Ry n-153
13/01/25

IN THE HIGH COURT OF DELHI AT NEW DELHI

No. 72-83/DHC/Gaz.IB/G-2/SC-Judgment/2026 Dated: 08 .01.2026

From :

The Registrar General,
High Court of Delhi,
New Delhi.

To

1. The Principal District & Sessions Judge (HQ), Tis Hazari Courts Complex, Delhi.
2. The Principal District & Sessions Judge (New Delhi), Patiala House Courts Complex, New Delhi.
3. The Principal District & Sessions Judge (South), Saket Courts Complex, New Delhi
4. The Principal District & Sessions Judge (South-East), Saket Courts complex, Delhi.
5. The Principal District & Sessions Judge (East), Karkardooma Courts Complex, Delhi.
6. The Principal District & Sessions Judge (North-West), Rohini Courts Complex, Delhi.
7. The Principal District & Sessions Judge (North-East), Karkardooma Courts Complex, Delhi.
8. The Principal District & Sessions Judge (Shahdara), Karkardooma Courts Complex, Delhi.
9. The Principal District & Sessions Judge (South-West), Dwarka Courts Complex, New Delhi.
10. The Principal District & Sessions Judge (West), Tis Hazari Courts Complex, Delhi.
11. The Principal District & Sessions Judge (North), Rohini Courts Complex, Delhi.
12. The Principal District & Sessions Judge-cum-Special Judge (PC Act) (CBI), RACC, New Delhi.
13. The Principal Judge (HQ), Family Courts, Dwarka, New Delhi.

Sub : **Judgment dated 08.12.2025 passed by Hon'ble Supreme Court of India in Civil Appeal No. 14630 of 2025 [Arising out of SLP(Civil.) No. 10389 of 2025] titled as "Harshbir Singh Pannu and Anr. Vs. Jawinder Singh"**

Sir/ Madam,

I am directed to forward herewith a copy of Judgment dated 08.12.2025 passed by Hon'ble Supreme Court of India in Civil Appeal No. 14630 of 2025 [Arising out of SLP(Civil.) No. 10389 of 2025] titled as "Harshbir Singh Pannu and Anr. Vs. Jawinder Singh" through email and to request you to download the same and circulate amongst all the Judicial Officers working under your respective control for information and necessary compliance.

Yours faithfully,

(Ashok Sharma)
Assistant Registrar (Gazette-IB)
For Registrar General.

OFFICE OF THE PRINCIPAL DISTRICT & SESSIONS JUDGE; ROHINI COURTS, DELHI

No. 1402-1477 .....Genl.I/F. 3(A)/N-W&N/RC/2026 Dated 12/01/2026

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(SUSHIL KUMAR)
Link Officer In-Charge, General Branch-I
North-West & North District
Rohini Court Complex, Delhi

2025 INSC 1400

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 14630 OF 2025

[Arising out of Special Leave Petition (Civil) No. 10389 of 2025]

HARSHBIR SINGH PANNU AND ANR. ...APPELLANT(S)

VERSUS

JASWINDER SINGH ...RESPONDENT(S)

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

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1. Leave granted.

"Arbitration is often a friend in conferences but a foe in practice. Its raison d'etre has always been to ease the burden on courts and to ensure the expeditious resolution of commercial disputes. Yet, this is not its only virtue. The true advantage of arbitration lies in its freedom and flexibility, with party autonomy as the cornerstone of the arbitral process.

Parties enjoy the liberty to determine the strength and composition of the tribunal, to appoint domain experts as arbitrators, and to design procedures suited to the nature and complexity of their disputes. This freedom allows them to bring to the table expertise and insight that even a judge may not be able to contribute.

However, parties often embrace arbitration in good times, only to resist or manipulate it when disputes actually arise – seeking either to wiggle out of arbitration altogether or to tilt the process unfairly in their favour. In such situations, judicial intervention becomes inevitable and rightly so to safeguard fairness and the integrity of the arbitral process.

The evolution of the judicial role from that of a helicopter parent to that of a guardian angel of arbitration has been neither smooth nor uniform. Successive legislative amendments, most notably those of 2015, 2019, and 2021, have sought to curtail judicial interference and recalibrate the delicate balance between autonomy and oversight. Yet, in practice, arbitration has at times become more cumbersome than civil litigation. Parties continue to exploit every procedural avenue to delay proceedings, i.e., filing a maze of applications before the arbitral tribunal, the High Court, and even this Court, often on technical or jurisdictional objections.

The present case is yet another instance where the fine boundary between judicial oversight and arbitral independence is tested. At its core, arbitration remains a

creature of contract, founded on the twin pillars of party autonomy and impartiality. Every act of interpretation whether of the statute or of the contract must therefore be guided by these two foundational principles."

Hindustan Construction Company Ltd. v. Bihar Rajya Pul Nirman Nigam Ltd. & Ors. 2025 INSC 1365

2. We are tempted to preface our judgment with the above quoted observations of this Court made by one of us, R. Mahadevan J., as the situation remains the same. The concerns articulated above continue to resonate with an undiminishing force in the present litigation as-well. The issues that have unfolded before us echo the very same judicial disquiet. Even with the passage of time, the challenges that beset the arbitral process persist in much the same form and complexity.

3. The respondent although served with the notice issued by this Court yet, has chosen not to remain present before this Court either in person or through an advocate and oppose this appeal.

4. This appeal arises from the judgment and order passed by the High Court of Punjab and Haryana dated 07.01.2025 in ARB No. 357 of 2023 (O&M) (for short, the "**Impugned Judgment and Order**") by which the petition filed by the appellants herein for

appointment of an arbitrator under Section(s) 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for short, the "**Act, 1996**") came to be rejected.

I. FACTUAL MATRIX

5. It appears from the materials on record that the appellant no. 2 and the respondent herein, had entered into a partnership agreement to form a partnership firm running in the name and style of 'M/s Amritsar Health & Hospitality Services' *vide* a partnership deed dated 31.03.2013. The said firm was engaged in the business of providing health care and hospitality services as-well as the operation of specialty care hospitals in Amritsar. Sometime thereafter, the appellant no. 1 herein also came to be inducted as a partner into the said firm by way of a fresh partnership agreement entered between the parties *vide* a partnership deed dated 12.03.2014.

6. The aforesaid partnership deed, more particularly, Clause 13 provided that in the event of any dispute or difference arising out of the said partnership agreement the same would have to be resolved through arbitration alone. The said clause reads as under:

> *"13. That in case of any misunderstanding, disagreement, differences controversy, disputes or claim, if any arising out of this Deed or relating to this contract or breach thereof, if not settled mutually between the parties, the same shall be referred to two arbitrators to be nominated mutually by all the parties. The decision given by such arbitrators, unanimously shall be binding on parties concerned. In case of any disagreement between the said arbitrators, the natter will be referred to any other Umpire, whose award given shall be final and binding on all the parties."*

7. Sometime, in the year 2017, various disputes cropped up between the appellants herein and the respondents in respect of the capital contributions and the day-to-day management of the partnership firm.

8. Accordingly, the appellants issued a legal notice dated 13.06.2018 to the respondent *inter-alia* for dissolution of the partnership firm with immediate effect and to refer the disputes to arbitration, by calling upon the respondent to mutually appoint an arbitrator in terms of Clause 13 of the aforesaid partnership deed.

9. Since no reply was received from the respondent to the aforesaid notice of invoking arbitration, the appellants herein filed a petition being ARB No. 180 of 2019, for seeking appointment of an arbitrator under Section 11 of the Act, 1996 before the High Court.

10. The High Court *vide* its order dated 02.03.2020 passed in ARB No. 180 of 2019, allowed the aforesaid petition filed by the appellants and thereby appointed a Sole Arbitrator to adjudicate the disputes between the parties. Whilst passing the said order, the High Court further directed that the fees payable to the Sole Arbitrator shall be determined either in accordance with the Fourth Schedule of the Act, 1996 or as may be mutually agreed upon by the parties. The said order reads as under: -

> *"After hearing learned counsel for the parties and leaving them to raise all their claims/defences/counter-claims which may be available to them in law to be raised before the arbitrator, Justice Ram Chand Gupta, a former Judge of this Court is appointed as the sole Arbitrator. However, such appointment would be subject to the declaration to be made by Justice Ram Chand Gupta under Section 12 of the Act with regard to his independence and impartiality to settle the dispute between the parties.*
>
> *The Arbitrator is requested to complete the proceedings within the time limit specified under Section 29A of the Act.*
>
> *The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended or as may be mutually settled by the parties and the Arbitrator."*

(Emphasis supplied)

A. Proceedings before the Sole Arbitrator.

11. Pursuant to the above, the arbitration proceedings were commenced and the appellants herein filed their Statement of Claim before the arbitral tribunal to the tune of Rs. 13,65,09,906/-.

12. Thereafter, *vide* the order dated 05.01.2021 passed by the Sole Arbitrator, the Statement of Claim filed by the appellants herein was taken on record. It further appears that the Sole Arbitrator on the basis of the said Statement of Claim, determined the fees payable in accordance with the Fourth Schedule to a sum of Rs. 17,01,655/- which was to be borne equally by both the parties i.e., Rs. 8,50,827/- by the appellants and respondent, respectively. The said order reads as under: -

> "***ORDER***
> *Vide order dated 14.10.2020, parties were directed to complete the pleading part through email as well as by filing hard copies of the pleadings by post. In compliance of the said order claim petition has been filed by the claimant. Respondent has also confirmed on telephone that hardcopy of the claim petition had been received by them. In view of the same, respondent is directed to file written statement/counter claim if any on or before 25.01.2021.*
>
> *After going through the claim petition, the total claim amount is Rs. 13,65,09,906/-. According to 4th Schedule of Arbitration and Conciliation Act, 1996, tentative fee to be paid to the Arbitrator comes to Rs. 17,01,655/- to be shared equally by both the parties. Hence, both the parties are*

directed to pay Rs. Rs.8,50,827/- each in the Bank Account of the undersigned on or before the next date of hearing. [...]"

(Emphasis supplied)

13. Although it is not forthcoming from the record whether the consent of the parties was obtained whilst fixing the fees payable to the arbitrator as per the Fourth Schedule of the Act, 1996, yet as there was no objection from either party, we need not dwell any further on this aspect.

14. Thereafter, the respondents filed their counter-claim to the tune of Rs. 82,78,54,166/- and the total sum in dispute, together with the claim and the counter-claim came to a sum of Rs. 96,43,64,072/-. In view of the same, the Sole Arbitrator *vide* its order dated 23.04.2021 again revised the fees payable in terms of the Fourth Schedule of the Act, 1996 to a sum of Rs, 37,50,000/-, to be borne equally by both the parties. The said order reads as under: -

*"**ORDER***
[...] So far as fee payable to the Arbitrator is concerned, tentative fee after going through the claim petition was assessed vide order dated 05.01.2021. Total claim of the claimants is Rs. 13,65,09,906/-. However, respondent has also filed counter-claim claiming a total sum of Rs. 82,78,54,166/-. Hence, total sum in dispute comes to Rs. 96,43,64,072/-. The fee as calculated on the sum in dispute as per IVth Schedule of the Arbitration and Conciliation Act, 1996 comes to much more and however in view of ceiling

fixed under the said Schedule, fee payable to the Arbitrator is fixed at Rs. 37,50,000/-. On the request of the parties, they were permitted to pay the fee in installments vide order dated 02.02.2021. Parties were permitted to pay 50% of the fee before completion of pleadings. However, despite repeated orders, parties had paid only a part of first installment of even the tentative fee as assessed vide order dated 05.01.2021. However, as the fee has now been revised in view of the counter-claim filed by the respondent, parties are again directed to pay first installment of the fee so reassessed on or before the next date of hearing.

[...] However, there is no dispute that claimants are liable to pay their 50% share of fee of Arbitrator and however even claimants have not paid first installment of the fee. It is clarified that subject to decision on the application moved by respondent, both the parties are now liable to pay Rs. 18,75,000/- each. 50% of the same is to be paid by both the parties before completion of pleadings. Hence, both the parties are directed to pay the same on or before the next date of hearing."

(Emphasis supplied)

15. Pursuant to the same, both the appellants and the respondent herein, preferred an application raising certain objections to the determination of fees by the Sole Arbitrator *vide* its order dated 23.04.2021.

16. The appellants *inter-alia* contended that the counter-claim filed by the respondents was not only frivolous but was also an exaggerated estimation of the amount claimed, and that the appellants were not in a financial position to bear the arbitral fees for the total amount in dispute.

17. The respondent on the other hand, contended that he was liable to pay only 25% of the total fees of arbitration as his share in the partnership firm was only 25%.

18. In view of the aforesaid, the Sole Arbitrator adjourned the proceedings for further hearing on the aspect of fees payable, and directed the counsel appearing for the appellants and the respondent to seek further instructions in this regard.

19. On the next date of hearing, the Sole Arbitrator *vide* its order dated 17.07.2021, dismissed the application filed by the respondents contending that he was liable to pay only 25% of the total fees of arbitration in view of his share in the partnership firm. The Sole Arbitrator held that as per Section 38 of the Act, 1996, both the contesting parties, namely, the claimant and the respondent, are liable to bear the fees of arbitration in equal proportion i.e., both the claimant and the respondent are liable to pay 50% of the total fees assessed, respectively. The Sole Arbitrator further held that the total sum of Rs. 37,50,000/-, payable towards the fees of arbitration had been determined in accordance with the Fourth

Schedule of the Act, 1996 and with the consent of both the parties. The relevant observations read as under: -

> *"Second sitting by video-conference was conducted by the Tribunal and the senior counsel for the claimant as well as counsel for the respondent were duly heard. Detailed order was passed fixing Arbitrator's fee as Rs. 37,50,000/-. It may be mentioned here that the said order was passed with the consent of counsel for both the parties.*
>
> *An application filed by respondent that he is liable to pay only 25% of the fee on the plea that his share in the partnership firm concerned is only 25% was also decided after hearing counsel for both the parties and it was held that at this stage under Section 38 of the Act both the contesting parties i.e., claimants and respondent are liable to pay 50% each of the fee assessed. Both the counsel had agreed that both the parties would pay Rs. l,00,000/- each by the next date of hearing and regarding mode of payment of respective share of fee of Arbitrator, they would seek instruction from their respective clif.us and hence the matter was adjourned."*
>
> (Emphasis supplied)

20. Thereafter, it appears from the material on record that a total of six hearings were conducted by the Sole Arbitrator. In all the said six hearings, the learned counsel for the appellants remained absent, as a result of which the matter had to be adjourned.

21. In the meantime, the appellants herein filed one affidavit before the Sole Arbitrator expressing their inability to pay their share of the arbitral fees, as determined earlier with the consent of the

parties. Accordingly, the Sole Arbitrator in view of Section 38 of the Act, 1996, enquired from the respondent, if he would be willing to bear the claimant's share of the arbitral fees, and accordingly adjourned the matter for further hearing. The relevant observations read as under: -

> *"Fourth physical hearing was conducted by the Tribunal on 25.02.3022 in Chandigarh Arbitration Centre. However on that date as well though respondent was present, clerk of Mr. Ripudaman Sidhu, Advocate appeared and sought adjournment on the plea that the counsel could not, be present due to prior engagement. However on that date affidavit regarding admission/denial of documents in compliance with order dated 12.09.2021 was filed by clerk of Mr. Ripudaman Sidhu, Advocate. Another affidavit of claimant was filed that claimant is not in a position to pay his share of pay of Arbitrator as assessed vide order dated 17.07.2021 with the consent of counsel for the parties. However in view of Section 38 of the Act, respondent was given an opportunity, as to whether he was ready to pay arbitrator's fee of the share of the claimant as well. As neither claimant nor counsel for the respondent was present on that date, in the interest of justice, matter was adjourned to 17.03.2022."*
>
> (Emphasis supplied)

22. On 28.03.2022, the matter was again taken up by the Sole Arbitrator on the issue of termination of arbitral proceedings for non-payment of fees of arbitration in terms of Section 38 of the Act, 1996. The appellants herein once again reiterated their stance that they were not in a position to pay the arbitral fees for both the

claim and the counter-claim, and could pay only their share of the fees in respect of the claim. The respondent on the other hand, submitted that although he was willing to pay the arbitral fees for both the claim and the counter-claim, yet he was not ready to bear the claimant's share of the fees payable.

23. In such circumstances referred to above, the Sole Arbitrator *vide* its order dated 28.03.2022 terminated the arbitral proceedings. The Sole Arbitrator observed that as per Section 38 of the Act, 1996, where one party fails to pay his share of the arbitral fees, the other party may pay that share. However, in the event the other party also declines to pay the said share of the arbitral fees, the arbitral tribunal may suspend or terminate the arbitral proceedings. Accordingly, since neither party was willing to pay the arbitral fees in respect of either the claim or the counter-claim, the arbitral proceedings came to be terminated by the Sole Arbitrator. The relevant observations read as under: -

> *"[...] the matter was adjourned for today for hearing the parties regarding termination of proceedings under Section 38 of the Act.*

15. It has been stated by learned counsel for the claimant that claimant is not in a position to pay his share of Arbitrator's fee as assessed vide order dated 17.07.2021 as he has suffered losses in the businesss and he is not in a position to pay the said fees. He has further stated that claimant is ready to pay only 50% of the fee of his claim i.e. 50% of Rs. 17,01,855/- i.e. Rs. 8,50,827/-. However when query was put to him by the Tribunal as to when he would pay the said amount, he stated that he would pay the same as and when his business earning would improve and he receives the possession of the hospital.

