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

% ***Date of decision: October 6, 2023***

\+ **O.M.P. (COMM) 249/2021 & I.As. 10593/2021 & 634/2022**

1. **ZAKIR HUSSAIN**
Director, M/s Zum Zum Cold Storage Pvt. Ltd.,
32nd Milestone, Delhi-Hapur Road,
Massori, Ghaziabad,
Uttar Pradesh – 201302.

2. **M/S ZUM ZUM COLD STORAGE PVT. LTD.**
32nd Milestone, Delhi-Hapur Road,
Massori, Ghaziabad,
Uttar Pradesh – 201302 ..... Petitioners

Through: Mr. Kshitij Sharda and Mr. Aditya Parashar, Advocates.

versus

SUNSHINE AGRISYSTEM PVT. LTD.
K-13A, Hauz Khas Enclave,
New Delhi – 110016 ..... Respondent

Through: Mr. Anand Varma, Ms., Apoorva Pandey and Ms. Adyasha Nanda, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

1. A petition under **Section 34 of the Arbitration and Conciliation Act, 1996** *(hereinafter referred to as* 'A & C Act, 1996'*)* has been filed for setting aside the Award dated 04.02.2021.

2. The petitioner has challenged the impugned Award dated 04.02.2021 whereby the following reliefs have been awarded :

> (i) ***the claim of the Respondent (claimant in the suit)*** *has been allowed to grant damages in the amount of* ***Rs.***

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1,79,83,682/- *(One crore seventy-nine lakh eighty three thousand six hundred and eighty two only)* ***along with interest at the rate of 9 per cent per annum*** *from the date of filing of the claim till date of payment; and*

(ii) ***the counter claim of the Petitioners*** *seeking damages of the amount of Rs. 1,65,50,000/- (one crore sixty five lakhs and fifty thousand only) has been allowed only to the extent of* ***Rs. 4,32,705/-*** *(Four Lakhs thirty two thousand seven hundred and five), along with interest at the rate of 9 per cent per annum from the date of filing of the claim till date of payment.*

Factual Background:

3. The respondent, a dealer in carrots *(who was the claimant / Petitioner in the Arbitration proceedings)* entered into an '*Agreement for Cold Storage'* dated 01.03.2011 for storing his carrots in the Cold Storage of the petitioner (*who was the respondent in the Arbitration proceedings*) herein. Vide this Agreement, the respondent sought to store, handle, grade, treat, bag, dispatching, etc the carrots for a period from 01.03.2011 to 31.10.2011. The salient covenants of the Agreement dated 01.03.2011 were as under:

*"**Clause 1:**RIGHTS AND OBLIGATION OF SSAPL*

…

ii. The carrot stored in the cold storage shall at all times be the sole and exclusive property of SAPL.

iii. The SAPL shall pay the sum decided, i.e. Rs. 48,00,000/-from 1st March 2011 to 15th October 2011. The storage charges shall include charges for the use of the area for the entire term.

iv. The payment shall be made by SAPL in favour of the storage
company by cheque within two weeks of taking the material out

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from the cold storage after deduction of TDS (as applicable) for the quantity or number of bags taken out from the cold storage chamber. The payment for October will be done in the first week of October Last and final.

v. Storage Company does not bother how many bags SAPL keep in cold storage, whether 50000 or 80000 ..... .

vi. SAPL will facilitate installation of web-based temperature monitoring device in all chambers for monitoring the temperature and for record purpose."

4. **Clause 2** of the Agreement dated 01.03.2011 speaks of the rights and obligations of the storage Company/ petitioner. Relevant sub-clauses read as under:

i. *Storage Company certifies that Storage Company has the authority to make available the cold storage for a term and further assures SAPL that the goods are not lien marked to his bankers and not under any pledge or hypothecation of any lender to the storage Company.*
ii. *Storage Company shall permit SAPL representative or its agents, entry to the Cold Store for inspection of Cold Store/ commodities stored therein.*
iii. *Storage Company shall give a proper receipt to SAPL or its representative/agent for commodities received for storing at the cold storage chamber and mentions clearly in the receipt the original weight/name of the commodity/lot number so stored and the number of bags received for storage.*
iv. *Gate Pass should be maintained for all inward and outward movements.*
v. *Storage Company will not sell or dispose the commodities stored in the cold storage to any person or company without the prior written approval/authorization of SAPL.*
vi. *Storage Company will not check the grade of carrot SAPL will keep the storage company will maintain the temperature from 1- degree Celsius to 4-degree Celsius+ 1-degree Celsius. SAPL will keep a supervisor to check the*

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temperature. The temperature should not exceed 4.5 degree during the unloading of the material in the cold storage.

vii. *Storage Company will not provide any fungicide or chemical for carrot bags.*

viii. In case of any loss suffered by SAPL due to failure in maintaining temperature in cold storage, storage company shall be held accountable for the same and will pay damage to SAPL to fully compensate the loss.

ix.*In case of any loss suffered by SAPL due to failure in maintaining temperature in the cold storage, Storage Company shall be held accountable for the same and will pay damage to SAPL to fully compensate the loss.*

x. *The storage company will arrange to shift the material to its another chamber if any significant damage is observed in the product quality during the tenure of this agreement."*

5. The Agreement dated 01.03.2011 therefore was for the usage of cold-storage for the period from 01.03.2011 to 31.10.2011, during which period, the petitioner was responsible to make the space in the cold-storage available and to maintain the requisite temperature during this period. On the other hand, it was provided that the carrots stored in the cold-storage, shall be the sole and exclusive property of the respondent and Respondent shall be responsible to facilitate installation of a web-based temperature monitoring device in all the chambers for monitoring the temperature and for record purposes. It was also agreed that for the purpose of ensuring that the temperature was maintained from 1 degree Celsius to 4 degree Celsius ± 1 degree Celsius, respondent shall keep Supervisor to check the temperature. There was no obligation on the petitioner either to check the grade or quality or the quantity of the carrots.

6. The total rent payable to the petitioner for use of the storage space for the agreed eight months from 01.03.2011 to 15.10.2011 was of

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Rs.48,00,000/- for the use of the area for the entire term. The payment was agreed to be paid by the respondent in favour of the petitioners by cheque within two weeks of taking the material out from the cold-storage after deductions of TDS for the quantity or number of bags taken out from the cold-storage chamber. The payment for October was to be done in the first week of October, 2011 as the full and final settlement.

