (emphasis added)

ii. ***Ashiana Infrabuild LLP v M/S S.D. Bhalerao Constructions Pvt. Ltd.*** 2021 SCC OnLine Del 3741:

This Court was dealing with the petition under Section 6 of the A&C Act and, therefore, the relevance of a Cancellation Agreement ('***CA***'),

executed subsequent to the Joint Venture Agreement ('***JVA***') cancelling the rights and obligations arising under the same. The Court held as under:

> "*9. After a plain reading of the CA, one notices that the commercial arrangement as encapsulated in the JVA stood terminated and superseded by the CA. In the recitals, it is recorded that pursuant to meetings to settle accounts with each other, the parties have agreed to cancel the JVA with effect from 1st April, 2017 on mutually agreed terms as recorded in the CA. The CA then categorically records that all rights and obligations/liabilities under the JVA have been cancelled. Furthermore, Clause 13 of the CA stipulates that the Agreement sets forth the entire agreement and understanding between the Parties relating to the subject matter therein and supersedes "any and all prior discussions, communications, negotiations, understanding, agreements, or contracts, whether written or oral". Thus, in the prima facie opinion of the court, the CA does indeed record that the JVA has been cancelled by the parties by mutual agreement.*"
>
> (emphasis added)

iii. ***WAPCOS Ltd. v Salma Dam Joint Venture*** 2020 3 SCC 169:

The Court was dealing with the petition under Section 11(6) of the A&C Act, where a revised agreement had been signed subsequent to the Joint Venture Agreement ('***JVA***'). The High Court had held that the arbitration agreement under the JVA was still in force and would operate between the parties. The Supreme Court however held that terms and conditions in the revised agreement left no doubt that the

arbitration agreement had been done away with. The Court observed the same in *paragraph 34*, which is extracted as under:

> "*34. It is not unknown in commercial world that the parties amend original contract and even give up their claims under the subsisting agreement. The case on hand is one such case where the parties consciously and with full understanding executed AoA whereby the contractor gave up all his claims and consented to the new arrangement specified in AoA including that there will be no arbitration for the settlement of any claims by the contractor in future. Having chosen to adopt that path, it is not open to the contractor to now take recourse to arbitration process or to resurrect the claim which has been resolved in terms of the amended agreement, after availing of steep revision of rates being condition precedent...*"
>
> (emphasis added)

Cases cited by Respondent/Applicant

34. ***Sasan Power Ltd. v North American Coal Corpn. (India) (P) Ltd.*** (2016) 10 SCC 813:

The Court was dealing with the application under Section 45 of the A&C Act, which was allowed by the District Court and the plaint of the plaintiff was rejected. The same was upheld by the High Court. The Supreme Court while examining the scope and purview of Section 45 held as under:

> "*48. It is settled law that an arbitration agreement is an independent or "self-contained" agreement. In a given case, a written agreement for arbitration*

could form part of another agreement, described by Lord Diplock as the "substantive contract" [Aughton Ltd. v. MF Kent Services Ltd., (1991) 57 BLR 1 (CA)"the status of a so-called "arbitration clause" included in a contract of any nature is different from other types of clauses because it constitutes a "self-contained contract collateral or ancillary to" "the substantive contract". These are the words of Lord Diplock in Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corpn. Ltd., 1981 AC 909 : (1981) 2 WLR 141 (HL). It is a self-contained contract, even though it is, by common usage, described as an "arbitration clause". It can, for example, have a different proper law from the proper law of the contract to which it is collateral. This status of "self-contained contract" exists irrespective of the type of substantive contract to which it is collateral."] by which parties create contractual rights and obligations. Notwithstanding the fact that all such rights and obligations arising out of a substantive contract and the agreement to have the disputes (if any, arising out of such substantive contract) settled through the process of arbitration are contained in the same document, the arbitration agreement is an independent agreement. Arbitration agreement/clause is not that governs rights and obligations arising out of the substantive contract: It only governs the way of settling disputes between the parties.

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51…If it is impermissible for a civil court to examine whether a dispute is really covered by the arbitration agreement, we see no reason to hold that a civil court exercising jurisdiction under Section 45 could examine the question whether the

> *substantive agreement (of which the arbitration agreement is a part) is a valid agreement. No doubt that HPCL case [Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503] was in the context of the bar contained in Section 8 of the 1996 Act. But the same principles of interpretation apply even for the interpretation of Section 45.*"
>
> (emphasis added)

35. ***SBI General Insurance Co. Ltd. v Krish Spinning*** 2024 SCC OnLine SC 1754:

a. The Supreme Court was dealing with an appeal from the High Court allowing the application for the appointment of an Arbitrator to resolve the disputes between the parties. The issue arose under an Insurance Agreement that was taken for fire and special perils, and an incident had occurred. An insurance claim had been submitted by the respondent, which was eventually followed up by a consent letter to the Surveyor, accepting the assessment of loss made by the Surveyor and signing of a discharge voucher. After the release of the settlement amount, the respondent disputed the claim and, therefore, the matter went into dispute and was being assessed for dispute resolution.