16. It has been stated by learned counsel for the respondent as well as respondent who is also present in person that he is ready to pay his share of the fee as assessed vide order dated 17.07.2021 and he is not ready to pay the share of claimant as well.

17. Parties were directed to pay their respective share of Arbitrator's fee as assessed vide order dated 17.07.2021 as provided under Section 38 of the Act which is reproduced as under:

> *"38. Deposits. –*
> *(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:*
>
> *Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.*
>
> *(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties: Provided that where one party fails to pay his share of the deposit, the other party may pay that share:*

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be."

18. As is dear from the aforementioned provision of the Act, where one party fails to pay his share of the fee, the other party may pay that, share and however if other party also does not pay the aforesaid share in respect of claim or the counter-claim, the Arbitral Tribunal may suspend or terminate the Arbitral proceedings in respect of such claim or counter-claim as the case may be. As is clear from the aforementioned facts, I had been conducting proceedings in this matter for the last about two years and had been making efforts to decide the same expeditiously even during COVID-19 pandemic. Four hearings by video-conference were also conducted at my residence. Five physical hearings were also conducted at Chandigarh Arbitration Centre. However claimant was not interested in getting this matter decided expeditiously as is clear by various orders passed by the Tribunal. He is not ready to pay his share of the Arbitrator's fee on the plea that he is not in position to pay the same as he suffered losses in the business and possession of the hospital has also been taken away. Hence in view of these facts, I have no other alternative but to terminate the further proceedings of the Tribunal in this matter. I hereby order for termination of the present proceedings under Section 38 of the Act."

(Emphasis supplied)

B. <u>Proceedings before the High Court</u>.

24. Aggrieved by the aforesaid, the appellants preferred a petition under Article 227 of the Constitution being CWP No. 6182 of 2022 before the High Court of Punjab and Haryana *inter-alia* assailing, ***first***, the order dated 28.03.2022 passed by the Sole Arbitrator terminating the arbitral proceedings, ***secondly***, the constitutional *vires* of the Fourth Schedule of the Act, 1996 and ***lastly***, the determination of fees by the Sole Arbitrator in consequence thereof.

25. During the pendency of the aforesaid proceedings, this Court in its decision in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** reported in **2022 SCC OnLine SC 1122**, upheld the constitutional validity of the Fourth Schedule of the Act, 1996.

26. Since the principal contention advanced by the appellants in the aforesaid writ petition for assailing the termination of the arbitral proceedings was on the ground that the Fourth Schedule of the Act, 1996 was arbitrary and thus, the Sole Arbitrator could not have determined the fees in accordance thereof. High Court *vide* its order dated 15.02.2023, dismissed the writ petition in view of the *ratio* laid down by this Court in ***Afcons*** (supra). However, the

High Court left it open for the appellants to avail any other remedy that may be available to them in law, against the termination of arbitral proceedings. The relevant observations read as under: -

> *"The issue(s) raised in this petition has already been decided by the Supreme Court in the case of Oil and Natural Gas Corporation Ltd. Vs. Afcons Gunanusa JV, 2022 SCC OnLine SC 1122. Therefore, the petition is disposed of, in terms of the said decision. However, the petitioner would be at liberty to avail the remedies, if any, available in law."*

II. IMPUGNED ORDER

27. Pursuant to the aforesaid, the appellants filed one another petition under Section 11 sub-section(s) (5) and (6) of the Act, 1996 before the High Court of Punjab and Haryana, being ARB No. 357 of 2023 (O&M), seeking appointment of an arbitrator afresh.

28. The High Court *vide* its impugned judgment and order dated 07.01.2025 declined to entertain the second petition filed by the appellants under Section 11 of the Act, 1996 on the ground that the same was not maintainable. The said decision is in three parts: -

(i) ***First,*** the High Court placing reliance on the decision of the High Court of Delhi in ***M/s Chemical Sales Cooperation & Ors. v. M/s A Laxmi Sales and Services Pvt. Ltd. & Ors.*** reported in **2011 SCC OnLine Del 3487** held that there lies

a distinction between termination of arbitral proceedings and termination of mandate of the arbitral tribunal. Termination of proceedings simpliciter under Section 38 of the Act, 1996 does not automatically mean the termination of the mandate of the arbitrator in terms of Section 32 sub-section (2)(c) of the Act. The relevant observations read as under: -

> *"13. Section 32 of the Arbitration Act provides for the termination of the proceedings. This provision came up for interpretation before the Delhi High Court in M/s. Chemical Sales Corporation and others Versus M/s. A & A Laxmi Sales and Service Private Limited and others. 20} J SCC OnLine Delhi 3847. The Court proceeded to notice the statutory provision and observed as under:*
>
> *xxx xxx xxx*
>
> > *11. The aforesaid provision specified the circumstances under which arbitral proceedings shall be terminated. It provides that arbitral proceedings shall stand terminated on Arbitral Tribunal making an award. Besides that, arbitral proceedings can also be terminated in case (a) claimant withdraws his claim (b) parties agree on the termination of the proceedings. For example, if parties arrive at a settlement and agree for termination of proceedings, in such an eventuality also, arbitral proceedings shall stand terminated (c) if Arbitral Tribunal finds that continuation of the proceedings have become unnecessary or impossible for any other reason. In other words, if the arbitral tribunal finds, for any reason which includes non-*

cooperation of the parties, making the continuation of the proceedings impossible, then it can make an order for termination of the arbitral proceedings. In case of termination of the proceedings, the mandate of Arbitral Tribunal shall also stand terminated as envisaged under Sub-Section 3 of Section 32 of the Act except in cases where Section 33 and Section 34(4) of the Act are attracted. Arbitral Tribunal has power to terminate the arbitral proceedings under Section 25(a) upon default of the claimant to communicate his statement of claim; under Section 30(2) upon settlement of dispute by the parties and under Section 38(2) upon failure of the parties to pay the amount of deposit fixed by the Arbitral Tribunal. The termination of arbitral proceedings is different from termination of the mandate of arbitrator. The mandate of arbitrator, depending upon the facts and circumstances of a case, may come to an end but not the arbitral proceedings. For example, if the parties to the arbitration agreement had fixed a period of six months for completion of arbitral proceedings and making of an award by the Arbitral Tribunal and the Arbitral Tribunal fails to do so on or before expiry of six months, the mandate of Arbitral Tribunal shall come to an end but not the arbitration proceedings and in such an eventuality, if a substitute arbitrator is appointed than he shall have to continue with the arbitration proceedings from the stage the same had been left by the earlier arbitrator. However, in case arbitration proceedings are terminated within the meaning of Section 32 of the Act resulting in termination of mandate of arbitrator, the same cannot continue merely by appointing another arbitrator. In such a scenario, first of all, the arbitration proceedings have to be

revived after setting aside the order of Arbitral Tribunal terminating the arbitral proceedings.

12. In view of the above discussions, I do not find any force in the contention of learned senior counsel for the petitioner that the termination of arbitral proceedings, in this case on the ground of alleged non-cooperation of the claimant including the ground of non-payment of fee, tantamount to withdrawal by the arbitrators resulting in termination of mandate of Arbitral Tribunal, within the meaning of Section 15(1)(a) of the Act thereby attracting sub-Section 2 of Section 15 of the Act. In this case, arbitrators have not withdrawn from office for any reason as stipulated in Section 14 or 15 of the Act but have, in fact, terminated the arbitral proceedings under Section 32 (2)(c). Thus, in my view, sub Section 2 of Section 15 of the Act is not attracted in the facts of this case."

14. The above reproduced observaiions of the Delhi High Court clearly amplify that the termination of the arbitral proceedings is different from the termination of the mandate of the Arbitrator. [...]"

(ii) ***Secondly,*** the High Court observed that, the Sole Arbitrator in the present case had terminated the arbitral proceedings on account of the failure of the parties to pay the arbitral fees. Since under Section 38, the Sole Arbitrator is empowered to do so, he can neither be said to have withdrawn from office nor otherwise rendered incapable of

acting as an arbitrator. As such there was no occasion for seeking substitution of the arbitrator in terms of Section 11 read with Section 15 sub-section (2) of the Act, 1996. The relevant observations read as under: -

> *"12. It is evident from the perusal of the above reproduced order that the Arbitrator had proceeded to terminate the proceedings on account of the attitude of the parties, who failed to fulfil their commitment and pay the arbitral fee. The order passed by the learned Arbitrator fell within the four corners of Section 38(2) of the Arbitration Act, which he was fully empowered to pass. Petitioners remained unsuccessful in a challenge to the said order when a writ petition filed by them was disposed off by this Court on 15.02.2023 [...]*
>
> *xxx xxx xxx*
>
> *14. [...] The termination of the arbitral proceedings can be on account of the non-cooperative attitude of the parties, including the non-deposit of the arbitral fee, as is this situation in the present case. In such circumstances, there is no occasion for filing of a fresh petition for appointment of an Arbitrator [...] The judgments relied upon by the counsel for the petitioner are not attracted lo the facts of the present case and in both the cases a substitute arbitrator was appointed under Section 15 of the Arbitration Act as the previous arbitrator had resigned/withdrawn from the proceedings."*

(iii) ***Thirdly,*** according to the High Court the appropriate remedy against such order of termination of proceedings under Section 38 of the Act, 1996 ought to have been either

by way of filing an application for recall of the order of termination before the Sole Arbitrator or by challenging the legality of the termination under Section 14(2) of the said Act. In this regard reliance was placed on the decisions of this Court in ***SREI Infrastructure Finance Ltd. v. Tuff Drilling*** reported in **(2018) 11 SCC 470** and ***Lalitkumar Sanghavi v. Dharmdas Sanghvi*** reported in **(2014) 7 SCC 255**, respectively. The relevant observations read as under: -

> *"14. [...] rather the remedy for the party concerned is either to file an application for recall of the order as has been held by the Supreme Court in Srei Infrastructure Finance Limited's case (supra) or lo challenge the legality of the order under Section 14(2) as observed by the Apex Court in Lalitkumar's case (supra). [...]"*

29. In such circumstances referred to above, the appellants are here before this Court with the present appeal.

III. <u>SUBMISSIONS ON BEHALF OF THE APPELLANTS</u>

30. Mr. Nakul Dewan, the learned Senior counsel and Mr. Samarth Sagar, the learned counsel, appearing for the appellants, in their written submissions have stated thus: -

> *"The Hon'ble High Court while dismissing the application of the Petitioners has passed the impugned order on 3 principal*

premises: 1. That an order terminating arbitral proceedings on the ground of non payment of Arbitrator's fees falls within the parameters of Section 38(2) and the Arbitrator is fully empowered to pass such an order. 2. The only remedy available to an aggrieved party is to either file an application for recall before the same Arbitrator. 3. The other remedy is to challenge the order terminating the arbitral proceedings under Section 14(2). It is submitted that all the 3 premises on which the impugned judgment is based are wholly erroneous and in ignorance of the settled jurisprudence on this issue.

I. ***Termination of Arbitral Proceedings on ground of non-payment of fees can be passed by the Arbitrator under Section 38(2)***

The finding of the arbitrator on this aspect is absolutely erroneous, both legally and factually. It is contrary to settled jurisprudence on this issue. The Supreme Court in the case of Lalitkumar Sanghavi v. Dharamdas Sanghvi, (2014) 7 SCC 255 has clearly traced the source of this power to only Section 32(2)(c). The ratio is extremely specific and clear. Therefore, the finding of the High Court is totally contrary to judgment in Lalitkumar Sanghavi's case (supra), which has consistently been followed by High Courts also.

Secondly, the recent judgment of this Hon'ble Court judgment in the case of ONGC Ltd. v. Afcons Gunanusa JV, (2024) 4 SCC 481 also vitiates the finding of the Hon'ble High Court as perverse and unsustainable. This Hon'ble Court in the Afcons Gunanusa JV case (supra) while examining the provisions of Sections 31, 31A, 38 and 39 has clearly held that the power of the Arbitral Tribunal to fix its own fees is subject to the consent of the parties. It has further been held that an Arbitral Tribunal does not have the power or jurisdiction to pass any binding direction to the parties on the aspect of its fees.

This ratio assumes importance as in the present case, the Sole Arbitrator, vide its procedural order dated 23.04.2021 (Annexure P-13) had enhanced its fees in accordance with the Fourth Schedule without taking the consent of the parties.

This is also evident from the procedural order 24.05.2021 (Annexure P-14) wherein the Petitioners' raise their objection to the said enhancement, which the Petitioners further strengthened by filing a writ petition (Annexure P-15) in the High Court against the determination of fees by the Sole Arbitrator.

It is submitted that the order dated 28.03.2022 (Annexure P-9, Pg. 61 of SLP) terminating the arbitral proceedings on ground of non-payment of fees has the effect of binding the parties to the arbitration to the determination of fees made by the Arbitrator, while the issue was pending before the High Court. Furthermore, this order also imposes the unfortunate consequence of extinguishing the lis between the parties, which is completely disproportionate and unwarranted. According to the judgment in Afcons Gunanusa JV case (supra) the Arbitral Tribunal clearly did not have the power or jurisdiction to do so.

II. <u>Power of recall of an Arbitrator of an order passed under Section 32(2)</u>

The High Court fell into a grievous and manifest error of law in holding that first remedy available to the petitioners is to file an application for recall of the order of termination of proceedings before the Sole Arbitrator. The High Court relied on the case of SREI Infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd., (2018) 11 SCC 470 to come to the said conclusion.

It is submitted that the High Court has completely misread and misunderstood the judgment in the case of SREI Infrastructure Finance Ltd. (supra). The Hon'ble Supreme Court has read the power of recall and review on procedural aspects into Section 25 only and not Section 32. Infact, this Hon'ble Court had specifically noticed the differences in the language of Section 25 and 32 and while distinguishing the scope of the two provisions, refrained from reading the said power into Section 32.

It is submitted that the entire premise of the finding arrived at by the Hon'ble High Court is based on a complete misreading and misappreciation of the actual ratio decidendi of the judgment in the case of SREI Infrastructure Finance Ltd. (supra) and such liable to be set aside and rejected.

III. <u>Challenge to order terminating arbitral proceedings under Section 14(2)</u>.

It is submitted that the finding of the High Court that the other option available to the petitioners is to challenge the termination of mandate under Section 14(2) is again based on a complete misreading of the provisions of the Arbitration and Conciliation Act, 1996, as well as the law on the said issue.

In the facts of the present case, the question of challenging the termination of mandate would arises when a party wants to dispute the facts leading to the termination of mandate and the termination of mandate. In the present case, the petitioners are not disputing the termination of the mandate. They are rather challenging the termination of proceedings. According to petitioners, this present case concededly results in termination of mandate of the Sole Arbitrator, but not the termination of proceedings.

In such a case, the appropriate remedy is Section 15(2) and not Section 14(2). Reference is invited to the judgment in the case of Swadesh Kumar Goyal v. Dinesh Kumar Agarwal & ors., (2018) 11 SCC 470.

Furthermore, Section 15(2) is an enabling provision, which enables a party to seek the appointment of a substitute arbitrator in accordance with the 'rules applicable to the appointment of the arbitrator being replaced', which this court has held to include the arbitration agreement and statutory provisions applicable when the mandate of arbitration agreement is not fulfilled, i.e. Section 11(6). Section 15(2) is merely a substantive provision, which gets implemented through the machinery and procedural provision of Section 11(6). Therefore, the Petitioners'

application under Section 11(6) was fully maintainable. Reference is invited to the judgment in the cases of:

- *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd., (2006) 6 SCC 204;*
- *Shailesh Dhairyawan v. Mohan Balakrishna Lulla, (2016) 3 SCC 619*
- *C.G. Govardhan v. R.K. Estates & ors., 2019 SCC Online Kar. 4293*

And all other judgments in Compilation Vol.2 submitted by the Petitioners.

IV. Submissions on reconsideration of the law in relation to power to terminate arbitral proceedings for non-payment of fees

It is humbly submitted that the principal basis for rooting the power of the Arbitrator to terminate the arbitral proceedings on account of non payment of fees is a result of the nebulous provisions of Sections 32(2)(c) and 38(2).

Section 38 relates to deposits, which the arbitral tribunal may demand as an advance for the costs referred to in Section 31(8). Costs, as defined and explained in Section 31(8) indeed include the fees of the arbitrator. However, as explained and held by the Supreme Court in ONGC Ltd. v. Afcons Gunanusa JV, (2024) 4 SCC 481, the provisions of Section 31 and 32 and 38 cannot clothe the Arbitral Tribunal with the power to bind the parties to a unilateral determination of fees by the Arbitral Tribunal. Determination of fees has to always be subject to the consent of the parties.

It is submitted that the Supreme Court in the case of Lalitkumar Sanghavi v. Dharamdas Sanghvi, (2014) 7 SCC 255 had traced the power to terminate the arbitral proceedings under this ground to Section 32(2)(c) alone. However, there is cause to question the correctness of this position of law. This is because of the following reasons:

1. *The language of Section 32(2)(c) itself suggests that the ground of non-payment of fees will not be covered by it.*

Section 32(2)(c) allows the arbitral tribunal to terminate the arbitral proceedings if "the continuation of the proceedings has for any reason become unnecessary or impossible." It is submitted that the phrase "unnecessary or impossible" signifies circumstances that render the performance of the adjudicatory function futile or incapable of being performed. They relate to circumstances which are involuntary and outside the control of the Arbitral Tribunal, which the Arbitral Tribunal must yield to. They do not relate to circumstances which the Arbitral Tribunal can voluntarily waive, like agreeing to fees acceptable to the parties. It is submitted that non-payment of fees can never become a ground for termination of proceedings itself, which is a very serious consequence bringing an end to the life of the lis itself. This lacuna has been noticed by the judgment of the Delhi High Court also in the case of Shushila Kumari & anr. v. Bhayana Builders Pvt. Ltd., 2019 SCC Online 7243.