7. Admittedly, in terms of Agreement dated 01.03.2011, the respondent was permitted to use the Cold Storage Chamber with the dimension of 73' X 97' X 50' and the respondent stored 45,702/- bags of carrots out of which it had withdrawn 7,587/- bags during the period from 08.04.2011 to 28.08.2011, while the balance 38,115/- bags of carrots remained in the cold-storage which was supposed to be removed during the period from September-October, 2011. Disputes arose between the parties as the respondent asserted that the Appellant herein, in breach of the Agreement, sold/misappropriated the stored carrots in September, 2011 itself without any knowledge, notice or intimation to the respondent, thereby causing losses to them.

8. The petitioner herein, however asserted that despite repeated intimations and reminders, the respondents failed to remove the carrots from the Cold Storage even on the expiry of the term of *Agreement* and failed to pay the rent thereof in accordance with the terms of the Agreement. Left with no option as the carrots were rotting, they were dumped by the petitioner in their yard in January, 2012.

9. The respondent thus, filed a **Claim** in the sum of Rs.2,39,78,243/- on account of the losses suffered by it along with an *pendente lite* interest @ 15% from the date on which the losses were incurred till the date of Award.

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10. The petitioners in addition to defending the claim of the respondent had also filed a **Counter-Claim** seeking damages in the sum of Rs.1,65,50,000/- from the respondents towards the rent, cleaning, insulation damage and loss due to not running the cold chamber along with an interest @ 18% per annum.

11. **Issues were framed on 21.03.2015** as under :

> *"(i) Whether the Respondents are guilty of misappropriation of the 38,115 bags of carrots stored by the Claimant at the Respondents' Cold storage facility? OPC*
> *(ii) What are the damages payable to the Claimant by the Respondents for misappropriation of the 38,115 bags of carrots, including interest and costs? OPC*
> *(iii) Whether the Claimant had rightfully paid the payment to the counter- Claimant/Respondents in accordance with the agreement entered between the parties? OPC*
> *(iv) Whether any payment was due from the Claimant to the Respondents? OPC*
> *(v) Whether the Claimant has supplied and stored the carrot that was defective being "Dhoop Laga Hua" and "Garmi Khaya Hua"? OPR*
> *(vi) Whether the Claimant had acted contrary to the terms and conditions of the agreement? OPR*
> *(vii) Whether the Claimant had forged the signature of the Manager of the counter- Claimant/ Respondents and had forged any other documents? OPR"*

12. The learned Arbitrator after considering the evidence allowed the **Claim** of the respondent and awarded a sum of **Rs.1,79,83,682**/-.

13. The learned Arbitrator declined the **Counter-Claim** of the petitioner in the sum of Rs.1,65,50,000/- on account of expenses incurred for rent, cleaning, insulation damage charges etc. by observing that the petitioner had violated and acted contrary to the terms and clauses of the Contract by

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disposing of the carrots without the permission of the respondent herein and therefore, was in breach of reciprocal promise as defined under Section 54 of the Contract Act, thereby absolving the respondent of its reciprocal promise of payment. Since, there was no significant violation of the terms of the Agreement, the petitioner was not entitled to claim damages in the sum of Rs.1,65,50,000/-.

14. However, the **Counter-Claim** of the petitioner was partly allowed to the extent of **Rs.4,32,705/-** towards the amount payable by the respondent as per bill dated 12.08.2011.

15. Aggrieved by the Award allowing the Claim of the Respondent and rejecting part Counter-Claim of the Petitioner, the present Petition under Section 34 of the A & C Act, 1996 has been filed on behalf of the petitioners.

16. The **main grounds of challenge** are that the impugned Award is unconscionable, patently illegal and based on perverse findings which are in conflict with the Fundamental Policy of Law of India. It is asserted that the respondent had relied upon the Letter-cum-Show Cause Notice dated 31.10.2011 for the alleged misappropriation of carrots which was allegedly served upon the petitioner *vide* the courier receipts and tracking status Report filed on record. However, learned Arbitrator's reliance on these documents to assume service is perverse and unsustainable as the courier receipts and the tracking status report is dated October, 2012 which is one year later and are not of October, 2011 i.e. the month when the Agreement came to an end.

17. It is submitted that the respondent had relied upon the same courier receipts and tracking status report in proof of the dispatch and service of the

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Notice dated 08.10.2011 for invocation of the Arbitration Clause, upon the petitioner's counsel in Arbitration Petition No.19/13 filed before this Court. The evidence has been manipulated which clearly establishes that no **Show Cause Notice/ Letter dated 31.10.2011 was ever served upon the petitioners** and same could not have been relied upon by the learned Arbitrator to draw an adverse inference against the petitioner. A deliberate, malafide and conscious act of fabrication of evidence and manipulation of record has been perpetrated by the respondent. It is established from the record that the alleged Show Cause Notice dated 31.10.2011 was a fabricated document and was untenable in the eyes of law.

18. Further, the learned Arbitrator has held that there was no valid Notice or intimation given by the petitioners vide their letters dated 02.11.2011 and 12.11.2011 to the respondent, calling upon them to remove their carrots from the Cold Storage which is completely contrary to the record. In both the letters, the petitioners had clearly and categorically called upon the respondent to remove the carrots. While admitting that incorrect Tracking Report was filed in respect of the Postal Receipt dated 22.08.2012, it is submitted that the postal receipts dated 18.11.2011 for the letters dated 02.11.2011 and 12.11.2011 remain uncontroverted. Therefore, the findings of the learned Arbitrator in respect of these two letters is erroneous and not based on any evidence.

19. It is contended that the Learned Arbitrator has also wrongly observed that these letters were not proved since no clerk or any official from the Post Office had been examined. However, while making these observations, the learned Arbitrator has completely overlooked Section 27 of the General Clauses Act, 1897 which provides for the presumption of service of Notice

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by post. Learned Arbitrator has wrongly concluded that the postal receipts pertaining to these two letters were forged or that they did not pertain to these two letters. The findings of the learned Arbitrator are, therefore, perverse and contrary to the evidence on record.

20. It is further asserted that though the application for placing the additional documents on record was allowed, but costs were imposed which could not be paid by the petitioner. Consequently, the additional documents were not permitted to be taken on record which is against all tenets of justice and equity.

21. Furthermore, the dismissal of the application of the petitioner under Section 27 of the A & C Act, 1996 is also challenged as perverse and patently illegal. The petitioners had sought that the assistance of Civil Court for examination of Government official i.e. District Horticulture Officer, Ghaziabad who had inspected the Cold Storage on 24.11.2011 and found the quality of the carrots to be deteriorating and had directed the respondents to remove the carrots, and to produce official records/ letters so exchanged, as primary evidence. It is submitted that these documents and the witnesses were most relevant for the fair adjudication of the disputes to bring out the truth. However, the application for producing additional documents and for examination of the witness, was dismissed which has led to failure of justice and the petitioners have been deprived of their valuable legal right to bring on record the true factual situation.