b. The appellant claimed that it was not open to the respondent to rescind from the settlement and invoke the arbitration clause, as no obligation remained to be fulfilled under the contract, pursuant to the discharge of the contract. The Supreme Court held that whether

there has been a discharge of the contract or not, is a mixed question of fact and law and if any dispute arises, such a dispute is arbitrable, as per the mechanism under the arbitration agreement in the underlying contract. The Supreme Court held as under:

> "*53. Thus, even if the contracting parties, in pursuance of a settlement, agree to discharge each other of any obligations arising under the contract, this does not ipso facto mean that the arbitration agreement too would come to an end, unless the parties expressly agree to do the same. The intention of the parties in discharging a contract by "accord and satisfaction" is to relieve each other of the existing or any new obligations under the contract. Such a discharge of obligations under the substantive contract cannot be construed to mean that the parties also intended to relieve each other of their obligation to settle any dispute pertaining to the original contract through arbitration.*
>
> ****
>
> *115. The dispute pertaining to the "accord and satisfaction" of claims is not one which attacks or questions the existence of the arbitration agreement in any way. As held by us in the preceding parts of this judgment, the arbitration agreement, being separate and independent from the underlying substantive contract in which it is contained, continues to remain in existence even after the original contract stands discharged by "accord and satisfaction".*
>
> ****
>
> *122. Once an arbitration agreement exists between parties, then the option of approaching the civil court becomes unavailable to them. In such a scenario, if the parties seek to raise a dispute, they*

> *necessarily have to do so before the arbitral tribunal. The arbitral tribunal, in turn, can only be constituted as per the procedure agreed upon between the parties. However, if there is a failure of the agreed upon procedure, then the duty of appointing the arbitral tribunal falls upon the referral court under Section 11 of the Act, 1996. If the referral court, at this stage, goes beyond the scope of enquiry as provided under the section and examines the issue of "accord and satisfaction", then it would amount to usurpation of the power which the parties had intended to be exercisable by the arbitral tribunal alone and not by the national courts. Such a scenario would impeach arbitral autonomy and would not fit well with the scheme of the Act, 1996.*"
>
> (emphasis added)

36. From assessment of the decisions noted above, the following principles can be culled out for the purpose of assessment, as to whether an original agreement containing an arbitration clause can stand superseded/eclipsed by a settlement agreement foreclosing/cancelling the original agreement, if the parties agree to settlement/compromise:

i. Repudiation by one party alone does not terminate the contract. It takes two to end it, and hence the contract would subsist for the determination of rights and obligations of the parties and the arbitration clause also survives [***Damodar Valley*** *(supra)*].

ii. As the contract is the result of an agreement between the parties, it is equally open to them to terminate it, treat it as if it never existed, or

substitute it with a new contract. In such a case, the arbitration clause also comes to an end and ceases to exist [***Damodar Valley*** *(supra)*].

iii. If the dispute between the parties is that the contract itself does not subsist as a result of being substituted by a new contract or by rescission or alteration, a dispute cannot be referred to arbitration as the arbitration clause itself would perish, if the averments have been found to be valid [***Damodar Valley*** *(supra)*].

iv. The arbitration clause is a collateral term of the contract as distinguished from its substantive terms, but nonetheless, it is an integral part of it [***Kishorilal Gupta and Bros.*** *(supra)*].

v. However comprehensive the terms of an arbitration clause may be, existence of the contract is a necessary condition for its operation, it perishes with the contract [***Kishorilal Gupta and Bros.*** *(supra)*].

vi. Though the contract was validly executed, the parties may put an end to it as if it never existed and substitute a new contract for it solely governing the rights and liabilities. The original contract would have no legal existence, and the arbitration clause cannot also be inoperative, having become void and extinguished [***Kishorilal Gupta and Bros.*** *(supra)*].

vii. Survival of the arbitration clause has to be seen in light of the terms and conditions of the new agreement; it cannot survive if the agreement has been superseded/novated by a later agreement [***Young Achievers*** *(supra)*].

viii. Once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract, and such dispute or difference is amicably resolved by way of a final settlement, then unless that settlement is set aside through proper proceedings, it cannot lie in the mouth of one of the parties to spurn it on the ground of mistake and proceed to invoke the arbitration clause. Party cannot take the benefit of the settlement and then subsequently challenge/question it [***Nathani Steels Ltd.*** *(supra)*].

ix. The terms and conditions specified in the subsequent agreement leave no manner for doubt that the arbitration agreement has been dispensed with. Where the parties consciously and with full understanding execute a new agreement, give up all claims, and consent to a new arrangement including that there will be no arbitration for the settlement of any claim in the future, it is not open to either party to take recourse to the arbitration process or resurrect claims that have been resolved under the amended agreement [***WAPCOS Ltd.*** *(supra)*].

x. The original contract would remain in existence for the purposes of disputes in connection with issues of repudiation, frustration, breach, etc., and the arbitration clause would continue to operate for those purposes [***Kishorilal Gupta and Bros.*** *(supra)*].