2. *The above lacuna has further been strengthened by a recent judgement of this Hon'ble Court on the scope of Section 32(2)(c) in the case of Dani Wooltex v. Sheil Properties Ltd., (2024) 11 SCC 1. The Supreme Court while examining the scope of Section 32(2)(c) has underscored the peculiar characteristics of the phrase "unnecessary or impossible" as relating to the futility of performing the adjudicatory function in light of abandonment of claim by the party. This judgment again highlights the peculiar limitation of the circumstances in which power under Section 32(2)(c) can be invoked, which clearly shows that power to terminate proceedings on ground of non-payment of fees cannot be related to Section 32(2)(c).*

3. *The doctrine of proportionality also occasions a rethink of the present state of law on the ground that the inability of the parties to pay the fees determined by the arbitral tribunal, on grounds of economic capacity, ought not to be used against the parties as a penal measure entailing extinguishment of their dispute. This is especially so when the Arbitration and Conciliation Act, 1996 provides*

sufficient mechanisms to the Arbitral tribunal to arrive at a reasonable amount of fees and secure the same by:

a. *Determining the reasonable amount of costs (including fees) by disregarding frivolous claims made to frustrate arbitral proceedings under Section 31A(3)(c),*
b. *Directing payment of the defaulting party's share by the first party under Section 31A(4),*
c. *Terminating the proceedings only qua the claim for which fees have not been paid, and not the other claims for which deposits have been paid, under the second proviso to Section 38(2).*

4. *Section 39 of the Arbitration Act, which prescribes a lien of the Arbitral Tribunal on the award till the time unpaid costs of arbitration are paid also provides sufficient security to the Arbitral Tribunal in case the fees agreed between the Tribunal and parties is not paid.*

All these circumstances show that the consequence of non-payment of fees of the arbitral tribunal, ought not to be the termination of proceedings, which is a disproportionately prejudicial consequence being visited upon the parties to the dispute.

It is submitted that in case, the Arbitral Tribunal is not amenable to the fees agreed to upon by the parties, the appropriate course of action is not to terminate the proceedings under Section 32(2)(c) which will end up extinguishing the lis between the parties, but rather to terminate their mandate by withdraw under Section 15(2)(a), which can then enable to parties to seek appointment of a substitute arbitrator under Section 15(2).

It is submitted that the above interpretation provides a reasonable solution to the lacunae present in the statute as of now and renders unnecessary complications suitably redressed."

IV. ISSUES FOR DETERMINATION

31. Having heard the learned counsel appearing for the appellants and having gone through the materials on record, the following questions fall for our consideration: -

I) What meaning should be ascribed to the words "termination of the arbitral proceedings" figuring in the different provisions of the Act, 1996? Is the phrase susceptible to only one meaning?

II) What is the meaning and effect of the termination of arbitral proceedings contemplated under Section 38 of the Act, 1996? Is it the same as the termination of arbitral proceedings contemplated under Section 32?

III) What is the remedy available to a party aggrieved by an order passed by an arbitral tribunal terminating the proceedings?

V. ANALYSIS

32. Mr. Nakul Dewan, the learned Senior counsel appearing on behalf of the appellants vehemently submitted that the order dated 28.03.2022 passed by the Sole Arbitrator terminating the arbitral

proceedings could be said to be contrary to the scheme of the Act, 1996.

33. His submission is two-fold, which we shall try to understand.

34. He submitted that under the Act, 1996, the power of the arbitrator to order the termination of arbitral proceedings is contained only in Section 32 of the said Act. He would submit that, any order of termination of arbitral proceedings, even on grounds of non-payment of fees as stipulated in Section 38 of the Act, 1996, would essentially be an order under Section 32 of the said Act.

35. To fortify his above noted submission, the learned Senior counsel placed reliance on the decision of this Court in ***Lalitkumar V. Sanghavi*** (supra), wherein, according to him, this Court "*traced the source of this power to only Section 32(2)(c)*".

36. He further submitted that any order of termination of arbitral proceedings under Section 32(2)(c), would automatically result in the termination of the mandate of the arbitrator as-well, and that the *ratio* of ***Lalitkumar V. Sanghavi*** (supra) *"is extremely specific and clear"* in this regard.

37. He would next submit that, although the Sole Arbitrator is well within his powers empowered to terminate the arbitral proceedings in terms of Section 32 of the Act, 1996, yet in the present case, the Sole Arbitrator could not have terminated the proceedings on the ground of non-payment of fees in view of the decision of this Court in ***Afcons*** (supra).

38. Since, the Sole Arbitrator, whilst revising the fees of arbitration in terms of the "*inflated*" counter-claim of the respondents, failed to obtain the consent of the parties for the same, any such determination of the fees stood vitiated.

39. As a consequence, an order of termination of proceedings for the non-payment of such fees would also stand vitiated. In this regard, he once again drew our attention to ***Afcons*** (supra), which held that "*that the power of the Arbitral Tribunal to fix its own fees is subject to the consent of the parties*".

40. He further submitted that, however, since an order of termination of arbitral proceedings also results in the termination of the mandate of the arbitrator, even if such termination is on any

ground which is untenable in the eye of law, the same cannot be challenged under Section 14 of the Act, 1996.

41. According to him, the High Court whilst passing the Impugned Judgment and Order committed an egregious error in holding that the appropriate remedy against an order of termination of arbitral proceedings for non-payment of fees, would be to challenge the termination of the mandate of the arbitrator under Section 14 of the Act, 1996.

42. He would submit that Section 14 of the Act, 1996 only deals with termination of the mandate of the arbitrator, and not termination of arbitral proceedings under Section 32 of the said Act. Since, in the present case the mandate of the arbitrator was terminated due to the termination of the arbitral proceedings, Section 14 would not be attracted.

43. According to him, "*the question of challenging the termination of the mandate*" would arise "*when a party wants to dispute the facts leading to the termination of mandate*" or "*the termination of the mandate*" itself. "*In the present case, the petitioners are not disputing the*

termination of the mandate. They are rather challenging the termination of proceedings."

44. To put it simply, according to the learned Senior counsel, the appellants herein are not aggrieved with the termination of the mandate of the arbitrator, but the termination of the proceedings itself. The termination of mandate of the arbitrator is only an incidental consequence of the termination of the arbitral proceedings.

45. However, since under the Act, 1996, there is no provision for challenging an order of termination of the arbitral proceedings under Section 32, the only available remedy is by way of appointment of a substitute arbitrator. In this regard, reliance was once again placed on the decisions of this Court in ***Lalitkumar V. Sanghavi*** (supra), which held that in case of termination of the arbitral proceedings "*the appropriate remedy is Section 15(2) and not Section 14(2)*".

46. In the last, he would submit that since consent of the parties was *sine qua non* for determining the fees of arbitration, the termination of the proceedings on non-payment thereof was bad in law, and

thus, a substitute arbitrator could have been appointed in terms of Section 11 read with Section 15(2) of the Act, 1996.

47. What we have been able to discern from the above, is that the appellants want to put forward the following proposition of law:

(i) ***First,*** an arbitral tribunal is empowered under the Act, 1996 to terminate the arbitration proceedings for non-payment of fees, and the source of such power is Section 32 as per ***Lalitkumar V. Sanghavi*** (supra).

(ii) ***Secondly,*** where such termination of proceedings is erroneous or contrary to law, the remedy to challenge the same, in the absence of any specific provision under the Act, 1996, would invariably lie under Section 15, more particularly by appointment of a substitute arbitrator. It is inconsequential that such termination of proceedings automatically results in termination of the mandate of the arbitrator, insofar as the question of the appropriate remedy is concerned.

A. <u>Termination of Arbitral Proceedings under the Act, 1996</u>.

i. Statutory Provisions pertaining to Termination of Proceedings.

48. Before we proceed to consider whether the order of termination of the arbitral proceedings for non-payment of fees passed by the Sole Arbitrator could be said to be contrary to law, more particularly, the decision of this Court in ***Afcons*** (supra), we must first try to understand what is the meaning and effect of "*termination of arbitral proceedings*" under the Act, 1996.

49. The Act, 1996 nowhere defines the expression "*termination*" or "*termination of arbitral proceedings*". However, these expressions are referred to in numerous instances within the Act, which we shall outline hereinafter.

50. Under the Act, 1996 there are only four provisions which speak of termination of arbitral proceedings by an arbitrator, those being, Section 25 sub-section (a), Section 30 sub-section (2), Section 32 and Section 38, respectively.

51. We must first look into Section 25 of the Act, 1996. The same reads as under: -

> "***25. Default of a party.—***
> *Unless otherwise agreed by the parties, where, without showing sufficient cause, —*

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited.

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it."

52. Section 25 sub-section (a) of the Act, 1996, provides for the termination of arbitral proceedings by an arbitrator on the ground of default on the part of the claimant. It stipulates that, where a claimant fails to provide a statement of his claim(s) in terms of Section 23, without showing any sufficient cause for such failure, the arbitral tribunal shall terminate the proceedings.

53. Section 25 sub-section(s) (b) and (c) further clarify that, any default in filing of the statement of defence by the respondent or a default in appearance or production of any evidence, respectively, shall not constitute a ground for termination of the arbitral proceedings.

54. The expression "*the arbitral tribunal shall terminate the proceedings*" used in sub-section (a) Section 25 indicates that in the absence of any agreement to the contrary, it would be mandatory for the arbitral tribunal to terminate the arbitral proceedings, where the claimant defaults in either filing or communicating its statement of claim(s) in the manner provided under Section 23 of the Act, 1996.

55. On the other hand, the words "*the arbitral tribunal shall continue the proceedings*" employed in sub-section (b) of Section 25 indicates that, if the respondent fails to either file or communicate its statement of defence, the same shall not be ground to terminate the proceedings, and the arbitral tribunal would be mandatorily required to continue the proceedings.

56. Whilst continuing with the proceedings, it would be within the discretion of the arbitral tribunal to either forfeit the right of the respondent to file its statement of defence, or to permit the filing of the same by condoning the default, if sufficient cause is shown. However, any failure in filing of the statement of defence, shall not be treated as an admission of the allegations by the claimant.

57. The purport behind requiring the arbitral tribunal to continue with the proceedings, even when the respondent chooses to not file its statement of defence, is to ensure that the arbitral proceedings are not frustrated by any devious respondent, who may not be inclined to have the adjudication reach its logical conclusion. It is to prevent the arbitration process from being abused and subverted by a party who, through deliberate inaction, seeks to impede its culmination.

58. Lastly, Section 25 sub-section (c) deals with a situation, where any party either fails to appear before the arbitral tribunal or produce any documentary evidence, that may be required by the arbitral tribunal. In such a scenario, the said provision empowers the arbitral tribunal to continue with the proceeding, and pass an award based on the evidence before it, irrespective of the non-appearance of any party or the non-production of any evidence.

59. The use of the expression "*may continue the proceedings and make the arbitral award*" in Section 25 sub-section (c) is particularly noteworthy.

60. Unlike sub-section(s) (a) and (b), which expressly provide the consequence of any default by the parties in complying with the requirements laid down therein, namely, that the arbitral proceedings shall terminate and shall not terminate, respectively, Section 25 sub-section (c) is conspicuously silent on any such consequence.

61. Even though Section 25 sub-section (c), by use of the word "*may*", leaves it to the wisdom of the arbitral tribunal to continue the proceedings and make an award, it nowhere empowers the arbitral tribunal to terminate the proceedings, where it chooses to not continue the proceedings and make an award.

62. This nuanced distinction between Section 25 sub-section(s) (a) and (b) on one hand, and sub-section (c) on the other, is of vital importance for the purpose of understanding the scope of Section 32 of the Act, 1996, more particularly, sub-section (2)(c), thereof.

63. How this plays out *vis-á-vis* the legislative scheme of Act, 1996, particularly in respect of 'termination of proceedings' shall be discussed in more detail, in the latter parts of this judgement.

64. The substantive part of Section 25 stipulates that the rigours of the said provision are subject to any agreement by the parties in this regard, or the existence of any sufficient cause for a default in either the filing of a statement of claim or defence, the production of any evidence or in appearing before the arbitral tribunal.

65. In other words, under Section 25, it is open for the parties to agree on the procedure or course of action which is to be followed by the arbitral tribunal, in the event of any default on part of either parties, in the filing, production or appearance before the arbitral tribunal.

66. The parties, by an agreement in this regard, may choose that the non-filing of a statement of claim shall not be a ground for termination of arbitral proceedings, or vice-versa, that a default in the same even if it has occasioned by a sufficient cause, shall be a ground for termination of the proceedings.

67. However, in the absence of any such agreement, the rigours of Section 25, in the even of any default by the parties in complying with the requirements laid down therein, will only spring into action where such default is "*without sufficient cause*".

68. We say so because, the substantive part of Section 25 opens with the words "*where, without showing sufficient cause,* –". A plain reading of the aforesaid expression indicates that it governs the entire scheme of Section 25 of the Act, 1996.

69. There is nothing in the bare text of Section 25 to suggest that the condition of an 'absence of a sufficient cause', stipulated in the substantive portion is confined in its application to only some sub-section(s) of Section 25 and not to the provision as a whole.

70. This requirement of first, ascertaining, whether a sufficient cause exists for any default by a party in terms of Section 25, is indispensable. It applies equally to all sub-section(s) of Section 25. The arbitral tribunal is required to satisfy itself of the absence of a sufficient cause, before it can proceed to take recourse under any of the sub-section(s) of Section 25, as the case may be.

71. Thus, in the absence of any agreement, the yardstick or test for the exercise of the limited discretion conferred upon the arbitral tribunal under Section 25, would be to see, if any sufficient cause existed for the default.

72. An arbitral tribunal may exercise its power to either terminate the proceedings, or forfeit the right to file a statement of defence or pass an award *ex-parte* or sans the production of any piece of evidence, under Section 25 sub-section(s) (a), (b) and (c), respectively, upon its satisfaction that no sufficient cause existed for such default.

73. We shall now look into Section 30 of the Act, 1996, which reads as under: -

> *"**30. Settlement.—***
> *(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.*
>
> *(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.*
>
> *(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.*
>
> *(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute."*

74. Section 30 of the Act, 1996, *inter-alia* provides the manner in which the parties, after the commencement of the arbitral proceedings, may arrive at a settlement in respect of the dispute between them.

75. The provision embodies the cardinal principle of consent being the cornerstone of arbitration, by recognizing the autonomy of the parties to settle their dispute at any point in time during the arbitration proceedings. It fortifies that the commencement of arbitration does not take away such autonomy, and the pendency of proceedings, will not be fatal to any outside settlement.

76. The other foundational pillar of arbitration, namely, the resolution of disputes, fairly and effectively, has been enshrined in sub-section (1) of Section 30. Under this provision, a positive duty has been cast upon the arbitral tribunal to encourage and facilitate a settlement between the parties.

77. The provision elaborates, that this duty may be discharged by the arbitral tribunal through mediation, conciliation or any other process, that it considers expedient for meeting the ends of justice and facilitating a settlement between the parties.

78. Sub-section (2) of Section 30 is of particular importance for our discussion. It provides that where the parties arrive at a settlement in respect of the dispute, the arbitral tribunal shall terminate the proceedings. It further states, that if the parties so request, the arbitral tribunal, if it has no objection, shall record the terms of the settlement in the form of an award.

79. What would be the form and manner in which the award recording the settlement arrived at by the parties is to be made, as-well as the effect of such an award, have been delineated in the subsequent sub-sections.

80. Section 30 sub-section(s) (3) and (4), stipulates that the contents of the award must conform to the parameters laid down in Section 31 and that it shall have the same status and effect as any other award, under the Act, 1996, respectively.

81. As per Section 30 of the Act, 1996, more particularly sub-section (2), the arbitral tribunal is required to terminate the proceedings, upon the settlement of the dispute by the parties. This is because, once the dispute between the parties stands settled, nothing remains for the arbitral tribunal to adjudicate upon.

82. Before we proceed to look into Section 32 of the Act, 1996, it would be apposite to first understand when an arbitral tribunal would be empowered to terminate the arbitral proceedings as per Section 38 of the said Act.

83. Section 38 of the Act, 1996 reads as under: -

> *"**38. Deposits.—***
> *(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:*
>
> *Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.*
>
> *(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:*
>
> *Provided that where one party fails to pay his share of the deposit, the other party may pay that share:*
>
> *Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.*
>
> *(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be."*

84. The provision of Section 38 deals with deposit of "costs". The term "costs" refers to the expenses incurred in conducting and facilitating the arbitral proceedings. Such costs are determined by the arbitral tribunal in accordance with Section 31A of the Act, 1996. Sub-Section(s) (3) and (4) of Section 31A enumerate the circumstances which may be taken into account by the arbitral tribunal for determining such costs.

85. The Explanation appended to Section 31A of the Act, 1996, further states that the term "costs" means the reasonable costs relating to, the fees of the arbitrators, the administrative outlays of the tribunal, the legal fees and charges, and any other expenses incurred in connection with the arbitral proceedings and the Award.