22. Likewise, the petitioner's application for filing additional affidavit has been dismissed by Order dated 21.10.2016. The reasoning given that the respondents would not have had an opportunity to rebut the new facts which is totally perverse and untenable as they would have gotten full opportunity

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to controvert any deposition made in the additional affidavit by way of cross-examination of the witness.

23. The petitioner has further claimed that no damages could have been awarded to the respondent since it failed to lead any evidence to prove the quality or weight of the carrots stored by the petitioners in the Cold Storage. The figures taken by the respondent for calculation of damages was not based on any evidence, let alone any cogent or reliable evidence and had remained totally unsubstantiated.

24. It is their case that the documents and the record clearly reflect that the quality of carrots had deteriorated for no fault of petitioners. Even otherwise, it was imperative for the respondents to establish the quality of carrots to substantiate their claim for damages. Furthermore, the calculation of damages was not based upon the pleaded factors in the Statement of Claim viz. Cost of acquisition of carrots, expenses and loss of profits, but has been calculated on the basis of highest sales price of carrots in Azadpur wholesale market for the months of September and October, 2011, the data which was filed by the petitioners along with their affidavit of evidence. The principles applied for calculation of damages had no nexus with the calculations submitted by the respondent and could not have been made the basis for awarding the damages.

25. The respondent having taken out 7587 bags of carrots for sale, possessed evidence of the sale price, the weight and also the expenses incurred on sale. This evidence ought to have been brought on record and they should have also produced the Books of Accounts and other related documents to establish the cost of acquisition of carrots and the weight, quality in order to prove the alleged factual losses. However, no such

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evidence has been led by the respondent. The only presumption that can be drawn from withholding the relevant evidence under Section 114 of Indian Evidence Act is that this evidence was unfavourable to the respondent. However, learned Arbitrator has ignored all the principles and failed to consider the basic and vital aspects.

26. **The Petitioner further claimed that its Counter-Claim** has been wrongly allowed only to the extent of Rs.4,32,705/- on the basis of perverse reasoning which is untenable as Section 54 of the Indian Contract Act, 1872 (*hereinafter referred to as* 'ICA, 1872') is not even applicable to the facts of this case. The objective or purport of Section 54 of Indian Contract Act, 1872 has been wrongly appreciated by the learned Arbitrator while considering the Counter-Claim of the petitioner.

27. The respondent was permitted to use the Cold Storage from 01.03.2011 till 31.10.2011 irrespective of the damage or loss of carrots. The respondent was not absolved of the liability to pay the user charges for the period for which it had used the Cold Storage.

28. A further plea has been taken that the dispute was not arbitrable in view of the provisions of Uttar Pradesh Regulation of Cold Storages Act, 1976. The application of the petitioners challenging the jurisdiction of the learned Arbitrator had been wrongly dismissed by placing reliance on the judgment of the Apex Court in *SBP & Co. vs. Patel Engineering (2005) 8 SCC 618*. The jurisdictional issue of arbitrability of the disputes has been raised by the petitioner which requires reconsideration. It is thus, asserted that the Award suffers from patent illegality, is perverse and is liable to be set aside.

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29. **Learned counsel on behalf of the Respondent** has averred that the as per the Agreement dated 01.03.2011, the petitioners did not have the right to dispose the carrots without the prior approval of the respondent as it remained the sole and exclusive property of the respondent. When the respondent's representative on 25.09.2011 visited the Cold Storage, they were informed that 38,115 bags of carrots had been disposed of by the petitioners. The respondent thereafter sent a Show Cause Notice dated 31.10.2011 seeking an explanation regarding the same; however, the respondent failed to reply to the Notice.

30. It is further averred that the record of the Arbitral Tribunal makes it apparent that the petitioners constantly employed tricks and tactics to delay and derail the proceedings. They also made several attempts to challenge the jurisdiction of the learned Arbitrator. It is stated that the learned Arbitrator gave complete opportunity to both the parties to plead their respective cases. The Award has been passed by taking into consideration all the material evidence on record and thus it is not susceptible to challenge under Section 34 of the A & C Act, 1996.

31. It is their case that the petitioner is seeking re-appreciation of the of the evidence on merits which is beyond the limited scope of interference under Section 34. Despite making averments that the Award is based on perverse reasoning and is patently illegal, the petitioner has failed to show any justifiable reasoning for the Court's interference as all the pleas were dismissed on factual and legal and rational grounds. Reliance has been placed on *Associate Builders vs Delhi Development Authority*, (2015) 3 SCC 49. In fact the petitioner is attempting to raise fresh pleas vis a vis photographs of the dumped carrots, electricity bills, etc which were not

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adopted by them before the learned Arbitrator. It is argued that the new pleas or interpretations on the existing evidence cannot be made at this stage when they were not advanced before the learned Arbitrator.

32. Lastly, it is contended that the damages were awarded by the arbitrator based on the Statement of Loss submitted by the respondent. Since the Agreement provided for the grant of damages in case of loss and the computation of the same is a question of fact, the court under Section 34 cannot interfere with the fact finding exercise of the Tribunal as provided in *Mc Dermott International Inc. vs Burn Standard Co. Ltd*., (2006) 11 SCC 181.

33. **Submissions heard from the Ld. Counsel for both the parties and also perused the Written Arguments**.

Arbitrability of Disputes:

34. At the outset, a legal objection has been taken on behalf of the petitioners in regard to the arbitrability of the dispute in the present case. It is argued that M/S. Zum Zum Cold Storage Pvt. Ltd. (petitioner No.2 herein) is a provider of cold-storage services and the Agreement between the parties was an *"Agreement for Cold-Storage"* and nowhere the term *"Warehouse"* has been used in the said Agreement. The cold-storage was located in the State of Uttar Pradesh and was covered under the Uttar Pradesh Regulation of Cold Storages Act, 1976 *(hereinafter referred to as the* "Act, 1976"*)*. The Act, 1976 provides for the mechanism for resolution of disputes that may arise therein under Sections 16, 17 and 18 of the Act, 1976. All the claims which arose with respect to the Agreement dated 01.03.2011 for cold-storage of goods, could have been decided only under

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the Act, 1976. Therefore, disputes *inter se* the parties essentially were not arbitrable and could not have been a subject matter of arbitration before the Ld. Arbitrator and the entire Award stands vitiated.