37. In light of the principles laid down in the aforementioned judgments, and upon careful consideration of the facts and circumstances of the present case, it emerges that MOM executed between the parties on 25th June 2018, for the purpose of *short closing* the contracts, is not a continuation of the

earlier agreements dated 17th January 2017, and 5th April 2017. Rather, it constitutes an independent and fresh agreement. Consequently, the MOM, being a subsequent agreement will supersede the earlier contracts and will render the earlier contracts along with the arbitration clauses contained therein, ineffective and inoperative.

38. This opinion of the Court is based on the following facts and circumstances:

i. ***Firstly***, that the termination of the contracts was not unilateral but both parties agreed to short closure of the contracts. In view of the principles noted above, in the event, had there been repudiation by one party and a unilateral termination by the other, there could have been a situation of the arbitration clause also surviving for the determination of rights and obligations. However, that is not the case here;

ii. ***Secondly***, that the short closure of the contract, in commercial/business terms, refers to premature termination of a contract before all obligations are fulfilled. There could be various reasons for a short closure of the contract. However, the said MOM categorically stated that the short closure was due to mutual agreement between the parties considering that obligations had not been met and there was a poor supply of goods;

iii. ***Thirdly***, that pursuant to the MOM, various components of which are listed/referred in *paragraph 30* above, there was no arbitrable dispute left to be adjudicated between the parties. Moreover, the MOM categorically provided for the return of the 188 unqualified drums and

the payment for those, as well as the refund of the advance, amongst other issues. What is important is that, in subsequent communications which are listed/referred in *paragraph nos. 19 and 31* above, there was a clear acknowledgment by the defendant that they were firm on compliance with the terms of the MOM and did not deny that they had an obligation to pay. For that reason, there was no '*dispute'* under the original contracts;

iv. ***Fourthly***, that the said MOM was complete in its own right, as it provided the terms on which the parties had agreed to settle the open issues and move forward with a new set of terms and conditions, and therefore, new obligations had come into play. The obligations under the existing contracts were not referred to and had no role to play in executing the terms of the MOM;

v. ***Fifthly***, there was no reference in the MOM regarding any modality which had to be followed to enforce the terms of the original contracts. A default had taken place, and parties had mutually agreed upon a new set of terms and conditions;

vi. ***Sixthly***, no arbitration clause or agreement was mentioned in the MOM, nor there was any reference to any term or provision of the original contracts;

vii. ***Seventhly***, the fact that the MOM was dated 25th June 2018 and the suit was filed in April 2022, and there was no communication by the defendant, in the intervening period, that the arbitration clause would apply or the original contracts would subsist. Moreover, the application

under section 45 of the A&C Act was moved more than two years later, while the suit was pending, and the delay seems to suggest that this has been an afterthought, though not a determinative factor for the Court to reach this opinion; and

viii. ***Lastly***, reliance by defendant no.1 on ***SBI General Insurance*** (*supra*) is not apposite and relevant, considering that the issue in this case was related to an insurance claim, and the dispute was related to whether the contract had been discharged or not. The Supreme Court, on the basis that the issue was a mixed question of fact and law, and therefore arbitrable, had arrived at the finding that the original contract would subsist. These facts are completely distinguishable from the case at hand, considering that there is no leftover dispute relating to the short closure of the contract, since the defendant has consistently acknowledged the same in subsequent communications, as noted above. There is no mixed question of fact and law which needs to be determined, for which provisions of the original contract need to be adverted to.

Conclusion

39. In the opinion of the Court, permitting a commercial party to spin a web around and obfuscate what seems to be a clear and categorical admission of liability and agreement to the modality of payment, would be diluting and eroding the sanctity of contracts. There would be no purpose served to refer the matter back to arbitration, where no dispute arises. The suit has been clearly filed for recovery of the agreed amounts as per the MOM. The

principles culled out in *paragraph 36* above, as endorsed and encapsulated in ***Larsen and Toubro*** (*supra*), form the basis of opinion of the Court. The parties have decided to put an end to the contract, and substitute a new contract to govern their future liabilities, and the original contract, including the arbitration agreement, would stand perished. The axe fell when the MOM was executed, the past was severed from the future obligations that parties agreed to.

40. In view of the above, the Court finds no merit in the application of defendant no.1, and therefore, the present application is dismissed.

CS(COMM) 628/2022

1. List on 8th May 2025 before the Joint Registrar (Judicial) for further proceedings.

2. Judgment be uploaded on the website of this Court.

ANISH DAYAL, J.

APRIL 09, 2025/sm/bp