86. Section 38 sub-section (1), empowers the arbitral tribunal to direct the deposit of a certain portion of these "costs" by the parties, in the form of an advance towards the immediate expenses, the tribunal expects to likely incur for the continuation of the arbitral proceedings in respect of the claim(s) before it.

87. Where a counter-claim is also filed, the arbitral tribunal is further empowered, under the Proviso to sub-section (1) of Section 38 to fix separate amounts of deposit for the claim and the counter-claim, as the case may be.

88. Section 38 sub-section (2) embodies the general rule, that any deposit, which may be required by the arbitral tribunal, shall be payable by the parties in equal proportions. In other words, both the claimant and the respondent are ordinarily responsible to pay 50% of the deposit, respectively.

89. The First Proviso to Section 38 sub-section (2), further stipulates that, where either party defaults paying his share of the deposit, then the same may be paid by the other party.

90. The Second Proviso to Section 38 sub-section (2) is of particular importance. It provides that, in the event the other party also declines to pay the aforesaid share of the deposit, the arbitral tribunal may either suspend or terminate the proceedings in respect of such claim or counter-claim, as the case may be.

91. To put it simply, where both the parties fail to make the deposit as required by the arbitral tribunal in respect of a claim or a counter-

claim then in such a situation, the tribunal would be empowered to either suspend or terminate the proceedings *qua* such claim or counter-claim.

92. Lastly, Section 38 sub-section (3), provides that once the proceedings stand terminated, the arbitral tribunal shall furnish the account of all the deposits received by it, and return any unexpended balance to the parties.

93. Both Section(s) 25 and 30 of the Act, 1996 respectively, insofar as termination of arbitral proceeding is concerned, are an exception to the general rule contained in Section 32 sub-section (1) of the Act, 1996.

94. We may now proceed to look into Section 32 of the Act, 1996. The said provision reads as under: -

> *"**32. Termination of proceedings.—***
> *(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).*
>
> *(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where –*

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings."

95. A bare perusal of the aforesaid provision, particularly, Section 32 sub-section (1), reveals that, the termination of arbitral proceedings under the Act, 1996, may occur in two distinct ways; ***first,*** through the passing of the final award, or ***secondly*** by an order of the arbitral tribunal under sub-section (2), thereof.

96. Section 32 sub-section (2) of the Act, 1996 warrants a careful examination. The said provision sets out the three situations in which an arbitral tribunal may, without rendering the final award, terminate the arbitral proceedings by passing an order to that effect. The arbitral tribunal may, by an order, terminate the proceedings where: -

(i) ***First,*** as per sub-clause (a), if the claimant withdraws his claim, and the respondent has no objection to the withdrawal. However, if the respondent raises an objection to the withdrawal, on the ground that it may impede the dispute from being finally resolved, the arbitral tribunal may refuse to terminate the proceedings. What is sought to be conveyed by the phrase "*the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute*" used in sub-clause (a) is that, the objection to the withdrawal by the respondent, must be founded upon a genuine interest on his part, in having the dispute resolved. Where such objections are motivated by any extraneous considerations, such as an intent to either delay or protract the dispute or to vexatiously harass the claimant through the continuation of the proceedings, the arbitral tribunal may decline to entertain such objections., and proceed to order a termination of the proceedings.

Where any objection has been raised by the respondent, the arbitral tribunal, before passing an order for termination of the proceedings, is required to make a finding, that the

objections raised, are not *bona-fide* insofar as the resolution of the dispute is concerned.

Insofar, as the question when such a respondent could be said to have a legitimate interest in securing the final settlement of dispute is concerned, it is not possible to lay down any straitjacket formula or prescribe any exhaustive list. The answer must invariably turn upon the peculiar facts and attendant circumstances of each case. Each case would have to be assessed, keeping in mind the nature of the claims, the stage of the proceedings, the evidence on record, and the preliminary findings already made by the arbitral tribunal. We shall discuss this in more detail in the latter parts of this judgment.

(ii) ***Secondly,*** as per sub-clause (b), where both the parties agree to the termination of the arbitral proceedings, the arbitral tribunal shall pass an order to such effect.

(iii) ***Thirdly,*** as per sub-clause (c), where the arbitral tribunal finds that the continuation of the proceedings has "*for any other reason*" become unnecessary or impossible, the arbitral

proceedings shall pass an order terminating the proceedings.

97. We shall discuss sub-section (2) of Section 32, particularly, the scope and extent of the arbitral tribunal's authority to pass an order for termination of proceedings thereunder, in more detail in the subsequent parts of this judgment.

98. Lastly, sub-section (3) of Section 32 stipulates what would be the legal effect of the termination of arbitral proceedings under the Act, 1996. It provides that, subject to the provisions of Section(s) 33 and 34(4), the termination of the arbitral proceedings, shall in consequence also terminate the "*mandate of the arbitral tribunal*".

99. To put it simply, upon termination of the arbitral proceedings, either by way of a final award or an order to that effect, as the case may be, the arbitral tribunal, save and except the exercise of the limited powers conferred upon it by Section(s) 33 and 34(4) respectively, shall cease to have any further power or function, under the Act, 1996.

100. Thus, apart from the power to correct or interpret an award and eliminating the grounds for setting aside the arbitral award, in terms of Section(s) 33 and 34(4) respectively, the arbitral tribunal, upon the termination of the proceedings, is divested of all other powers, and no longer has any jurisdiction, in respect of the dispute.

ii. What is the source of the Arbitral Tribunal's power to terminate the proceedings under the Scheme of the Act, 1996?

101. What can be discerned from the above is that, Section(s) 25, 30 and 38 of the Act, 1996 respectively, empower the arbitral tribunal to terminate the proceedings on different grounds, stipulated therein.

102. Although, Section 32 sub-section (1) provides that an arbitral proceeding shall be terminated either by a final award or by an order under sub-section (2) thereof, yet the situations in which the tribunal may pass such an order do not explicitly encompass the situations contemplated under Section(s) 25, 30 and 38 of the Act, 1996 respectively.

103. It was argued on behalf of the appellants herein, that any order of termination has to be traced back to Section 32 sub-section (2) of the Act, 1996, more particularly, the residual provision contained in sub-clause (c).

104. Section 32(2)(c) empowers the arbitral tribunal to pass an order of termination, where it finds that the proceedings has for any other reason become "*unnecessary or impossible*".

105. According to the proposition of law, put forth by the appellants, this expression is wide enough to encompass the different scenarios under which proceedings may be terminated in terms of Section(s) 25, 30 or 38 of the Act, 1996, respectively.

a. Contradictory Views on the subject.

106. Before we proceed to answer the aforesaid contention canvassed on behalf of the appellant, it would be apposite look into the various decisions on the subject, and the cleavage of opinion expressed as regards the scope and power of an arbitral tribunal to terminate the proceedings under the Act, 1996.

I. Decisions reading Termination under Section(s) 25, 30 or 38 respectively with Section 32 sub-section (2) of the Act, 1996.

107. The question as to when the arbitral tribunal would be empowered to either suspend or terminate the proceedings under the various provisions of the Act, 1996, came to be examined for the first time in ***Maharashtra State Electricity Board v. Datar Switchgear Ltd.*** reported in **2002 SCC OnLine Bom 983**.

108. The decision of the High Court of judicature at Bombay in ***Datar Switchgear*** (supra), is significant. The facts of the case are not relevant for the present discussion. To put it succinctly, the question that came up before the High Court was, whether an arbitral tribunal is empowered to suspend or terminate the proceedings on account of the failure of the respondent therein to comply with its interim order directing the deposit of a specified amount, in terms of the contract. The relevant paragraphs read as under: -

> *"2. The question which this Court is called upon to decide in these proceedings is whether an Arbitral Tribunal constituted under the Arbitration and Conciliation Act, 1996 is empowered by the provisions of the Act to suspend the hearing of the arbitral proceedings and, in the alternate, whether the Court exercising jurisdiction under section 9 can issue a direction to that effect. Shorn at this stage of all the details to which it would nevertheless become necessary to advert during the course of the judgment, the Arbitral*

Tribunal by an interim direction, directed the petitioner ("MSEB") to deposit certain amounts which were permitted to be withdrawn by the respondent ("DSL") against Bank Guarantees. The Bank which had issued the Bank Guarantees extended the guarantees from time to time but then declined to renew them any further. The Guarantees were not invoked by the MSEB before expiry, as a result of a clause in the guarantees which made invocation conditional upon permission being granted by the Arbitral Tribunal to MSEB. DSL has, in the meantime, been declared a sick industrial undertaking under the Sick Industrial Companies (Special Provisions) Act, 1985 and pleads that it is unable financially to secure any alternative Bank Guarantee at this stage. On an application moved by MSEB, the Arbitral Tribunal has ordered DSL to bring back the moneys which were withdrawn and to this order, DSL has submitted itself. The Arbitral Tribunal has declined to accede to the prayer of MSEB that the arbitral proceedings be suspended in their entirety (including the hearing of the counter claim of MSEB) until the moneys are brought back. That decision is challenged by MSEB. Of the three arbitrators constituting the Arbitral Tribunal, Mr. Justice V.D. Tulzapurkar has expressed the view that he was doubtful as to whether the Tribunal had the power to suspend the proceedings, but, that in any case, no case for suspension has been made out since the conduct of DSL was neither deliberate, nor contumacious. The second learned arbitrator Mr. Justice M.L. Pendse has held that there was no power in the Arbitral Tribunal to suspend its proceedings and to grant a stay as prayed but, that in any event, in view of the fact that the arbitral proceedings have proceeded to a considerable extent and evidence has been substantially recorded, it would not be appropriate for the Tribunal to accede to the prayer. A dissenting view has, however, been expressed by Mr. Justice S.C. Pratap, who has held that there is a power in the Arbitral Tribunal to grant a stay of proceedings and a sufficient ground has been made out before the Tribunal to do so in the facts of the present case, since the conduct of DSL is contumacious. The dissenting member of the Tribunal has, however, directed that the hearing of the counter claim preferred by MSEB must proceed though, as already noted

earlier, the prayer of MSEB was that the entire proceedings including hearing of the counter claim ought to be stayed. The Arbitral Tribunal has thus by a majority declined to stay the proceedings before it. In these proceedings, MSEB has moved the Court both in the exercise of its appellate jurisdiction under section 37 of the Act, treating the order passed by the Arbitral Tribunal as one under section 17 declining to grant an interim measure of protection and in the alternative under section 9, contending that even if the appeal is held not to be maintainable, this Court has the power and jurisdiction to suspend the arbitral proceedings as prayed. The issues which, therefore, arise before the Court, relate to (i) whether the Arbitral Tribunal has the power to stay or suspend its proceedings under the Act; (ii) whether the Court has the power to do so in a proceeding under section 9; and (iii) whether a case for the exercise of power in the present case has been made out."

(Emphasis supplied)

109. The High Court speaking through Dr. D.Y. Chandrachud J. (as his Lordship then was), answered the aforesaid in a negative, with the following pertinent observations on the power of the arbitral tribunal to terminate the arbitral proceedings: -

(i) ***First,*** the High Court held that the termination of the mandate of the arbitrator is not co-terminus with the termination of the arbitral proceedings. In the former, the arbitrator merely withdraws from office, thereby permitting the appointment of a substitute arbitrator to continue the proceedings. In the latter, however, the arbitral

tribunal itself collapses. In this regard, the High Court gave an illustration that where the tribunal, under Section 16 of the Act, 1996, holds that there is no valid arbitration agreement, the same would result in the termination of proceedings, and with it, *ipso facto,* the tribunal itself. The relevant observations read as under: -

> *"36. [...] The termination of a mandate of the arbitrator is not co-terminus with the termination of arbitral proceedings because when the mandate of the arbitrator terminates when he withdraws from the office or by agreement between the parties, a substitute arbitrator is to be appointed according to the same rules that were originally applicable to the appointment of the arbitrator.*
>
> *"37. [...] A determination by the Arbitral Tribunal on the question of the jurisdiction or on the existence or validity of the arbitration agreement has important consequences in terms of the continuance or, as the case may be, the cessation of proceedings. A ruling by the Arbitral Tribunal that it has no jurisdiction or, as the case may be, that there is no valid or existing arbitration agreement will result in a termination of proceedings by the Arbitral Tribunal. The power to make that determination has specifically been entrusted to the Arbitral Tribunal."*

(Emphasis supplied)

(ii) ***Secondly,*** although Section 25 of the Act, 1996 contemplates three distinct scenarios of default by a party, yet the authority of the arbitral tribunal to order a termination of

the proceedings arises in only one of those scenarios, namely where the claimant fails to communicate his statement of claim in terms of Section 23. In all other cases of default by a party, such as the failure to file a statement of defence, to appear during a hearing or to produce any evidence required, it would attract only the imposition of certain penalties. The tribunal may forfeit the right to file the statement of defence, or seek the assistance of the court under Section 27 to obtain the evidence, by which the party in default may be held in contempt, or it may proceed to pass an *ex-parte* award. However, the tribunal in these situations is not empowered to terminate the proceedings unlike Section 25(a), and must continue with the arbitration. The relevant observations read as under: -

> *"42. As a part of Chapter V, certain provisions have been enacted to deal with the case of defaults by a party. Section 25 envisages a situation where without sufficient cause, (i) the claimant fails to communicate his statement of claim within the period prescribed, (ii) the respondent fails to communicate his statement of defence or (iii) a party fails to appear or produce documentary evidence. In a case where the claimant fails to communicate his statement of claim, the Arbitral Tribunal shall terminate the proceedings. Where the respondent fails to communicate his statement of defence, the Tribunal shall continue the*

proceedings without treating that failure in itself as an admission of the allegations made by the claimant. The third possibility which is envisaged by section 25 is where a party fails to appear at an oral hearing or to produce documentary evidence, in which case, the Tribunal shall continue the proceedings and make the Arbitral Award on the evidence before if.

43. The Arbitral Tribunal can apply to the Court for assistance in taking evidence and the procedure in this regard its regulated by sub-sections (1) to (4) of section 27. Sub-section (5) of section 27 lays down that persons failing to attend in accordance with a process issued by the Court for the recording of evidence before the Arbitral Tribunal or making any other default, or refusing to give their evidence, or being "guilty of any contempt of the Arbitral Tribunal during the conduct of arbitral proceedings shall be subject to the like disadvantages, penalties and punishments by order of the Court on the re-presentation of the Arbitral Tribunal as they would incur for the like offences in suits tried before the Court". The power to punish for any contempt of the Arbitral Tribunal has been vested with the Court."

(Emphasis supplied)

(iii) ***Thirdly,*** the termination of arbitral proceedings may take place as per Section 30 sub-section (2) of the Act, 1996 if the parties settle the dispute, during the course of the arbitral proceedings. The relevant observations read as under: -

"45. Chapter VI of the Act is entitled "Making of Arbitral Award and termination of proceedings". The termination of proceedings can take place under section 30(2) if the parties settle the dispute, during the course of arbitral proceedings and if a request to that effect is made by the parties before the Arbitral

Tribunal. That settlement then culminates in an agreed Arbitral Award. Section 31 deals with the form and contents of the Arbitral Award and sub-section (6) thereof provides that the Arbitral Tribunal may, at any time during the arbitral proceedings, make an interim Arbitral Award on any matter with respect to which it may make a final Arbitral Award."

(iv) ***Fourthly,*** under Section 38 of the Act, 1996 the arbitral tribunal is empowered to fix the amount of deposit as an advance towards costs which includes the fees and expenses of the arbitrator, witnesses, and the tribunal itself. Such deposits are payable in equal shares by the parties, but where one party fails to pay his share of the deposit, the other party may pay that share. However, where the other party also does not pay the aforesaid share in respect of a claim or the counter claim, the arbitral tribunal under the Second Proviso to Section 38 sub-section (2) may suspend or terminate the proceedings in respect of such claim or counter-claim as the case may be. The relevant observations read as under: -

"49. Chapter IX of the Act is entitled "appeals" and in so far as the present case is concerned, it is material to note that an appeal lies against an order of the Arbitral Tribunal granting or refusing to grant an interim measure under section 17. Chapter X of Part-I makes

miscellaneous provisions and section 38 thereof deals with deposits. Sub-section (1) of section 38 empowers the Arbitral Tribunal to fix the amount of deposit as an advance for costs referred to in sub-section (8) of section 31. Sub-section (8) of section 31 provides for costs including the fees and expenses of the arbitrator and witnesses, legal fees and expenses, administrative fees of the institution supervising the arbitration and other expenses incurred in connection with the arbitral proceedings and Award. Sub-section (2) of section 38 provides that the deposit is to be payable in equal shares by the parties, but where one party fails to pay his share of the deposit, the other party may pay that share. The second proviso to sub-section (2) enunciates that where the other party also does not pay the aforesaid share in respect of the claim or the counter claim, the Arbitral Tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim as the case may be. A provision thus has been enacted for the suspension of the proceedings by the Arbitral Tribunal where costs have not been deposited."