35. In support of the contentions that the disputes were not arbitrable as Uttar Pradesh Regulation of Cold Storages Act, 1976 was applicable, the petitioners had filed an application under *Section 16 of A & C Act, 1996* before the Arbitrator which was rejected *vide* Orders dated 07.01.2017 and 21.04.2017 by observing that Clause 3 of the Agreement clearly provides for disputes to be settled by way of arbitration. It was further observed vide Order dated 21.04.2017 that the Arbitral Tribunal had provided sufficient opportunity to the petitioner to present their case and thus, no partiality can be made out. Parallelly, Review Petition No. 83 of 2017 was also filed seeking a review of Order dated 14.05.2013 vide which the Sole Arbitrator was appointed by this Court. The Review Petition was dismissed on account of delay vide Order dated 28.02.2017 and SLP (C) 016034-016035/2017 challenging the said dismissal also met with the same fate vide Order dated 05.05.2017.

36. This aspect has also been considered in the impugned Award. Making reference to Sections 43 and 25 of the Uttar Pradesh Regulation of Cold Storages Act, 1976, it was concluded that the reference of disputes to District Horticulture Officer was merely directory and not mandatory. The Arbitration Clause contained in the Agreement did not make it inconsistent and or in conflict with the Act, 1976.

37. In order to appreciate the question related to the non-arbitrability of the present dispute, we find it pertinent to refer to Section 43 of the Act, 1976, which reads as under:-

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> *"**Section 43: Effects of Acts and Rules, etc. inconsistent with other enactments and instruments.***
> *The provision of this Act or any rule made thereunder, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any contract, or in any other instrument having effect by virtue of any enactment other than this Act."*

38. The *Doctrine of Election* assumes significance when two remedies are available for the same relief. Every case of election, therefore, presupposes a plurality of remedies. The Hon'ble Apex Court in the case of *National Insurance Co. Ltd. v. Mastan* (2006) 2 SCC 641 held that:-

> "*The doctrine of election is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.* ***The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both."***

39. The Apex Court in the case of *Transcore vs. Union of India* (2008) 1 SCC 125, in the context of the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (*hereinafter referred to as* 'DRT, Act, 1993'). It observed that the doctrine of election of remedy has three elements, namely, *(i) existence of two or more remedies; (ii) inconsistencies between such remedies and (iii) a choice of one of them*. If any one of the three elements is not there, the *Doctrine of Election* does not apply. Thus, if co-existent remedies are available to the litigants which are repugnant and inconsistent at the time of choice of remedy, then the doctrine of election applies.

40. However, such a choice of remedy may not be available in all such cases. **Jennifer L. Peresie** in '**Reducing the Presumption of Arbitrability**'

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by 22 Yale Law & Policy Review, Vol. 22, Issue 2 (Spring 2004), PP. 453-462 observed:

> *"It is necessary to examine if the statute creates a subject right or liability and provides for the determination of each right or liability by the specified court or the public forum so constituted and whether the remedies beyond the ordinary domain of the civil courts are prescribed. When the answer is affirmative, arbitration in the absence of special reason is contraindicated. The dispute is non-arbitrable."*

41. It can be inferred from the above that in cases, where there are two remedies, one being a general remedy and the other being a special one, the maxim of *Generalia specialibus non derogant* would apply i.e. a general law will generally not prevail over a special law. The issue of arbitrability of disputes in such cases where special statutes govern the field has been further enunciated by the Apex Court in the landmark decision of *Vidya Drolia vs. Durga Trading Corporation* (2021) 2 SCC 1, the Court expounded a four-fold test to determine when a dispute shall not be arbitrable in India which are as follows:

> *"(i) relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem;*
> *(ii) affects third party rights; have erga omnes effect; require centralized adjudication;*
> *(iii) relates to inalienable sovereign and public interest functions of the State; and*
> *(iv) dispute is expressly or by necessary implication non-arbitrable as per the statue."*

42. The Apex Court further held as under:

> "*implicit non-arbitrability of a dispute arises when the mandate of law specifically provides that the parties are*

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> *quintessentially barred from contracting and waiving the adjudication by a designated court or a specified public forum. Then, the person has no choice but to seek the remedy before the forum which is mandated by the statute and not by any other forum."*

43. The Apex court also observed in absolute terms that non-arbitrability would be implicit if it be found that a law creates a specified forum or a designated court for adjudication of disputes. It was held that the issue of non-arbitrability would have to be decided and answered upon due examination of the special statute which may create not just a special right or a liability but also provide for the determination of such a right or liability by that specified court or public forum alone. Particular reference was made to the judgements *Common Cause v. Union of India* in, (1999) 6 SCC 667 : 1999 SCC (Cri) 119; *Agricultural Produce Market Committee v. Ashok Harikuni*, (2000) 8 SCC 61 to observe that *decisions and adjudicatory functions of the State that have public interest element like the legitimacy of marriage, citizenship, winding up of companies, grant of patents, etc. are non-arbitrable, unless the statute in relation to a regulatory or adjudicatory mechanism either expressly or by clear implication permits arbitration. In these matters the State enjoys monopoly in dispute resolution.*

44. In the case of *Fermina Developers Private Limited vs. Indiabulls Housing Finance Limited* 2022 SCC OnLine Del 4487, the Co-ordinate Bench of this Court while considering the arbitrability of the disputes and the availability of alternate forums held:-

> "*that the doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available only if the law accepts existence of arbitration as an alternate remedy and freedom to choose available.*

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> *There should not be any inconsistency or repugnancy between the provisions of the mandatory law and arbitration as an alternative. Conversely, if in a given case, there is a repugnancy and inconsistency, the right of choice and election to arbitrate is denied*."

45. The example of non-arbitrability can be deciphered in the context of Non-Performing Assets Act, 2002 *(hereinafter referred to as* "NPA Act, 2002"*)* which was considered in the case of *M.D. Frozen Foods Exports (P) Ltd. vs. Hero Fincorp Ltd.* (2017) 16 SCC 741, wherein it was observed that the NPA Act, 2002 sets out in detail an expeditious procedural methodology enabling the financial institutions to take possession and sell secured properties for non-payment of the dues. Such powers, obviously, cannot be exercised through any alternate mechanism like arbitral proceedings.

46. Another illustrative case is of *Transcore* (supra) wherein the Apex Court observed that the provisions of DRT Act, 1993 provides for a complete code for recovery of debts. It provides for various modes of recovery such as recovery of debts through recovery certificates as well as the procedure for adjudication. The remedies mentioned therein are complementary to each other. It was thus concluded, that the disputes covered by DRT Act, 1993 were non-arbitrable as the Act contains all the provisions ranging from the institution of the case to the final disposal. Hence, there is a prohibition against the waiver of jurisdiction of the DRT by necessary implication.