(Emphasis supplied)

(v) ***Fifthly,*** Section 32 sub-section (1) of the Act, 1996, stipulates that the arbitral proceedings shall be terminated by the final award or by an order under sub-section (2) thereof. Sub-section (2) contemplates three situations where the tribunal is vested with the power to the arbitral proceedings, namely, (i) when the claimant withdraws his claim, (ii) when the parties agree and (iii) when the Tribunal finds that continuation of the proceedings has for any other reason

become unnecessary or impossible. The termination of proceedings results in the termination of the mandate of the tribunal. The relevant observations read as under: -

> *"46. Section 32 is entitled "Termination of proceedings" and sub-section (1) provides that the arbitral proceedings shall be terminated by the final Arbitral Award or by an order of the Arbitral Tribunal under sub-section (2). Sub-section (2) of section 32 is important for the purposes of the present proceedings [...]*
> *"47. Sub-section (2), therefore, contemplates three situations where the Arbitral Tribunal is vested with the power to terminate the arbitral proceedings, namely, (i) when the claimant withdraws his claim, (ii) when the parties agree and (iii) when the Tribunal finds that continuation of the proceedings has for any other reason become unnecessary or impossible. The mandate of the Arbitral Tribunal terminates with the termination of the arbitral proceedings. (Sub-section (3) of section 32). [...]*
>
> (Emphasis supplied)

(vi) ***Sixthly,*** the High Court observed that clause (c) of Section 32(2) vests a residuary power in the arbitral tribunal to terminate the proceedings where it finds that a continuation thereof has for any other reason become unnecessary or impossible. As no straitjacket formula could be laid down as to when the proceedings would become either unnecessary or impossible the legislature has left it for the

arbitral tribunal to determine the same. Yet the expression "unnecessary" must be construed to mean a situation where the proceedings are rendered infructuous or where the dispute itself does not survive, or the adjudication thereof is unnecessary as a result of any valid reason (emphasis). Similarly, impossibility is not to be construed to mean a mere physical impossibility of an adjudication. A consistent course of conduct of the party can also render the continuation of the proceedings impossible. However, the High Court cautioned that an arbitral tribunal should be weary of not permitting a party to take the benefit of its own contumacious conduct and seek the termination of proceedings. The relevant observations read as under: -

> *"[...] 47. Clause (c) of sub-section (2) of section 32 has vested a residuary power in the Arbitral Tribunal to terminate the proceedings where it finds that a continuation thereof has for any other reason become unnecessary or impossible. The legislature has advisedly left it to the Tribunal to determine as to when the continuation of the proceedings has become unnecessary or impossible. The expression "unnecessary" may for instance involve a situation where proceedings are rendered infructuous. A situation may have arisen as a result of which an adjudication into the dispute has become unnecessary either as a result of the fact that the dispute does not survive or for any other valid reason. Situations may*

> *also arise where a continuation of proceedings is rendered impossible. Impossibility is not merely to be viewed from the point of view of a physical impossibility of an adjudication, but may conceivably encompass a situation where a party by a consistent course of conduct renders the very continuation of the arbitral proceedings impossible. Then again a party which has been guilty of contumacious conduct cannot be heard to seek the benefit of its conduct to seek termination. It is impossible to catalogue the circumstances in which the Arbitral Tribunal may hold that it is either unnecessary or impossible to continue the arbitral proceedings."*

(Emphasis supplied)

110. Accordingly, the Bombay High Court in ***Datar Switchgear*** (supra) held that under the scheme of the Act, 1996, the arbitral tribunal is not empowered to either suspend or terminate the proceedings for the purpose of aiding or securing the execution or compliance of any interim order passed by it under Section 17 of the Act, 1996.

111. However, in arriving at the aforesaid conclusion, the Bombay High Court made some pertinent observations as regards the interplay between Section(s) 25, 30, 32 and 38 of the Act, 1996 respectively. To understand the same, paragraph 44 has to be read in conjunction with paragraphs 50, 55 and 57 respectively. They read as follows: -

"44. These statutory provisions enacted by Parliament are extremely material for, they reveal the scheme of the legislation. The legislature has envisaged a default of a certain specified nature and character in section 25 of the Act and has authorised the Arbitral Tribunal to terminate the proceedings where a claim has not been filed within the period prescribed by the Tribunal. Other kinds of defaults including a default in failing to attend for giving evidence in accordance with the process issued by the Court or contempt of the Arbitral Tribunal during the conduct of arbitral proceedings are subject to the imposition of disadvantages, penalties and punishments by order of the Court on the re-presentation of the Tribunal. The canvass of Chapter V is in relation to the conduct of arbitral proceedings. Chapter V does not encompass the termination of arbitral proceedings by the Arbitral Tribunal save and except for the reference to termination in section 25(a).

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50. A reading of the provisions contained in Part-I of the Arbitration and Conciliation Act, 1996 would, therefore, in my view, leave no manner of doubt that the Arbitral Tribunal does not have the power to suspend the arbitral proceedings before it as a step in aid of the execution of an interim order passed by the Arbitral Tribunal. While consolidating and amending the law relating to domestic and international commercial arbitration, the legislature has made specific provisions for the termination or, as the case may be, for suspension of arbitral proceedings. The Arbitral Tribunal is empowered to rule on its jurisdiction and to determine a challenge to the existence or the validity of an arbitration agreement. In such a situation, the recent decision of three learned Judges of the Supreme Court in (Bhatia International v. Bulk Trading S.A.)[2], (2002) 4 SCC 105 holds that applications for stay of arbitral proceedings or to challenge the existence or validity of the arbitration agreement or involving the jurisdiction of the Arbitral Tribunal have to be made to the Arbitral Tribunal under the Act. Such applications cannot be made to the Court under section 9. Where there is a challenge to the jurisdiction of the Arbitral Tribunal or the existence or validity of the arbitration agreement is questioned, an application can only

lie before the Arbitral Tribunal to have these issues adjudicated. As an incident of its power to adjudicate on its jurisdiction, the Arbitral Tribunal may entertain an application for stay or as a consequence of its determination upholding a challenge to its jurisdiction or to the existence or validity of the agreement on arbitration, terminate proceedings. In so far as defaults are concerned, the legislature has made specific provisions which envisage specific instances of default and provide clear cut consequences of those defaults. Among these circumstances, as already noted, are those envisaged in sections 25, 27(5) and 38 of the Act. Provisions have been made in section 32 for termination of proceedings. That being the position, it would be impermissible to read into sub-section (3) of section 19 a power to suspend arbitral proceedings or to terminate arbitral proceedings as an incident of the enforcement of an interim order.

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[...] The circumstances in which arbitral proceedings can be terminated, or as the case may be, can be suspended are defined by the Act. The Act has consolidated and amended the law relating to domestic and international commercial arbitration. The legislation envisages defaults and enunciates the consequences of those defaults. [...]

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57. [...] The power of the Arbitral Tribunal contrariwise is a power which the Arbitral Tribunal has during the pendency of arbitral proceedings before it to order an interim measure of protection. In so far as the Arbitral Tribunal is concerned, the proceedings terminate upon a final Arbitral Award or on an order passed under sub-section (2) of section 32. [...]"

(Emphasis supplied)

112. According to the High Court, the legislature recognizes the termination or, as the case may be, the suspension of the arbitral proceedings for only defaults of a certain specified nature and

character, and has thus, made specific provisions. It observed that Section(s) 25 and 38 of the Act, 1996 respectively, envisage such instances, where the consequence of a default would be termination of the proceedings. Section 32 of the Act, 1996, more particularly sub-section (2) is the provision which provides for the termination of the proceedings.

113. Thus, as per ***Datar Switchgear*** (supra), Section(s) 25, 31 and 38 of the Act, 1996 respectively, merely enumerate the instances in which the arbitral proceedings may be terminated. However, the order for effecting such termination is not passed under any of the aforesaid provisions. The provision under which the arbitral tribunal passes an order for termination of the proceedings is Section 32 sub-section (2) of the Act, 1996.

114. To put it simply, Section(s) 25, 31 and 38 of the Act, 1996 respectively, merely envisage the situations where an arbitral tribunal would be empowered to terminate the proceedings. However, the power to pass an order for the termination of the proceedings lies under Section 32 sub-section (2) of the Act, 1996 alone, even if such termination is pursuant to the aforesaid provisions of Section(s) 25, 31 and 38 of the Act, 1996 respectively.

115. ***Datar Switchgear*** (supra) expressly observes in the context of Section 25 of the Act, 1996 that the same "*does not encompass the termination of arbitral proceedings by the Arbitral Tribunal save and except for the reference to termination in section 25(a)*". Thus, according to it, the use of the words "*terminate the proceedings*" in Section(s) 25, 31 and 38 of the Act, 1996 respectively, is only a reference to the power of termination, that is enshrined in Section 32(2) of the Act, 1996.

116. The provision of Section 32 of the Act, 1996, first fell for the consideration of this Court in ***Lalitkumar V. Sanghavi*** (supra). In the said case, the arbitrator expressed his anguish at the dispute having remained pending for nearly four-years. During this period, the claimant had shown no interest in pursuing the arbitration, and had even failed to pay the fees as directed. Accordingly, the arbitral proceedings came to be terminated. The relevant observations read as under: -

> *"5. By his order dated 29-10-2007, the presiding arbitrator informed the appellants that the arbitration proceedings stood terminated. The relevant portion of the order reads as follows:*
>
> > *"The matter is pending since June 2003 and though the meeting was called in between June 2004 and 11-4-2007, the claimant took no interest*

> *in the matter. Even the fees directed to be given is not paid.*
>
> *In these circumstances please note that the arbitration proceedings stand terminated. All interim orders passed by the Tribunal stand vacated."*
>
> (Emphasis supplied)

116.1 In appeal, this Court *inter-alia* held that under the Act, 1996, more particularly Section 32, an arbitral proceeding can be terminated in only two ways. Either by the making of the final award, or by passing an order of termination of proceedings under sub-section (2) of Section 32. Sub-section (2) of Section 32, further provides three contingencies, where the proceedings may be terminated. Any such order of termination of proceedings would also terminate the mandate of the arbitral tribunal. Accordingly, it held that the order passed by the arbitrator terminating the proceedings on the ground of failure to pay the fees and want of prosecution on the part of claimant could have only fallen within the scope of clause (c) of Section 32(2) i.e., where the continuation of the proceedings has become impossible. The relevant observations read as under: -

> *"11. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings. From the language of*

> *Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2). Sub-section (2) provides that the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in clauses (a) to (c) thereof.*
>
> *12. On the facts of the present case, the applicability of clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29-10-2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-section (2), clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the Arbitral Tribunal also comes to an end. [...]"*
>
> (Emphasis supplied)

117. This Court in ***Lalitkumar V. Sanghavi*** (supra) further held that the appropriate remedy against an order terminating the arbitral proceedings lies by way of an application under Section 14 of the Act, 1996. However, for the sake of clarity, the question as to where the remedy against an order of termination of proceedings should lie shall be addressed in the latter parts of this judgment.

118. Thus, as per ***Lalitkumar V. Sanghavi*** (supra) it appears that an arbitral proceeding can be terminated under the Act, 1996 only by the passing of an order under Section 32(2). Furthermore, any such termination on the ground of non-payment of fees or

disinclination to pursue the arbitration, would fall within the scope of proceedings being rendered unnecessary or impossible in terms of clause (c) of Section 32(2) of the Act, 1996.

119. We are conscious of the fact that in ***Lalitkumar V. Sanghavi*** (supra), the termination of the arbitral proceedings by the tribunal was not strictly on the ground of non-payment of the arbitral fees. The arbitral tribunal had terminated the proceedings due to the lack of interest on the part of the claimant therein.

120. In such circumstances, it could be argued that ***Lalitkumar V. Sanghavi*** (supra) never held that a termination of proceedings *stricto-sensu* for the failure to pay the deposit in terms of Section 38, would also fall under Section 32(2)(c) of the Act, 1996.

121. We shall address this line of argument in more detail, once we examine the various decisions of the High Courts which have construed the power of termination of proceedings under Section 32(2) of the Act, 1996 to be distinct from that under Section(s) 25 and 38 of the Act, 1996 respectively.

122. Nevertheless, whether the ratio of ***Lalitkumar V. Sanghavi*** (supra) supports the above proposition of law can be discerned from the

manner in which the various High Courts have understood and applied the *ratio* of the said decision.

123. In this regard we may look into the decision of the Bombay High Court in ***Neeta Lalitkumar Sanghavi v. Bakulaben Dharmadas Sanghavi*** reported in **2019 SCC OnLine Bom 250** and the decision of the Delhi High Court in ***PCL Suncon v. National Highway Authority of India*** reported in **2021 SCC OnLine Del 313** respectively.

124. The controversy that arose in ***Lalitkumar V. Sanghavi*** (supra), more particularly, the termination of proceedings once again resurfaced before the Bombay High Court in ***Neeta Lalitkumar Sanghavi*** (supra).

125. Although the principal issue in ***Neeta Lalitkumar Sanghavi*** (supra) was whether the remedy against the termination of proceedings on the ground of failure to implead the legal heirs, would lie under Section 14 or 34 of the Act, 1996, yet the decision is significant for the purpose of gauging how the High Court understood the ratio of ***Lalitkumar V. Sanghavi*** (supra).

126. The Bombay High Court from a combined reading of Section 32 of the Act, 1996 and the ratio of ***Lalitkumar V. Sanghavi*** (supra),

arrived at the same conclusion. It observed that as per Section 32, the arbitral proceedings shall stand terminated by either the pronouncement of the final arbitral award or by an order of the arbitrator under sub-section (2) thereof. The relevant observations read as under: -

> *"19. Section 32(1) stipulates that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2). Sub-section (2) of Section 32 provides that the arbitral tribunal shall issue an order for the termination of the arbitral proceedings where (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute, (b) the parties agree on the termination of the proceedings, or (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. Section 32(3) stipulates that subject to section 33 and subsection (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.*
>
> *xxx xxx xxx*
>
> *24. [...] Section 32 of the Act provides for the termination of arbitral proceedings. It provides that the arbitral proceedings shall stand terminated by pronouncement of the final arbitral award or by an order of the arbitrator under sub-section (2) of Section 32. In the facts of the present case, the Arbitral Tribunal has terminated the proceedings by virtue of not bringing the petitioners on record in the arbitral proceedings. There is no pronouncement of a final arbitral award in the facts of the present case as stipulated under Section 32(1). Every order of the Tribunal terminating the arbitral proceedings can never be terms as an award. This is clear from an ex-facie reading of section 32. [...]"*

(Emphasis supplied)

127. Similarly, in ***PCL Suncon*** (supra), the Delhi High Court held that as per the decision of ***Lalitkumar V. Sanghavi*** (supra) Section 32 of the Act, 1996 is exhaustive and covers all cases of termination of arbitral proceedings under the Act. It further held that even an order terminating the proceedings for the failure to file the statement of claims in terms of Section 25 would, in substance, be an order under Section 32 sub-section (2) of the Act, 1996. The relevant observations read as under: -

> *"25. Section 32 of the A&C Act also draws a clear distinction between a final arbitral award and orders passed by an Arbitral Tribunal. In terms of Sub-section (1) of Section 32 of the A&C Act, arbitral proceedings stand terminated by a final award or by such orders as are specified under Sub-section (2) of the said A&C Act.*
>
> *xxx xxx xxx*
>
> *37. <u>The Supreme Court held the said order to be one terminating the arbitral proceedings under Section 32(2)(c) of the A&C Act as the said order would not qualify as an order under Clauses (a) or (b) of Section 32(2) of the A&C Act. The court proceeded on the basis that Section 32 of the A&C Act is exhaustive and covers all cases of termination of arbitral proceedings. This is implicit in paragraphs nos. 11 and 12 of the said decision, which read as under</u>:*
>
> > *"11. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings. From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of*

the Arbitral Tribunal under sub-section (2). Sub-section (2) provides that the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in clauses (a) to (c) thereof.

12. On the facts of the present case, the applicability of clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29-10-2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-section (2), clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the Arbitral Tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided under Section 14(2)".

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39. An order terminating the proceedings on failure of the claimant to file its Statement of Claims within the stipulated time, is also in the nature of an order under Sub-section (2) of Section 32 of the A&C Act and not an arbitral award because such an order does not decide any of the points on which the parties are in issue in the arbitration."

(Emphasis supplied)

128. In yet another decision of the Delhi High Court in ***Gangotri Enterprises Ltd. v. NTPC Tamil Nadu Energy Co. Ltd.*** reported in **2017 SCC OnLine Del 6560**, it was held that where the arbitrator terminates the proceeding in terms of Section 25(a) of the Act,

1996, the same would be a termination within the meaning of Section 32(2)(c) of the said Act.

128.1 In the said case, the appellant was given more than five opportunities to file its statement of claims, yet he failed to do so each time. Consequently, the arbitrator in terms of Section 25(a) of the Act, 1996, foreclosed the appellant's right to file the statement of claim.

128.2 However, the arbitrator did not terminate the proceedings in view of the counter-claims filed by the respondent. Instead, the appellant was directed to file his statement of defence in respect of the same, failing which the proceedings would continue without it.

128.3 Aggrieved by the aforesaid, the appellants moved the High Court contending that the order passed by the arbitrator, closing their right to file the statement of claims, had effectively terminated the proceedings and the mandate of the tribunal in respect of the claims, thereby entitling them to invoke the remedy under Section 14 of the Act, 1996.

128.4 However, the respondent therein contended that since the proceedings had not been terminated, and the arbitrator was still

continuing to adjudicate some of the disputes, there was no termination of the mandate, and as a result the appellants were not entitled to the relief under Section 14 of the Act, 1996.

128.5 The Delhi High Court observed that although the arbitrator did not terminate the proceedings in its entirety yet by virtue of closing the right of the appellants to file his statement of claim it had, in effect terminated the proceedings.