47. In essence, if the civil court's jurisdiction can be exercised despite the existence of a special remedy before a forum, then such disputes would also be arbitrable. The bar to arbitration or civil jurisdiction by necessary implication would apply only when the alternative remedy is a Complete

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Code in itself or provides a special statutory right or protection that the civil court or arbitral tribunal may not be able to grant. In addition to this, special forums created to provide a remedy with a welfare objective in mind, by necessary implication oust the jurisdiction of an Arbitral Tribunal.

48. In this context, for the proper adjudication of the dispute at hand, one may refer to the Act, 1976, wherein its objective is to provide "*for the licensing supervision and control of cold-storages in Uttar Pradesh and for matters connected therewith*". The objective of the Act reveals that the Statute is essentially for the purposes of supervision, control of cold-storages and licensing. While providing for such supervision and control, Section 17 of the Uttar Pradesh Regulation of Cold Storages Act, 1976 also provides for the rights and duties of the licensee i.e., owner of the cold-storage to whom license to run cold-storage is granted by the Licensing Officer. Section 24 of the Act, 1976 provides for the liability of the licensee to provide compensation for any loss, destruction, damage, deterioration and non-delivery of the goods stored in his cold-storage caused by the negligence, misconduct or default on the part of such licensee.

49. Section 25 of the Act, 1976 provides for the Dispute Resolution Mechanism. It states that any dispute related to compensation shall be referred to the Licensing Officer and who on satisfaction that any compensation is payable by the licensee, may issue a certificate of recovery to the collector who would recover the amount of compensation as arrears of land revenue and will pay the amount realised to the hirer (person hiring the cold storage facility from the licensee) after deduction of requisite costs.

50. Section 36 provides that any person aggrieved by the order of Licensing Officer refusing to discharge its duties as specified in various

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sections or to decide a dispute referred to it in Sections 14 or 25 may prefer an appeal to the Tribunal.

51. The comprehensive reading of the entire scheme of the Act, 1976 guided by its object clearly bring forth that it is a mechanism providing for a forum for settlement of disputes which may arise on account of licensing of cold-storages or *inter se* the hirer and the cold-storage owner on account of storage of goods. The scheme of Act, 1976 when read in the backdrop of Section 43 makes it abundantly clear that it does not oust the jurisdiction of the civil court. The Act, 1976, though enacted for a special purpose, does not provide any special right, remedy or procedure that cannot be sought before a civil court or arbitral tribunal as it merely provides that an informal mechanism for settlement of disputes under the Act, 1976. This Court finds that there is neither any explicit or implied ouster of arbitral jurisdiction. The learned Arbitrator is, therefore, rightly concluded that the dispute was not non-arbitrable and, therefore, this objection of non-arbitrability as agitated by the petitioners, is not tenable.

Misappropriation of 38,115 bags of carrot by the Petioner/ Cold Storage Company:

52. Now coming to the **merits** of the case, admittedly in terms of Agreement dated 01.03.2011, the respondent had stored 45,702/- bags of carrots out of which it had withdrawn 7,587/- bags during the period from 08.04.2011 to 28.08.2011, while the balance 38,115/- bags of carrots remained in the cold-storage. The *main issue* was whether the petitioners had misappropriated 38,115 bags of carrot stored by the respondent at their cold-storage facility in the month of September, 2011 itself and consequently, were liable to pay damages *or* whether did the respondent

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failed to remove the carrots which became rotten, in terms of the Agreement despite due Service of Notices dated 2.11.2013 & 9.11.2013 leading to their disposal by the petitioner in January 2012.

53. The petitioners had claimed as their defence that the respondent failed to remove the remaining carrots or make payment towards the carrots already removed from the cold-storage which compelled them to send the Letter dated 03.09.2011 requesting the respondent to pay 70% of the rent amount and to remove the remaining carrots before 15.10.2011. The petitioners had further asserted that two Supervisors, namely, Mr. Lokander and Mr. Moolchand deputed by the respondent also left the cold-storage in the month of September, 2011 along with all the belongings/set-up locking the cold-storage rooms and took away the keys of the locks.

54. The First document relied upon by the Ld. Arbitrator was the Notice dated 31.10.2011 allegedly addressed to the petitioner Zakir Hussain by the respondent, which reads as under:

> *"To,*
> *Zakir Husain Ji*
> *Jam Jam Cold Storage Pvt. Limited*
> *Nussorei Ghaziabad 201302.*
> *Sir,*
> *As you know that in your cold storage Global Agri System Private Limited from 2.3.2011 to 21.04.2011 done the storage of 45702 katta of carrot out of which the Global company has taken out 7587 katta from 8.4.2011 to 28.8.2011 rest of 38115 katta are stored in cold storage.*
> *In first week of September you made aware verbally that in the quality of the carrot stored by you is becoming inferior. After that you without any interim notice has thrown/sold the stored carrot because of which the company has financially suffered heavy loss.*

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Looking at the aforesaid loss the higher management of the company is very annoyed. Due to what reasons you have to throw away/sold the rest of the stored carrot whereas In consent letter the time of storage and taking out was from 1st March, 2011 to 31st October, 2011.
Kindly make us aware with the same.
Thanking you
Yours Sincerely

M/s Global Agrisystem Pct. Ltd.
Hauz Khas K13 A, New Delhi"

55. The petitioner had claimed that this letter was never served upon it. Learned Arbitrator relied upon the postal receipts to conclude the service of the letter dated 31.10.2011. However, as rightly pointed out by the learned Counsel for the Petitioner, these postal receipts pertain to October, 2012 and cannot pertain to the alleged service of Letter dated 31.10.2011. Candidly, learned Counsel on behalf of the respondent admitted that though these postal receipts pertain to a Notice sent subsequently for Invocation of Arbitration in 2012, but he argued that the letter was addressed to the petitioner at the correct address, which is sufficient proof of its service. This argument could have prevailed if there was any proof that the Letter was indeed posted but the respondent has failed completely to establish that it was ever posted. ***Learned Arbitrator overlooked this aspect and fell in error in concluding service of Letter dated 31.10.2011 despite no evidence.*** The entire case of the respondent to prove that the goods had been allegedly removed in September, 2011 was simply his Legal Notice dated 31.10.2011. Once the foundational base of his case is shaken the entire structure built on it, becomes wobbly. It has been explained in *Ssangyong Engineering and Construction Co. Ltd. vs NHAI,* Civil Appeal No. 4779 of 2019 that though a decision which is perverse, may no longer be a ground for challenge under

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"*public policy of India*" but would certainly amount to patent illegality appearing on the face of the award.

56. Another significant fact is that the calculation of damages in the sum of Rs.1,79,83,682 is based solely on the Statement of Losses annexed by the respondent alongwith their affidavit of evidence. The simplicitor statement of calculation without there being any evidence whatsoever and without proving the quantity and quality of carrots alongwith the rates which it could have fetched had it been sold in the market, cannot be held to be evidence of any kind by the respondent. Even though the filing of Statement of Losses for the first time alongwith the affidavit of evidence of the respondent, was not challenged by the petitioner herein but simplicitor calculation is not any kind of evidence to calculate the damages. Clearly, the estimation of the value of the goods as Rs.2,39,78,243/- out of which Rs.1,79,83,682/- were granted by deducting 30% as the negligence costs on the part of the respondents, is purely conjectural and is not based on any evidence whatsoever.

57. A **finding based on no evidence at all** or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Further, in *PSA Sical Terminals Pvt. Ltd. vs The Board of Trustees of Chidambaran Port Trust Tuticorin and others*, 2021 SCC OnLine SC 508 the Apex Court held that an award based on no evidence, or passed in ignorance of vital evidence, will be perverse.

58. Even from the contents of this Notice dated 31.10.2011 allegedly served upon the petitioner what emerges is that it merely stated that after the respondent was made aware verbally about the quality of carrots having become inferior, the same have been thrown/ sold without any prior

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intimation/ Notice to the respondent thereby causing heavy loss without mentioning any date whatsoever of the alleged removal which is an assertion made in the air without any material particulars. Aside from this Notice, no other evidence has been led by the respondent to corroborate their assertion that the goods had been removed prior to 31.10.2011. The conclusion of the **learned Arbitrator on the basis of this letter that the goods had been removed by the petitioner in breach of the Agreement, is clearly devoid of any evidence**.

59. Significantly, CW1 Shri S.K. Sharma who tendered his affidavit of evidence on behalf of the respondent/ claimant had stated that "*to the surprise and shock of the claimant on 25.09.2011 during the periodic visits by the claimant's representative to the respondent's Cold Storage, they were informed by the respondent's staff that the carrots stored had been sold out*". Therefore, according to the respondent, the goods had been sold of in September, 2011 itself. However, if so was the case, there is no explanation as to why the respondent had to wait till 31.10.2011 to protest about the alleged disposal of the carrots and even then the service of this Notice dated 31.10.2011, has not been proved on record.

60. The petitioner Zakhir Hussain in his affidavit of evidence had specifically deposed that on repeated calls and several reminders including the letter dated 03.09.2011, though the service of the Notice has not been proved, to Mr. Ajay Veer Singh and Mr. Rudra Pratap Gautam (representatives of the respondent) for removal of the carrots and for payment thereof. The representatives visited the Cold Storage on 25.09.2011 and supervised the Cold Storage as well as the carrots and also were provided with the Bill No.10 dated 12.08.2011 Ex.1/C in the sum of

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Rs.4,32,705 towards the removal of 6657 bags of carrots in August, 2011. The payment against the said Bill was assured to be made within one week, though no payment was received.

61. The respondent in its letter dated 31.10.2011 (though not proved but is the document of the respondent and can be read against it) admitted the visit of the two Supervisors to the Go-down and also that they were informed about the deteriorating quality of the carrots. The best witness to corroborate the assertions of the respondent that the carrots had been disposed of by then, could have been these two representatives namely Ajay Veer Singh and Rudra Pratap Gautam. Significantly, no affidavit of evidence of these two witnesses had been filed by the respondent and his defence of the goods having been removed prior to the conclusion of the date of Contract is vague in the absence of any specific date of removal. In fact, no cogent, admissible or comprehendible evidence with specific date has been led on behalf of the respondent. Its own document i.e. letter dated 31.10.2011 though not proved to have been served upon the appellant itself reflects the vagueness of its claim. **Learned Arbitrator failed to appreciate that the relevant evidence to prove the disputed facts was with the Respondent who chose to withhold the same leading to an adverse inference of it being against him**.

62. Further, the petitioner had relied upon Notice dated 02.11.2011 and a reminder letter dated 12.11.2011 to assert that since some carrots were rotting as they were "*dhoop laga hua and garmi khaye hue*", and on the instructions of Ajay Veer Singh and Rudra Pratap Gautam who had visited the cold storage in September, 2011, 7000 kattas of carrots were dumped in the yard for which the petitioner incurred a cost of Rs.70,000/- on labour and

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diesel. Many rotten carrots were still left which spoiled the remaining bulk. On top of that, no "*palti*" was done, because of which their condition further deteriorated. Roughly 35,000 katas remained in the Cold Storage and request was made vide Letter dated 02.11.2011 and a reminder Letter dated 12.11.2011 that someone may be sent to the Cold Storage for removal of 35000 kattas, but thereafter there was no response thereof. However, as has been observed by the learned Arbitrator there was no proof of service of these two letters upon the respondent and the contents of the same therefore, were rightly not relied upon.

Application for filing of Additional Documents:

63. Significantly, after the affidavit of evidence of the petitioner was submitted and when the matter was pending for cross-examination on 30.09.2016, the counsel for the petitioner requested that there were certain material documents which have not been placed on record and sought permission to move an appropriate application for filing the documents. The learned Arbitrator in its Order dated 30.09.2016 observed that the application may be filed within four days i.e. by close of 04.10.2016 which shall be taken on record only if the previous cost of Rs.10,000/- was defrayed and an additional cost of Rs.10,000/- was imposed for moving the said application. The application for additional documents dated 04.10.2016 though filed, but the cheque of Rs.20,000/- given towards payment of cost got dishonoured on 10.10.2016. The learned Arbitrator in its Order dated 21.10.2016 declined to accept the cost of Rs.20,000/- tendered in cash on the ground of dishonour of cheque. The application for additional document was thus, declined on the ground of non-payment of costs.

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64. Pertinently, the additional documents sought to be placed on record by way of the Application dated 04.10.2016, were in support of the petitioner's defence that the carrots were not disposed of during the period of Agreement till 31.10.2011 but were destroyed in January, 2012. Some of these documents were the letters to show that the respondent had not only failed to remove its goods from the Cold Storage of the petitioner, but he had been acting in a similar manner with various other Cold Storages in the year 2010-11 which were relevant to establish a pattern of his conduct during the relevant period.

65. The other set of documents were a copy of the letter dated 15.11.2011 sent by it to District Magistrate, Ghaziabad, U.P informing about non-removal of carrots from their Cold Storage by the respondent and a request to inspect the carrots and to issue instructions accordingly. The next letter dated 23.11.2011 addressed to District Horticulture Officer, Ghaziabad was informing that the goods/ carrots have not been removed by the respondent and they are emitting foul smell, waste water, fungus, heat, smoke, insects etc. causing damage to the insulation, wood racks etc. A request was made by the petitioner to inspect the goods in the Cold Storage and to give necessary instructions so that they will not have any problem in renewal of their license in future. Aside from this, is the letter dated 27.11.2011 written by the District Horticulture Officer to the Manager of the respondent mentioning that inspection was done in Cold Storage on 24.11.2011 when it was found that the carrots stood spoiled and required urgent removal for which directions were issued to the respondent. These three documents were absolutely pertinent to support the defence of the petitioner that the goods/ carrots had been destroyed only in January, 2012.