128.6 Placing reliance on ***Lalitkumar V. Sanghavi*** (supra) it held that such an order had the effect of terminating both the proceedings and the mandate of the tribunal terms of Section 32(2) of the Act, 1996 insofar as the claim is concerned, irrespective of the fact that the proceedings were still in progress in respect of the counter-claims, inasmuch as the final award that would be eventually passed would not include the said claims.

128.7 The relevant observations read as under: -

> *"12. GEL, thereafter, sought time to file its statement of claims but admittedly failed to do so. GEL's request for extending the time to file the statement of claims was accepted and the arbitrator extended time to file statement of claims on more than five occasions. However, since GEL failed to do so, the arbitrator passed the Interim Arbitral Order dated 28.04.2016 under Section 23 and 25 of the Act, in effect closing the right of GEL to file the statement of claims. The arbitrator, further directed GEL to file its response to the counter claims filed by NTECL.*

15. Mr. Bharat Sangal, the learned counsel appearing for NTECL submitted that the question of examining a controversy as to whether the arbitrator is de jure or de facto unable to act, would arise only in cases where the proceedings are finally closed and not in cases where the arbitrator is still continuing to adjudicate some of the disputes. He submitted that the decision in the case of Lalit Kumar v. Sanghavi (supra) would be applicable only in cases where the mandate of the arbitrator is terminated on account of final order terminating the proceedings in entirety.

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22. The learned counsel for GEL has sought to place GEL's case under Section 14(2) of the Act on the basis that the arbitrator has terminated the proceedings and therefore, by virtue of Section 32(3) of the Act, the mandate of the arbitrator also stands terminated; consequently, falling within the scope of Section 14(2) of the Act.

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23. It is necessary to observe that by the order dated 28.04.2016, the arbitrator has not terminated the arbitral proceedings in its entirety; he has terminated the proceedings qua the claims of GEL by closing GEL's right to file its claims. The arbitrator has therefore captioned the order as "Interim Arbitral Order passed under Sec 23 & 25 of the Arbitration and Conciliation Act 1996/2015 (Amendments)". By the said order, he also directed GEL to file a response to the counter-claims of NTECL and further clarified that "the final award will be pronounced after the adjudication of the counter claims".

24. Having stated the above, Mr. Sangal's the contention that the arbitrator's mandate has not terminated by the impugned order dated 28.04.2016 as the arbitral proceedings have not terminated, is erroneous. Clearly, the arbitral proceedings qua the disputes raised by GEL were terminated on account of its failure to file the statement of claims within the time as specified. Undisputedly, the effect of the order of 28.04.2016 is that arbitrator's mandate for deciding the claims intended to be raised by GEL stands terminated and he is de jure or de facto unable to act as an arbitrator qua such

claims even though his mandate to continue the proceedings and adjudicate the counter claims has not come to an end.

26. The decision in the case of Lalitkumar V. Sanghavi (supra) also turned on the principle that the petitioner could not be rendered remediless on account of the arbitrator terminating the proceedings. In that case no recourse would be available to the petitioner under Section 34 of the Act and thus the question would have to be considered within the scope of Section 14 of the Act. Thus, this decision applies only in cases where the arbitral proceedings are terminated by the arbitrator other than by making an award, that is, under Section 32(2) of the Act; it is clearly not applicable where the arbitral proceedings are terminated by virtue of Section 32(1) of the Act, that is, by making of an award.

27. Thus, the second question, whether the order dated 28.04.2016 closing the right of GEL to file its statement of claims and thereby terminating the proceedings qua such claims, is amenable to challenge under Section 14 of the Act, is answered in the affirmative. In cases where the arbitrator's mandate is terminated, a re-course to Section 14(2) of the Act would be available provided a specific remedy is not provided under the Act. In the present case, the arbitrator's mandate to adjudicate any claims of GEL under the Agreement, stands terminated. Concededly, the order dated 28.04.2016 as also the final award that may be passed, in as much as it would not include GEL's claim, would not be amenable to challenge under Section 34 of the Act."

(Emphasis supplied)

II. Decisions reading Termination under Section(s) 25, 30 or 38 respectively, to be independent from that under Section 32 sub-section (2) of the Act, 1996.

129. On the other hand, as discussed earlier, the power of the arbitral tribunal to terminate the proceedings under Section(s) 25, 30 or 38

of the Act, 1996 respectively, has been construed by various decisions to be independent from the power to terminate the proceedings under Section 32 of the said Act.

130. To put it simply, in several decisions the view has been taken that the provisions of Section(s) 25, 30, 32 and 38 of the Act, 1996 respectively, or at-least some of these provisions, each independently empower the arbitral tribunal to terminate the proceeding in the circumstances contemplated therein.

131. Thus, according to the aforesaid proposition, the power to terminate the proceedings under the Act, 1996 does not emanate solely from Section 32 sub-section (2), but rather inheres in various other provisions of the Act, that contemplate the termination of proceedings.

132. One of the significant decisions in this regard is the judgment of ***SREI Infrastructure*** (supra) rendered by a two-Judge Bench of this Court. In the said decision, the arbitral tribunal terminated the proceedings in terms of Section 25 of the Act, 1996 on account of the claimant's failure to file his statement of claim despite repeated

reminders. The tribunal whilst terminating the proceedings observed that the claimant appeared to be not interested in pursuing the arbitration and that no explanation had been offered for his failure to file the statement of claims.

133. Aggrieved by the same, the respondent preferred an application before the arbitral tribunal seeking recall of the order terminating the proceedings. The same came to be rejected on the ground that the tribunal lacked the authority to recommence the proceedings once they stood terminated. Against the same, a petition under Article 227 was preferred before the High Court, which came to be allowed. The High Court remitted the matter back to the tribunal for fresh consideration on the issue of termination of the proceedings.

134. In appeal, this Court observed that there was a legislative gap in the context of the provisions of Section(s) 25(a), 32(2) and 34 of the Act, 1996 respectively, that required to be resolved. Upon examining the aforesaid provisions, this Court held that the termination of proceedings envisaged under Section 25(a) of the

Act, 1996 is markedly different from that under Section 32(2)(c) for the following reasons: -

(i) ***First,*** it held that Section 25, more particularly clause (a) provides that when the claimant fails to communicate his statement of claim within the time as envisaged by Section 23, the arbitral tribunal has to terminate the proceedings. Thus, the provision contemplates a situation where the arbitral proceeding is yet to be started. The relevant observations read as under: -

> *"20. In the present case, proceedings were terminated vide order dated 12-12-2011 under Section 25(a). After termination of proceedings, application to recall the said order was filed by the claimant on 20-1-2012, which was rejected by the Arbitral Tribunal on the ground that it has no jurisdiction to recommence the arbitration proceedings. Section 25 contemplates a situation that when the claimant fails to communicate his statement of claim within the time as envisaged by Section 23, the Arbitral Tribunal has to terminate the proceedings. This section thus contemplates a situation where arbitration proceeding has not been started. [...]"*
>
> (Emphasis supplied)

(ii) ***Secondly,*** that the proceedings in terms of Section 25(a) of the Act, 1996 may be terminated only when the claimant is asked to show cause as to why he failed to submit his claim within

the time stipulated and the claimant fails to show any sufficient cause for the same. Thus, it is the duty of the arbitral tribunal to give an opportunity to the defaulting claimant to show sufficient cause for his failure. Where a sufficient cause is shown, either in response to the tribunal's notice, or by the claimant on his own, it is not obligatory for the arbitral tribunal to terminate the proceedings. The relevant observations read as under: -

> *"20. [...] The most important words contained in Section 25 are "where without showing sufficient cause – the claimant fails to communicate his statement of claim". Under Section 23(1), the claimant is to state the facts supporting his claim within the period of time agreed upon by the parties or determined by the Arbitral Tribunal. The question of termination of proceedings thus arises only after the time agreed upon between the parties or determined by the Arbitral Tribunal comes to an end. When the time as contemplated under Section 23(1) expires and no sufficient cause is shown by the claimant the Arbitral Tribunal shall terminate the proceedings. The question of showing sufficient cause will arise only when the claimant is asked to show cause as to why he failed to submit his claim within the time as envisaged under Section 23(1) or the claimant, on his own, before the order is passed under Section 25(a) to terminate the proceedings comes before the Arbitral Tribunal showing sufficient cause for not being able to submit his claim within the time. In both the circumstances i.e. when a show-cause notice is issued to the claimant as observed above or the claimant of his own shows cause for non-filing the claim within the time the*

> *Arbitral Tribunal shall take a call on terminating the proceedings*. It is easy to comprehend that in the event, the claimant shows a sufficient cause, the Arbitral *Tribunal* can accept the statement of claim even after expiry of the time as envisaged under Section 23(1) or grant further time to the claimant to file a claim. Thus, on sufficient cause being shown by a claimant even though time has expired under Section 23(1), it is not obligatory for the Arbitral Tribunal to terminate the proceedings. The conjunction of the wordings "where without showing sufficient cause" and "the claimant fails to communicate his statement of claim", would indicate that it is a duty of the Arbitral Tribunal to inform the claimant that he has failed to communicate his claim on the date fixed for that and requires him to show cause why the arbitral proceedings should not be terminated? *[...]"*
>
> (Emphasis supplied)

(iii) ***Thirdly,*** under the scheme of Section 25, ordinarily, the proceedings have to be terminated only when no sufficient cause is shown by the claimant for his default in filing the statement of claim. However, there is no impediment in the provision for the claimant to show such sufficient cause even after the termination of the proceedings. This is because the occasion to show sufficient cause would arise only after the claimant defaults in filing its statement of claims. Thus, even after passing the order for terminating the proceedings, if

sufficient cause is shown, the same can be accepted by the tribunal. There is no lack of the jurisdiction in the arbitral tribunal to recall the earlier order on sufficient cause being shown. The relevant observations read as under: -

> *"20. [...] Opportunity to show sufficient cause for his failure to communicate his claim statement can only be given after he has actually failed to do so. Whether in a case where the claimant failed to file a statement of claim and has failed also to show cause before an order of termination of proceedings is passed, the claimant is entitled to show cause subsequent to the termination, is the question which has fallen for consideration.*
>
> *21. When the Arbitral Tribunal without sufficient cause being shown by the claimant to file the claim statement can terminate the proceedings, subsequent to termination of proceedings, if the sufficient cause is shown, we see no impediment in the power of the Arbitral Tribunal to accept the show cause and permit the claimant to file the claim. The scheme of Section 25 of the Act clearly indicates that on sufficient cause being shown, the statement of claim can be permitted to be filed even after the time as fixed by Section 23(1) has expired. Thus, even after passing the order of terminating the proceedings, if sufficient cause is shown, the claims of statement can be accepted by the Arbitral Tribunal by accepting the show-cause and there is no lack of the jurisdiction in the Arbitral Tribunal to recall the earlier order on sufficient cause being shown."*

(Emphasis supplied)

(iv) ***Lastly,*** the occasion to terminate the proceedings under Section 32(2)(c) arises only when the claim is not terminated under Section 25(a), and the arbitration has proceeded further. The words "unnecessary" or "impossible" in Section 32(2)(c) have been used in a context different from that of the default contemplated under Section 25(a). Furthermore, the use of the phrase "*the mandate of the Arbitral Tribunal shall terminate*" in Section 32, and the omission of it in Section 25, clearly indicates that the nature of termination under the two provisions is distinct from each other. The distinction being that under Section 25(a), the proceeding can be recommenced even after termination, if the claimant shows sufficient cause, but no such revival is possible under Section 32(2)(c) of the Act, 1996. The relevant observations read as under: -

> *"22. Section 32 contains a heading "Termination of Proceedings". Sub-section (1) provides that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2). Sub-section (2) enumerates the circumstances when the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings. The situation as contemplated under Sections 32(2)(a) and 32(2)(b) are not attracted in the facts of this case. Whether termination of proceedings in the present case can be treated to be covered by Section 32(2)(c) is the question to be considered.*

Clause (c) contemplates two grounds for termination i.e. (i) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary, or (ii) impossible. The eventuality as contemplated under Section 32 shall arise only when the claim is not terminated under Section 25(a) and proceeds further. The words "unnecessary" or "impossible" as used in clause (c) of Section 32(2), cannot be said to be covering a situation where proceedings are terminated in default of the claimant. The words "unnecessary" or "impossible" has been used in different contexts than to one of default as contemplated under Section 25(a). Sub-section (3) of Section 32 further provides that the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings subject to Section 33 and sub-section (4) of Section 34. Section 33 is the power of the Arbitral Tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature or to give an interpretation of a specific point or part of the award. Section 34(4) reserves the power of the court to adjourn the proceedings in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. On the termination of proceedings under Sections 32(2) and 33(1), Section 33(3) further contemplates termination of the mandate of the Arbitral Tribunal, whereas the aforesaid words are missing in Section 25. When the legislature has used the phrase "the mandate of the Arbitral Tribunal shall terminate" in Section 32(3), non-use of such phrase in Section 25(a) has to be treated with a purpose and object. The purpose and object can only be that if the claimant shows sufficient cause, the proceedings can be recommenced."

(Emphasis supplied)

135. In ***Sai Babu v. M/s Clariya Steels Pvt. Ltd.*** **[Civil Appeal No. 4956 of 2019]**, another two-Judge Bench of this Court placing reliance on ***SREI Infrastructure*** (supra), reiterated that the termination of proceedings under Section 25(a) is distinct from that under Section 32(2)(c). As in the former, only the proceedings come to an end whereas in the latter the mandate of the arbitral tribunal also gets terminated. Thus, unlike Section 25(a), no option of recall would lie in cases covered by Section 32 of the Act, 1996. The relevant observations read as under: -

> *"The sole arbitrator who was appointed in this case terminated proceedings under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act'), by order dated 04.05.2017. However, on an application dated 05.05.2017 to recall the aforesaid order, the learned arbitrator passed an order on 18.05.2017 stating that, as good reasons had been made out in the affidavit for recall, he was inclined to recall the order even though under the Act, in law, it may be difficult to do so. A revision filed against the aforesaid order was dismissed by the High Court on 14.06.2017.*
>
> *Having heard learned counsel for the parties, we are of the view that the matter is no longer res integra. In SREI Infrastructure Finance Limited v. Tuff Drilling Private Limited' [(2018) 11 SCC 470] [...]*
>
> *xxx xxx xxx*
>
> *<u>It is clear, therefore, that a distinction was made by this Court between the mandate terminating under section 32 and proceedings coming to an end under section 25. This Court</u>*

has clearly held that no recall application would, therefore, lie in cases covered by section 32(3)."

(Emphasis supplied)

136. Thus, as per ***SREI Infrastructure*** (supra) and ***Sai Babu*** (supra) respectively, the termination of proceedings in terms of Section 25(a) cannot be construed to mean an order of termination under Section 32(2)(c), as both the provisions operate in different spheres and context.

137. In ***Hyderabad Metropolitan Development Authority & Anr. v. Ramky Elsamex Hyderabad Ring Road Ltd.*** reported in **2023 SCC OnLine TS 4416**, the question that came up for the consideration of the Telangana High Court was whether an order of termination pursuant to Section 38(2) would, in effect, constitute an order under Section 32(2)(c) of the Act, 1996.

138. The facts shorn of its details, are that the arbitral tribunal therein, by its order had directed the parties to deposit the fees within a specified time, failing which the proceedings would stand terminated. The respondent-claimant therein deposited its share of the fees, but the appellant defaulted. Notwithstanding the

default, the tribunal proceeded to continue with the proceedings. Aggrieved by the same, the appellants approached the High Court of Telangana *inter-alia* contending that, since the order of the arbitral tribunal had not been complied with, the proceedings automatically stood terminated in terms of Section 32(2)(c) read with Section 38(2) of the Act, 1996.

139. The Telangana High Court held that the arbitral tribunal could not have continued with the proceedings, as the same stood terminated for the following reasons: -

(i) ***First,*** that as per Section 38(2) of the Act, 1996, the arbitral tribunal is competent to terminate the proceedings where both the parties fail to deposit the fees as directed. Such an order of termination would be traceable to Section 32(2)(c) of the Act, as the non-deposit of the requisite fees makes it impossible for the tribunal to continue the proceedings. The relevant observations read as under: -

> *"15. According to Section 31(8) Costs of arbitration should be fixed by the Arbitral Tribunal in accordance with Section 31-A. Section 31-A is about regime for costs. Section 38 deals with deposits. According to sub-section (1), the Tribunal is competent to fix the amount of deposit or supplementary deposit as the case*

may be as advance for the costs referred to in Sub-section (8) of section 31 which it would expect to incur in respect of the claim submitted to it. Whenever there is a counter claim, Arbitral Tribunal is competent to fix separate amount of deposit for claim and counter claim. According to Sub-section (2), deposit referred to in Sub-section (1) should be payable in equal shares by the parties. First proviso to Sub-section (2) enables one party to pay the share of the other party also if the other party fails to pay its share. According to second proviso, where either party fails to pay share in respect of claim or counter claim, the Arbitral Tribunal can suspend or terminate the Arbitral proceedings in respect of the claim or counter claim. Sub-Section (3) enables rendering of accounts on such termination.

16. It is thus clear that according to second proviso to Sub-section (2), the Tribunal is competent to terminate Arbitral proceedings in case of failure of one party or both parties to the dispute not paying the deposit as directed by the Tribunal.