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66. The main objection taken by the respondent was that even though these documents were in the knowledge of the petitioner, they did not see the day of light till the filing of Affidavit of evidence by the Petitioner and also do not find any mention in the pleadings.

67. For proper appreciation of this argument, it would be significant to understand the distinction between *"material facts"* and "*material particulars*". The question to be addressed is whether the documents sought to be introduced by the petitioner at the time of his evidence amounted to new material facts or whether they were only material particulars in support of its defence.

68. In *Harkirat Singh vs. Amrinder Singh* (2005) 13 SCC 511, the Apex Court succinctly explained the distinction between *"material facts"* and *"material particulars."* The *"material facts"* are primary or basic facts which must be pleaded by the party in support of its case viz. its cause of action or defence. *"Material Particulars"* on the other hand, are details in support of the material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive details to the basic contours of a picture already drawn so as to make it more clear and informative. "*Material Particulars*" thus ensure *conduct of fair trial* and would not take the opposite party by surprise. All *material facts* must be pleaded by a party in support of its case since the object and purpose is to enable the opposite party to know the case he has to meet; in the absence of a pleading, a party cannot be allowed to lead evidence. Failure to state even a single *material fact* would entail dismissal of the suit of the petitioner. *Material Particulars* on the other hand, are only the details of the cases which are in the nature of evidence a party would be leading at the time of trial.

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69. The Apex Court reiterated this distinction in *Virender Nath Gautm vs. Satpal Singh* (2007) 3 SCC 617, wherein it was observed that there is a distinction between *facta probanda* (the facts required to be proved i.e. material facts) and *facta probantia* (the facts by means of which they are to be proved i.e. the particulars or the evidence). It is settled law that pleadings must contain only facta probanda and not facta probantia. *The material facts relied upon by the parties for the claim must be stated in the pleadings, but the facts by means of which the material facts are required to be proved and are in the nature of particulars or evidence, need not be set out in the pleadings.* They are not facts in *probanda*, but only relevant evidence required to be proved at the time of evidence in order to establish the facts in issue.

70. The Division Bench of this Court in *DDA vs. Krishna Construction Company* 183 (2011) DLT 331 (DB) observed that the principle that there cannot be any variance between the pleadings and proof, is not to be expressly found in any provision of Code of Civil Procedure, but has been evolved by the Courts with reference to Order VI Rule 2 and Rule 4 Code of Civil Procedure (*hereinafter referred to as* "CPC") as a general principle of law. It was explained that Order VI Rule 2 of CPC requires pleadings to contain a statement of concise form of material facts on which the party pleading relies for its claim or defence while as per Order VI Rule 4 CPC whenever necessary, material particulars in relation to material facts have also to be pleaded. It was further observed that one cannot win battles by springing surprises; it would be unjust if parties are permitted to lead evidence beyond the pleadings. It was held that though the stringent rules of pleadings envisaged by CPC do not apply to the pleadings before an

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Arbitrator, the principles contained therein would have general applicability to all the pleadings.

71. The Co-ordinate Bench of this Court in *Public Works Department vs. Navyuga Engineering Company Ltd. & Anr.* 2014 SCC OnLine Delhi 1343 endorsed the principles enunciated in *Krishna Construction Company* (supra) and on the facts of the case while considering the petition under Section 34 of the Arbitration & Conciliation Act, 1996 observed that the documents sought to be produced on record were beyond the material facts; in fact it was a new *material fact* which had no nexus with the defence raised and thus introducing them by way of additional documents, was not permitted.

72. Applying the above enunciated principles to the facts in hand, the ***material fact*** was the date of disposal of carrots; whether it was in September, 2011 or January, 2012. The parties had to prove their respective claims either by oral or documentary evidence. The documents being probantia i.e. evidence in proof of its claim, may not have found mention in the pleadings and could not have been outrightly rejected on procedural grounds.

73. Even though the learned Arbitrator had allowed the document to be brought on record, but the sole ground for rejection of bringing these documents on record was non-compliance of the condition of payment of cost, even though at the time of consideration of the application on 21.10.2016, the petitioner had tendered the cost in cash. It is pertinent to refer that vide Order dated 17.08.2017, the learned Arbitrator had waived this cost. The principles of natural justice require that all the requisite documents must be permitted to be brought on record. These documents

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which were most pertinent to ascertain the actual date when the carrots were destroyed to adjudicate fairly the rival claims of the parties, were denied solely on the ground of non-payment of cost, which in any case was not only tendered at the relevant time but even waived subsequently. Mere delay in payment of costs could not have been a valid ground especially considering the relevancy of documents to resolve the controversy. Significantly, these documents were sought to be brought on record, at the stage when the cross-examination of the petitioner was yet to commence. Bringing on record these documents would not have prejudiced the respondent in any manner since he would have had ample opportunity to address these documents in its rebuttal evidence.

74. The three letters/ documents were from the Government Department, the authenticity of which could not be prima facie challenged. By refusing to permit the most pertinent evidence, serious prejudice has been caused in determination of true facts. **This has led to not only negation of principles of Natural Justice but is also amounts to patent illegality.**

75. The learned Arbitrator though having acted conscientiously giving sufficient opportunities to the parties, *fell in error in not permitting the material documents/evidence to come on record. It is a case where the findings had been returned by the learned Arbitrator sans the most material evidence and his conclusions are essentially based on conjectures*. Though the petitioner may have produced the photographs of October, 2012 to claim that these depicted the dumping of the carrots in January, 2012, but aside from these photographs there were more pertinent and relevant documents addressed to the Government Agencies which held the potential to change the conclusion completely. Had these documents been permitted to be

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produced, the decisions of the learned Arbitrator could have been totally different. By not permitting the evidence to be brought on record, the conclusions arrived at were **without any evidence** and, **therefore, perverse and arbitrary**. *There is, therefore, perversity in the impugned Order of the learned Arbitrator wherein the relevant documents were not permitted to be brought on record on a procedural ground of non-payment of costs, though subsequently tendered, and on this ground itself the Award is liable to be set aside.*

Reciprocal Promises under the Agreement:

76. It may be further considered whether the Agreement between the parties can be construed as *reciprocal promises* as held by the learned Arbitrator. ***Section 2(f)*** *of the Indian Contract Act* defines a *reciprocal promise* as "*Promises which forms the consideration or part of the consideration for each other are called reciprocal promises"*.