17. Section 32 of the Act, 1996 is in three parts. (i) According to SubSection (1), Arbitral proceedings get terminated when final arbitral award is passed or by an order of the Arbitral Tribunal under Sub-section (2). According to Sub-section (2), Arbitral Tribunal shall issue an order for termination of the arbitral proceedings where the claimant withdraws his claim, unless respondent objects to such withdrawal; (ii) where both parties agreed for termination of proceedings; and (iii) where Arbitral Tribunal finds that the continuation of the proceedings has for any other reason becomes unnecessary or impossible.

xxx xxx xxx

22. Once proceedings are terminated traceable to Section 38(2) read with Section 32(1)(c), the Arbitral Tribunal has no competence to revive the arbitral proceedings on the assumption that parties have never

taken seriously the issue of termination of Arbitral proceedings. When statute operates the field, the understanding of the parties has no relevance. When proceedings stood terminated and when the Arbitral Tribunal has no competence to revive the Arbitral proceedings, merely because the parties participated in the subsequent proceedings has no legal consequence. The parties cannot confer jurisdiction contrary to statutory mandate.

23. In the case on hand, clause 32(2)(c) is attracted. The Tribunal assumed that if parties do not make the deposit within the time granted, they are not interested in continuing the Arbitral proceedings. Though, the Tribunal may not have used the words unnecessary or impossible, the tone and tenor of the order dated 10.09.2022 would clearly indicate that it was impossible to continue the arbitral proceedings. It is impossible to continue arbitral proceedings if one of the parties are not keen in participating in the arbitral proceedings by not depositing the amount. Thus, having regard to the conduct of one of the parties, petitioners herein, in not depositing the fee directed to be paid by the Arbitral Tribunal, it was impossible for the Arbitral Tribunal to proceed with the case. It is not the case of the respondent that he paid the fee payable by the petitioners also as envisaged by first proviso to Section 38(2) of the Act, 1996. Therefore, reading together second proviso to Section 38(2) and Section 32(2)(c), the Arbitral proceedings stood terminated by virtue of the orders of the Arbitral Tribunal dated 10.9.2022. Once proceedings are terminated as per these clauses, it is no more permissible for the Arbitral Tribunal to commence or continue the Arbitral proceedings."

(Emphasis supplied)

(ii) ***Secondly,*** the High Court by placing reliance on ***SREI Infrastructure*** (supra) held that the termination of

proceedings under Section 38(2) read with Section 32(2)(c) is distinct from that under Section 25 of the Act, 1996. Unlike Section 32(2)(c) where upon the termination of proceedings, the mandate of the tribunal also comes to an end, Section 25 carves out an exception. This is because, under Section 25, notwithstanding the termination of the proceedings, the mandate of the tribunal continues, thereby, making it permissible for the tribunal to revive the proceedings. However, under the scheme formed by Section(s) 38(2) and 32(2)(c) no such revival is possible. The relevant observations read as under: -

> *"24. Section 32(3) of the Act, 1996 clearly holds that once Arbitral proceedings are terminated, the mandate given to the Arbitral Tribunal also gets terminated. In other words, the mandate comes to an end, the moment Arbitral proceedings stood terminated. The scheme of the Act does not envisage revival of Arbitral proceedings once Arbitral proceedings are terminated. Section 25 carves out an exception to scheme of Sections 32 and 38 of the Act, 1996 as held by the Hon'ble Supreme Court in SREI Infrastructure Finance Ltd. According to law propounded by the Hon'ble Supreme Court even if there was default of a party as envisaged in Section 25, it is permissible for the Arbitral Tribunal to continue proceedings. Sections 32 and 38 of the Act, 1996 do not envisage such course."*
>
> (Emphasis supplied)

140. Thus, according to the Telangana High Court in ***Hyderabad Metropolitan Development Authority*** (supra), although an order of termination in terms of Section 25(a) would not fall within the scope of Section 32(2)(c) of the Act, 1996 as held by ***SREI Infrastructure*** (supra), yet when an order of termination of proceedings is passed in terms of Section 38(2), the same would invariably constitute an order under Section 32(2)(c) of the said Act.

141. In ***Sushila Kumari & Anr. v. Bhayana Builders Pvt. Ltd.*** reported in **2019 SCC OnLine Del 7243**, the arbitral proceedings came to be terminated on the ground that the claimant failed to quantify the valuation of her claim. The arbitrator observed that despite several requests, the claimant refused to quantify her claim because of which the total arbitral fees could not be properly determined. Accordingly, the arbitrator terminated the proceedings.

141.1 Aggrieved therefrom, the claimant approached the Delhi High Court *inter-alia* contending that even though her claim was non-monetary, she had already paid the requisite fees of the arbitrator, and thus, the proceedings could not have been terminated. In appeal, the Delhi High Court held as under: -

(i) ***First,*** that the power to terminate the proceedings is available to an arbitral tribunal under Section(s) 25 and 32 of the Act, 1996. It further held that the order passed by the arbitrator terminating proceedings for the non-valuation of the claims and thereby the fees payable, was in effect, an order under Section 32(2)(c) of the Act, 1996. The relevant observations read as under: -

> *"76. In this case, as noticed above, since the incumbent Arbitrator via order dated 14.07.2017 has terminated the arbitration proceedings without referring to any provisions of 1996 Act, the same, as has been correctly argued by Mr. Varma, would fall only under the provisions of Section 32(2)(c) of the 1996 Act.*
>
> *77. It is important to note that Subsection (1) of Section 32 speaks about termination of arbitration proceedings either upon a final award being rendered in the matter or by virtue of an order passed by the Arbitral Tribunal under Subsection (2) of the very same section.*
>
> *78. Under Subsection (2) of Section 32, an Arbitral Tribunal can order termination of the Arbitral proceedings under three situations as contemplated in Subclauses (a) to (c) of the very same provision. 79. Clause (a) of Sub-section (2) of Section 32 provides for a situation where the claimant withdraws his claim and the respondent does not object to the termination of the arbitration proceedings. In case, the respondent objects, then, the learned Arbitrator would have to continue with the arbitration proceedings if it recognizes that the respondent has a legitimate interest in obtaining a final settlement of the dispute at hand.*

> *80. Clause (b) of Subsection (2) of Section 32 provides for a circumstance where parties agree to the termination of the proceedings.*
>
> *81. Lastly, clause (c) of Subsection (2) of Section 32 provides that Arbitral Tribunal may terminate the arbitration proceedings if it finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.*
>
> *xxx xxx xxx*
>
> *87. As a matter of fact, the power to terminate the arbitration proceedings is also available in Section 25 of the 1996 Act."*
>
> (Emphasis supplied)

(ii) ***Secondly,*** that despite the appellant's obdurate refusal to quantify her claims for the purpose of determining the arbitrator's fee, the same did not have the effect of rendering the continuation of the arbitration proceedings impossible, and thus, the same could not have been terminated in terms of Section 32(2)(c) of the said Act. The relevant observations read as under: -

> *"82. In the instant case, the substitute Arbitrator terminated the arbitration proceedings as he found that the petitioners were obdurate in their stand of not valuing their claims and thereby enabling ascertainment of the Arbitrator's fee.*

> *83. To my mind, the learned Arbitrator could not have taken recourse to Section 32(1)(c) of the 1996 Act as, however, unreasonable the learned Arbitrator found the stand of the petitioners, it would still not be a circumstance which vested him with the power of terminating the arbitration proceedings. The reason I say so is that under clause (c) of Section 32(2) of the 1996 Act, the learned Arbitrator could have terminated the arbitration proceedings only if their continuation had become either unnecessary or impossible."*
>
> (Emphasis supplied)

142. In ***Dani Wooltex Corpn. v. Sheil Properties (P) Ltd.*** reported in **(2024) 7 SCC 1**, the appellant therein contended that the respondent had abandoned its claims, as the company, apart from filing its statement of claims, never made any effort to convene a hearing for the same. Accordingly, the arbitral proceedings came to be terminated. In appeal, this Court held as under: -

(i) ***First,*** that under the Act, 1996, apart from Section 25(a), the power to terminate the proceedings on the ground of abandonment of claim is available only under Section 32(2)(c) of the said Act. In the former, the proceedings can be terminated if the claimant fails to file his statement of claim in accordance with Section 23 of the Act, 1996. However, in the latter, the proceedings can only be terminated if the reason is such that it renders the continuation of the proceedings

unnecessary or impossible. The relevant observations read as under: -

> *"11. Clause (a) of Section 25 of the Arbitration Act provides that on the failure of the claimants to communicate the statement of claim in accordance with sub-section (1) of Section 23, the Arbitral Tribunal shall terminate the proceedings. Clause (b) of Section 25 provides that if the respondent fails to communicate his statement of defence in accordance with sub-section (1) of Section 23, the Arbitral Tribunal shall continue the proceedings. Clause (c) of Section 25 provides that if a party fails to appear at an oral hearing or to produce documents, the Arbitral Tribunal may continue the proceedings and make the arbitral award on the basis of whatever evidence is available with it. The power to terminate arbitral proceedings on the claimant's default to file a statement of claim is the only provision under the Arbitration Act to terminate the arbitral proceedings apart from Section 32.*
>
> *xxx xxx xxx*
>
> *17. Therefore, clause (c) of sub-section (2) of Section 32 can be invoked for reasons other than those mentioned in sub-section (1) of Section 32 and clauses (a) and (b) of sub-section (2) of Section 32. Under clause (c), the mere existence of a reason for terminating the proceedings is not sufficient. The reason must be such that the continuation of the proceedings has become unnecessary or impossible. In a given case, when a claimant files a claim and does not attend the proceedings, clause (a) of Section 25 comes into operation, resulting in the learned arbitrator terminating the proceedings."*

(Emphasis supplied)

(ii) ***Secondly,*** that as per Section 25 sub-clause (b) and (c), where a claimant, after the filing of his statement of claims, fails to appear at an oral hearing or fails to produce documentary evidence, the arbitral tribunal is empowered to continue with the proceedings. This clearly indicated the legislative intent that a claimant's failure to appear or fix a hearing, cannot, by itself, be a ground to hold that the proceedings have become unnecessary or impossible. The relevant observations read as under: -

> *"17. [...] If, after filing a claim, the claimant fails to appear at an oral hearing or fails to produce documentary evidence, it cannot be said that the continuation of proceedings has become unnecessary. If the claimant fails to appear at an oral hearing after filing the claim, in view of clause (c) of Section 25, the learned arbitrator can proceed with the arbitral proceedings. The fact that clause (c) of Section 25 enables the Arbitral Tribunal to proceed in the absence of the claimant shows the legislature's intention that the claimant's failure to appear after filing the claim cannot be a ground to say that the proceedings have become unnecessary or impossible."*

(Emphasis supplied)

(iii) ***Thirdly,*** that under Section 32(2)(c), abandonment of claims can be a reason to hold that the continuation of proceedings has become unnecessary. However, in order to terminate the

proceedings under the said provision, the abandonment of a claim, either expressly or impliedly, must be clearly established. The facts and the conduct of the party must be so clinching and convincing that it leads only to one conclusion that the claimant has given up his claim. Mere absence in proceedings or failure to fix a date for the hearing does not amount to abandonment of claim, as once the statement of claims is filed, it is the arbitral tribunal's duty under Section 25 to fix a date for hearing and continue with the proceedings. The relevant observations read as under: -

> *"13. The order of termination passed by the learned arbitrator, in this case, gives an impression that he was of the view that unless parties move the Arbitral Tribunal with a request to fix a meeting or a date for the hearing, the Tribunal was under no obligation to fix a meeting or a date for hearing. The appointment of the Arbitral Tribunal is made with the object of adjudicating upon the dispute covered by the arbitration clause in the agreement between the parties. By agreement, the parties can appoint an arbitrator or Arbitral Tribunal. Otherwise, the Court can do so under Section 11 of the Arbitration Act. An arbitrator does not do pro bono work. For him, it is a professional assignment. A duty is vested in the learned arbitrator or the Arbitral Tribunal to adjudicate upon the dispute and to make an award. The object of the Arbitration Act is to provide for an efficient dispute resolution process. An arbitrator who has accepted his appointment cannot say that he will not fix a meeting to conduct arbitral proceedings or a*

hearing date unless the parties request him to do so. It is the duty of the Arbitral Tribunal to do so. If the claimant fails to file his statement of claim in accordance with Section 23, in view of clause (a) of Section 25, the learned arbitrator is bound to terminate the proceedings. If the respondent to the proceedings fails to file a statement of defence in accordance with Section 23, in the light of clause (b) of Section 25, the learned arbitrator is bound to proceed further with the arbitral proceedings. Even if the claimant, after filing a statement of claim, fails to appear at an oral hearing or fails to produce documentary evidence, the learned arbitrator is expected to continue the proceedings as provided in clause (c) of Section 25. Thus, he can proceed to make an award in such a case.

xxx xxx xxx

18. Therefore, if the party fails to appear for a hearing after filing a claim, the learned arbitrator cannot say that continuing the arbitral proceedings has become unnecessary. Abandonment by the claimant of his claim may be grounds for saying that the arbitral proceedings have become unnecessary. However, the abandonment must be established. Abandonment can be either express or implied. Abandonment cannot be readily inferred. One can say that there is an implied abandonment when admitted or proved facts are so clinching and convincing that the only inference which can be drawn is of the abandonment. Mere absence in proceedings or failure to participate does not, per se, amount to abandonment. Only if the established conduct of a claimant is such that it leads only to one conclusion that the claimant has given up, his/her claim can an inference of abandonment be drawn. Merely because a claimant, after filing his statement of claim, does not move the Arbitral Tribunal to fix a date for the hearing, it cannot be said that the claimant has abandoned his claim. The reason is that the Arbitral Tribunal has a duty to fix a date for

a hearing. If the parties remain absent, the Arbitral Tribunal can take recourse to Section 25.

(Emphasis supplied)

142.1 Accordingly, this Court in ***Dani Wooltex*** (supra) whilst setting aside the order passed by the arbitral tribunal for termination of the proceedings, summarized its conclusion as under: -

> *"25. To conclude:*
> *25.1. The power under clause (c) of sub-section (2) of Section 32 of the Arbitration Act can be exercised only if, for some reason, the continuation of proceedings has become unnecessary or impossible. Unless the Arbitral Tribunal records its satisfaction based on the material on record that proceedings have become unnecessary or impossible, the power under clause (c) of sub-section (2) of Section 32 cannot be exercised. If the said power is exercised casually, it will defeat the very object of enacting the Arbitration Act;*
>
> *25.2. It is the Arbitral Tribunal's duty to fix a meeting for hearing even if parties to the proceedings do not make such a request. It is the duty of the Arbitral Tribunal to adjudicate upon the dispute referred to it. If, on a date fixed for a meeting/hearing, the parties remain absent without any reasonable cause, the Arbitral Tribunal can always take recourse to the relevant provisions of the Arbitration Act, such as Section 25;*
>
> *25.3. The failure of the claimant to request the Arbitral Tribunal to fix a date for hearing, per se, is no ground to conclude that the proceedings have become unnecessary; and*
>
> *25.4. The abandonment of the claim by a claimant can be a ground to invoke clause (c) of sub-section (2) of Section 32. The abandonment of the claim can be either express or implied. The abandonment cannot be readily inferred. There is an implied abandonment when admitted or proved facts are*

> *so clinching that the only inference which can be drawn is of the abandonment. Only if the established conduct of a claimant is such that it leads only to one conclusion that the claimant has given up his/her claim can an inference of abandonment be drawn. Even if it is to be implied, there must be convincing circumstances on record which lead to an inevitable inference about the abandonment. Only because a claimant, after filing his statement of claim, does not move the Arbitral Tribunal to fix a date for the hearing, the failure of the claimant, per se, will not amount to the abandonment of the claim*."
>
> (Emphasis supplied)

143. This Court in ***SREI Infrastructure*** (supra) held that a termination of proceedings under Section 32 of the Act, 1996, is wholly distinct from a termination under Section 25. The reason behind this distinction, as per ***SREI Infrastructure*** (supra) is in view of the use of the expression "*mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings*" in Section 32 and the omission thereof in Section 25 of the Act, 1996.

144. The expression "*mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings*" is unique to the provision of Section 32. This phrase has not been used by the legislature in any other provision of the Act, 1996. Even the other provisions in

which termination of proceedings has been alluded to, such as Section(s) 25 or 38 of the Act, 1996, the aforesaid phrase is absent.

b. Interplay between Section(s) 25, 30 38 and the termination of proceedings under Section 32 of the Act, 1996.

145. Before we proceed to understand the framework of termination of proceedings under Section(s) 25, 30, 32 and 38 of the Act, 1996 respectively, it would be apposite to understand the legislative history that led to the enactment of these provisions.

146. Prior to the 1996 Act, three Acts governed the law of Arbitration in India, namely, the Arbitration (Protocol and Convention) Act, 1937, which gave effect to the Geneva Convention; the Arbitration Act, 1940 which dealt with domestic awards; and the Foreign Awards (Recognition and Enforcement) Act, 1961 which gave effect to the New York Convention of 1958 which dealt with challenges to awards made which were foreign awards.

147. However, with the passage of time, the existing laws were felt to have become outdated to address the economic reforms taking place in the country and to keep pace with the emerging

international standards governing the resolution of domestic and international commercial disputes through arbitration.

148. Accordingly, the Act, 1996 was enacted by the Parliament *inter-alia* to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards, by taking into account the United Nations Commission on International Trade Law's Model law on International Commercial Arbitration adopted in 1985 (for short, the "**UNCITRAL Model**").