77. A contract may be **unilateral** i.e. the obligation under the Contract is to be performed by one person or may be **bilateral** wherein two separate transactions are performed reciprocally and the parties agree to exchange each for the other. Thus, in bilateral contracts both the parties have their respective obligations to perform. Such bilateral contracts may consist of "*mutually dependent*" or "*independent*" obligations. In a *dependent agreement*, the performance of one depends upon the prior performance by another and therefore, till such prior performance is performed, the other party is not liable for any action. Such promises which require the performance of a prior promise is covered under **Section 54** of the Indian Contract Act which reads as under:

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> *"When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract."*

78. On the other hand, in contracts which are *mutual and independent,* each party performs the promise and neither is entitled to demand the antecedent performance or even to require the other to be ready and willing to perform his part. Either party may recover damages from the other for the injury he may have received by a breach of the covenant for which there is no excuse. **Section 51** of the Indian Contract Act pertains to promises which need to be performed simultaneously and a promisor is not bound to perform unless reciprocal promisee is "*ready and willing to perform his reciprocal promise*".

79. In the present case, the terms of the Agreement between the parties defined the respective obligations of both the parties. The petitioner was supposed to make available his storage for storing of the carrots of the respondent at the required temperature, while the employees of the respondent were responsible to monitor that the said temperature was maintained properly and that the carrots were not getting rotten while they were lying in Cold Storage. ***The terms of the Agreement were mutual but independent.*** Though terms of the Agreement are mutual, the obligations to be performed in furtherance of the same transaction, were independent. They cannot be termed as reciprocal promises and the obligation of the respondent to pay for the rent charge of Rs.48 lakhs as was specifically

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agreed in the Agreement, could not have been refuted or denied by the respondent under the misconceived notion of reciprocal promises as the same constitutes the consideration under the Agreement. Thus, obligation of the petitioner to make the storage space available to the respondent is an absolutely independent obligation which admitted to no exceptions. On the other hand, if the respondent felt that his goods got spoiled because of some conduct of the petitioner, he could have claimed damages as was sought to be done by initiating the arbitration proceedings. By no interpretation can it be said that the Agreement was reciprocal or that by virtue of Section 54 of the Indian Contract Act, the respondent could have denied or avoided payment of Storage charges. The *learned Arbitrator had relied upon the provisions of the Contract Act in a manner which is against the law of the land and against the express provisions of law. It is not a case where there has been misappreciation of facts or law but a completely wrong application of law which was totally inapplicable.*

Applicability of the provisions of Bailment under Section 148 of the Contract Act:

80. The learned Arbitrator had further accepted the contentions of the respondent that the Agreement between the parties was essentially a contract for bailment as defined under Section 148 of the Contract Act and the petitioner was supposed to take good care of the goods and return the same to the respondent upon the expiry of the tenure of the Agreement dated 01.03.2011.

81. Sections 148, 152 and 160 of the Indian Contract Act read as under :

> *"**148. 'Bailment', 'bailor' and 'bailee' defined**.—A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the*

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purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.

***Explanation.**—If a person is already in possession of the goods of other contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.*

xxx

***152. Bailee when not liable for loss, etc., of thing bailed.—** The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.*

xxx

***160. Return of goods bailed, on expiration of time or accomplishment of purpose.**—It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished."*

82. Here again, the learned Arbitrator has concluded that in terms of the Agreement, it was the responsibility of the petitioner to ensure that the goods were stored in good condition and they do not deteriorate. Since, the petitioner failed to take necessary standard of care as required by the Statute and also failed to return the carrots as were entrusted to it, on the expiry of the term of Agreement, the petitioner was held to be guilty of misappropriation of 38,115 bags of carrots kept by the respondent in the Cold Storage. However, the terms of Agreement referred earlier, imposed the obligation on the petitioner to provide the Cold Storage and to maintain a temperature at a certain defined level and any failure to do so the petitioner

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shall be liable to account for the same. On the other hand, **Clause 1(ii)** expressly stated that the property in the carrots stored in the Cold Storage shall be the sole and exclusive property of the respondent. **Clause 2(vii)** further provided that the petitioner Company shall not provide any fungicide or chemical for carrot bags. Further, it would be the respondent who would regularly scrutinize the conditions of the carrots stored in the Cold Storage. **Clause 2(xii)** further provided that respondent Company shall depute a Supervisor during loading of carrots and will remained attached with the Storage to monitor temperature and quality of carrots. The Storage Company i.e. the petitioner was to facilitate the Supervisor of respondent to carry out his duties. The most pertinent question was: *whether the goods were disposed of before 31.11.2011 or were misappropriated but the Learned Arbitrator ventured into arenas which were not even relevant*.

83. It is quite evident from these express terms of the Agreement that the petitioner Company *was not under any obligation whatsoever to supervise and to maintain the quality of the carrots.* The property in the goods and its maintenance and supervision, was exclusively the domain of the respondent and the only obligation of the petitioner being limited to providing the storage space and to maintain the temperature. The **learned Arbitrator again fell in error of law while appreciating the concept of bailment and the corresponding obligations**. There is a complete misunderstanding of the law and its obligation to the given facts. It is not a case where two plausible views could have been taken out of which one has been accepted by the learned Arbitrator. **Here is a case which is absolutely against the law of the land**.

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84. The Apex Court in the case of *Associate Builders* (supra) held that an award in contravention of Section 28 of the A & C Act, 1996 would suffer from patent illegality. It was explained that the Section 28(1)(a) imposes a mandate on the arbitral tribunal to decide a dispute in accordance with the substantive law for the time being in force which includes the Indian Contract Act, 1872. Thus, this court is of the view that even an Award which blatantly misapplies the provisions of the Contract Law resulting in a perverse interpretation of the law, is liable to be set aside as such incorrect and unsubstantiated application of the substantive law goes to the root of the matter and has led to complete miscarriage of justice.

Conclusion:

85. To conclude, this is a case where the learned Arbitrator has denied the relevant evidence from being brought on record in contravention of principles of natural justice which has led to findings on facts which is supported by no evidence and thereby complete miscarriage of justice. Also, the Law of Reciprocal Promises and Bailment has been incorrectly invoked to justify Claims which is patent illegality and against the fundamental Law of the land.

86. Therefore, the Objections to the Award dated 04.02.2021 allowing the Claim of the respondent and partly allowing the Counter-Claim are hereby set aside. Parties are at liberty to initiate the arbitrations proceedings afresh as per rules.

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 6, 2023/*va/S.Sharma*

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