149. The Statement of Objects and Reasons appended to the Act states that although the UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, yet the harmonised concepts on arbitration and conciliation contained therein are universal in application and would serve as a model legislation on domestic arbitration and conciliation.

150. The Statement of Objects and Reasons of the Act, 1996 reads as under: -

"STATEMENT OF OBJECTS AND REASONS

The law on arbitration in India was substantially contained in three enactments, namely - the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Arbitration Act, 1940 was widely felt to have become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration had proposed amendments to this Act to make it more responsive to contemporary requirements. It was also felt that economic reforms taking place in India may not become fully effective if the laws dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. Conciliation, like arbitration is also getting worldwide recognition as an instrument for settlement of disputes.

The United Nations Commissions on International Trade Law (UNCITRAL) adopted the Model law on International Commercial Arbitration in 1985. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted a set of Conciliation Rules in 1980. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the said UNCITRAL Model Law and Rules is that they have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application. The UNCITRAL Model Law and Rules, though, are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation.

In India, in order to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the Model Law and Conciliation Rules adopted by the UNCITRAL, the President of India promulgated on 16th January, 1996, the Arbitration and Conciliation Ordinance, 1996 as the Parliament was not in session and the circumstances existed which rendered it necessary to take immediate action. The ordinance could not be replaced by an Act as the Parliament session was prorogued without passing the Bill. But in order to give further continued effect to the provisions of the said Ordinance, the President promulgated the Arbitration and Conciliation (Second) Ordinance, 1996 on 26th March, 1996 which could also not be passed by the Parliament. On 21st June, 1996, the President promulgated the Arbitration and Conciliation (Third) Ordinance, 1996. To replace the Ordinance of 21st June, 1996, the Arbitration and Conciliation Bill was introduced in the Parliament. The Bill was passed by both the Houses of Parliament and received the assent of the President on 16th August, 1996 and was titled as the Arbitration and Conciliation Act, 1996.

The main objects of the Act are-

(i) to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) to minimise the supervisory role of courts in the arbitral process;

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

(vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

(viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral awards to which India as a party applies, will be treated as a foreign award."

(Emphasis supplied)

151. Thus, the Act, 1996 substantially adopts the UNCITRAL Model as its framework. Several provisions in the said Act pertaining to domestic arbitration draw heavy inspiration from the UNCITRAL Model, with many provisions being in substance *pari-materia* to the corresponding Article(s) contained in the UNCITRAL Model, with marginal adaptations and tweaks.

152. Section(s) 25, 30 and 32 of the Act, 1996 in particular mirror Article(s) 25, 30 and 32 of the UNCITRAL Model, respectively. Thus, it would be apposite to first understand the underlying object with which these provisions came to be introduced in the Model Law.

I. History of the Working Group on the UNCITRAL Model Law on International Commercial Arbitration.

153. When the Working Group on International Contract Practices of UNCITRAL commenced its work on the Model Law on International Commercial Arbitration all the way back in 1982, the idea of 'termination of proceedings' by the arbitral tribunal first surfaced in the draft during the deliberations on the now Article 25 of the UNCITRAL Model Law in its Third Session. At that time, the provisions of Article(s) 30 and 32 as we know now, had not yet been conceptualised.

154. Article 25 earmarked the first instance where a reference was made to the termination of arbitral proceedings by the arbitral tribunal. However, what is particularly noteworthy is that, when Article 25 was being discussed, the provision was never intended to confer the arbitral tribunal with a general power to terminate the proceedings.

155. The discussions which followed the preparation of Article 25 largely revolved around addressing situations where a party failed to participate in the arbitration. The authority to terminate

the arbitral proceedings, was, at that time, understood as an implied power vested in the arbitral tribunal in *seisin* of the dispute. It was in this limited context that the termination of proceedings by the arbitral tribunal was adverted to.

156. The Working Group in its Third Session recognised that some jurisdictions were apprehensive to assign sanctity to decisions rendered *ex-parte*. According to it, this was an issue that could potentially allow a party to completely avoid arbitrations that would result in awards not in their favour by not participating in the proceedings. Such conduct would effectively leave the claimant in a lurch, especially in jurisdictions where an *ex-parte* award would not be enforceable.

157. Nevertheless, it was decided that the Model Law should explicitly permit an arbitral tribunal to proceed in the absence of one party. The Working Group resolved that a draft article be prepared by the Secretariat to allow the arbitration to continue in a party's absence under certain conditions. This was the genesis for the now Article 25 of the UNCITRAL Model. The relevant observations read as under: -

"7. Default
Question 4-13. If one of the parties fails to participate, would the arbitral tribunal be empowered to go ahead with the proceedings and make a binding award even without special authorization by the parties, including reference to arbitration rules which allow the arbitral tribunal to do so? If such special authorization were to be required, should the model law express1y recognize it as being effective, subject to any restrictions envisaged under question4-l4?

71. There was general agreement that, in principle, the arbitral tribunal should be empowered to continue the proceedings even if one of the parties fails to communicate his statement or to appear at a hearing. However, divergent views were expressed as to whether the model law should contain a provision to that effect which would set forth the conditions for such continuation. under one view, an attempt should be made to formulate the conditions for such continuation. Minimum requirements for continuing the proceedings and rendering an award in case of such _ failure would be that the party had been given due advance notice (possibly also requiring a statement of the legal consequences of default) and that the party had not shown sufficient cause for his failure. Under another view, it was not practical to regulate this issue in the model law, since such regulation might not be readily acceptable in some countries in view of their general position on ex parte judgements. If, however, there were to be a provision on this issue, one view was that it could provide that a court would decide, in the circumstances of each case, whether ex parte proceedings by the arbitral tribunal were permissible. Another view expressed concern over the delay and complications which might result from such court involvement. The Working Group decided to attempt to formulate the conditions that must be met for permitting ex parte proceedings, and to request the Secretariat to prepare draft provisions taking into account the suggestions made during the discussion. If such attempt proved to be fruitless, the issue would have to be left for decision to the procedural law of each State."

(Emphasis supplied)

158. What is interesting is the discussion which immediately followed. The Working Group decided that in addition to the aforesaid procedural issues, certain other aspects were also required to be dealt with in the Model Law. Amongst these was the issue on termination of arbitral proceedings. The Working Group appears to be cognizant of the fact that, any deliberation on the default of one party to participate in the proceedings, would nevertheless require discussion on the termination of proceedings as-well. Accordingly, it decided that the Secretariat would prepare draft provisions on these issues, with explanatory notes if appropriate.

> *"8. Further issues of arbitral procedure*
> *72. The Working Group agreed that, in addition to the procedural issues contained in questions 4-1 to 4-14, there were other issues of arbitral procedure possibly to be dealt with in the Model Law. The issues suggested for consideration were: minimum contents of a statement of claim and statement of defence (cf. arts. 18 and 19 of the UNCITRAL Arbitration Rules); language to be used in arbitration proceedings (cf. art. 17 of the UNCITRAL Arbitration Rules); notice of arbitration (cf. art. 3 of the UNCITRAL Arbitration Rules), and its effects on a prescription period; and termination of arbitral proceedings (cf. art. 34 of the UNCITRAL Arbitration Rules). The Working Group requested the Secretariat to prepare for its consideration draft provisions on these issues, with explanatory notes if appropriate."*

159. At its Fourth Session, the Working Group considered the aforesaid issue on the default of a party and examined the draft Article 24 (which eventually became Article 25 of the UNCITRAL Model). Two different variants of the draft Article 24 were presented to the Working Group, being Alternative 'A' and Alternative 'B', respectively. The relevant observations read as under: -

> *"Article 24*
> *124. The text of article 24 as considered by the Working Group was as follows:*
>
> *Alternative A:*
>
> *Article 24*
>
> *(1) If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his statement of claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitration proceedings.*
>
> *(2) If, within the period of time fixed by the arbitral tribunal, the respondent fails to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.*
>
> *(3) If one of the parties, invited in writing at least 30 days in advance, fails to appear at a hearing without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration; if the tribunal decides to do so, it shall notify the parties in writing.*
>
> *(4) If one of the parties, invited in writing to produce documentary evidence within a specified period of time of not less than 30 days, fails to do*

so, the arbitral tribunal may make the award on the evidence before it; if the tribunal decides to do so, it shall notify the parties in writing.

[(5) The defaulting party may, within 15 days after issuance of the order referred to in paragraph (1) or (2), or the notification referred to in paragraph (3) or (4), request the Authority specified in article 17 to review the decision of the arbitral tribunal as to whether the conditions laid down in the respective paragraph of this article were fulfilled.]

Alternative B:

Article 24

If, without showing sufficient cause for the failure,

(a) the respondent fails to communicate his statement of defence within the period of time fixed by the arbitral tribunal; or

(b) one of the parties, invited at least 30 days in advance, fails to appear at a hearing; or

(c) one of the parties, invited in writing to produce documentary evidence within a specified period of time of not less than 20 days, fails to do so,

the other party may request the Authority specified in article 17 to authorize [instruct] the arbitral tribunal to proceed with the arbitration.

125. The Working Group supported the policy underlying paragraphs (1) to (4) of Alternative A. It was generally agreed that these provisions were subject to the contrary agreement of the parties. It was noted that in paragraph (4) of article 24 (Alternative A) the words "without showing sufficient cause for such failure" had been erroneously omitted and should be added after the words "fails to do so".

126. It was agreed that paragraph (5) of Alternative A as well as the entire text of Alternative B should be deleted since they introduced a degree of court supervision of international commercial arbitration which was neither necessary nor desirable.

127. The view was expressed that this article should set forth principles in a general way without detailed procedural rules.

128. The Working Group was in agreement that this article should in its result preserve a balance of equality between the parties. It was noted, however, that it was difficult to preserve a formal equality since the parties were in different situations. The claimant has every reason to pursue his claim if he believes it is justified, since otherwise he will have incurred expenses for no substantive purpose. On the other hand, the respondent may fail to act in the arbitration so as to impede its progress.

129. It was suggested that the parties might be in a situation of greater equality if the failure of the defendant to communicate his statement of defence was treated as a denial of the claim. In such a case, even though the respondent was in default in respect of the arbitral procedure, the claimant would have to establish the merits of his case before the arbitral tribunal.

130. It was suggested that the time-limits provided for in this article might be too short, taking into account the distances and possible delays in communications. It was also suggested that a flexible approach in giving the arbitral tribunal some discretion in setting time-limits might be appropriate.

131. The view was also expressed that it would be appropriate to make clear in paragraph (3) that the arbitral tribunal should give a party a period of time to show that he had sufficient cause for his failure to appear at a hearing."

160. The significant take-aways from the above discussion of the Working Group, for the present issue at hand, emerge from the draft version of Article 24 that was proposed and the general object underlying the said provision highlighted by the Working Group.

161. In the Alternative 'A' version of draft Article 24, more particularly clause (5), a party was empowered to approach the authority stipulated in the then draft Article 17 to pass a direction to the arbitral tribunal, to continue with the proceedings. Similar provision was also included in the Alternative 'B' version of draft Article 24.

162. We shall discuss the vital importance of the aforesaid in the latter parts of this judgment.

163. Suffice to say, for the present moment, the observations made by the Working Group on the draft Article 24 at para 127 are significant. The Working Group observed that the draft Article 24 should only "*set forth principles in a general way without detailed procedural rules*" (emphasis).

164. The above observations clearly show, that whilst drafting the now Article 25, what was in the mind of the Working Group was only to provide the general principles in respect of the consequences of a party's default and the power of the arbitral tribunal to continue with the proceedings *ex-parte* in certain situations.

165. The Working Group never intended Article 25 to vest the arbitral tribunal with the power to terminate the proceedings. The authority of the arbitral tribunal to terminate the proceedings, was, at that stage, always understood to be impliedly vested in the arbitral tribunal.

166. We say so, because the Working Group felt the need to incorporate a specific provision in respect of the power of the arbitral tribunal to terminate the proceedings at a much later stage, and for very different reasons, which we shall shortly discuss.

167. One another key provision which was introduced and deliberated upon by the Working Group during its Fourth Session, was the provision on settlement of disputes by the parties during the course of proceedings.

168. The Working Group examined the draft Article 33 prepared by the Secretariat. The said draft provision *inter-alia* stipulated that where the parties during the course of arbitration arrive at a settlement of the dispute, the arbitral tribunal shall either issue an order for termination of the proceedings or upon request from both parties, record the settlement in the form of an award, if agreeable to the tribunal. The said provision ultimately was adopted in the UNCITRAL Model as Article 30 (corresponding Section 30 of the Act, 1996). The relevant observations read as under: -

> *"Article 33*
> *171. The text of article 33 as considered by the Working Group vas as follows:*
>
> *Article 33*
>
> *Alternative A: (1) If, during the arbitration proceedings, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitration proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms.*
>
> *A1ternative B: (1) If, during the arbitration proceedings, the parties agree on a settlement of the dispute, the arbitral tribunal shall, if requested by [both parties] [a party, unless the arbitration agreement requires a request by both parties1', record the settlement in the form of an arbitral award on agreed terms, unless the arbitral tribunal has [good and substantial compelling] reasons, in particular grounds of international public polies , not to follow that request.*

(2) An award on agreed terms shall be made in accordance with the provisions of articles 27 and 35 and shall state that it is an award [On agreed terms]. Such an award has the same status and executory force as] [shall be treated like any other award on the merits of' the case.

172. There was general agreement that Alternative A of paragraph (1) was preferable.

173. However, in this context a view was expressed that the procedure for recording a settlement as an award on agreed terms would not be necessary if the Model Law would provide for the enforceability of the settlement agreement as such.

174. It was suggested that the arbitral tribunal should be empowered to record a settlement in the form of an arbitral award on agreed terms on the request of either party. It was pointed out that it is often the case that only the party who is to receive payment under the award has an interest in converting the settlement into an award which can then be enforced under the 1958 New York Convention.

175. On the other hand, it was noted that a settlement may be ambiguous or subject to conditions that might not be apparent to the arbitral tribunal. According to this view, which received a majority of the support, there were fewer dangers of injustice by requiring both parties to request an award on agreed terms.

176. The Working Group was of the view that the arbitral tribunal should have the right to decide whether it would record the settlement in the form of an agreed award."

169. This was the second instance where a reference to "*termination of proceedings*" surfaced in the draft UNCITRAL Model. The significance of the aforesaid lies in the discussions that followed in the next session.

170. Due to the reference to "*termination of proceedings*" in the various draft provisions of the Model Law, more particularly, draft Article(s) 24 and 33, respectively, an impending need was felt by the Working Group to discuss a dedicated provision on the termination of arbitral proceedings.

171. Thus, in its Fifth session, the Working Group discussed the possibility of a new provision pertaining to termination of proceedings. The Working Group felt that, in light of the various draft provisions that allude to the termination of proceedings, it would be appropriate if the Model Law provided "*certainty in respect of important consequences of the termination of arbitral proceedings*". The relevant observations read as under: -

> *"F. Termination of arbitral proceedings*
>
> *38. The Working Group considered the question whether it would be appropriate to include in the model law a provision on termination of arbitral proceedings (on the basis of a note by the Secretariat, WP.4l, paras. 38-41 and draft article F).*
>
> *39. There was wide support in the Working Group for the view that the model law should contain a provision on termination of arbitral proceedings. Such a provision would be useful because it would provide certainty in respect of*

important consequences of the termination of arbitral proceedings.

40. The prevailing view was that there should be no automatic termination of arbitral proceedings and that a procedural decision by the arbitral tribunal was needed for terminating the arbitral proceedings. However, it was suggested that the wording should indicate that a special order of termination was not always necessary, for example, when the dispute was settled by an agreement of the parties or by an award on the merits of the claim.

41. It was also suggested that the model law should contain a rule empowering the arbitral tribunal to decide whether it was appropriate to terminate the proceedings after the tribunal gave suitable notice to the parties of its intention to terminate the proceedings."

(Emphasis supplied)

172. The above discussion of the Working Group is significant. It highlights the considerations that weighed with the Working Group when it began to draft a dedicated provision on the termination of arbitral proceedings.

173. The Working Group observed that, possibly in light of the draft Article(s) 24 and 33 (now Article(s) 25 and 30 of the UNCITRAL Model, respectively), in order to avoid the possibility of an "*automatic termination of proceedings*", a procedural decision by the

arbitral tribunal should be required for the termination of proceedings.

174. The instances specified by the Working Group, where such an order would be required are also significant. It observed that such an order should not be required where either the parties settle the dispute or where a final award is rendered. The former was suggested in light of the draft Article 33, which initially empowered the tribunal to terminate the proceedings by issuing an order to such effect or by passing an award recording the terms of settlement.

175. In the Sixth Session, the Working Group considered both the draft Article 33 and the provision on termination of proceedings, then numbered as draft Article F, which later came to be adopted as Article 32 of the UNCITRAL Model and corresponding Section 32 of the Act, 1996.

176. The deliberations of the Working Group on draft Article F read as under: -

"F. Termination of arbitral proceedings

47. The text of article F as considered by the Working Group was as follows:

"Article F

(1) The arbitral proceedings are terminated:

(a) by the [making/ [delivery] of the final award which constitutes or completes the disposition of all claims submitted to arbitration; or

(b) by an agreement of the parties that the arbitral proceedings are to be terminated; or

(c) by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) After having given suitable notice to the parties, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings when the claimant withdraws his claim or if for any other reason the continuation of the proceedings becomes unnecessary or inappropriate.

The mandate of the arbitral tribunal is terminated with the termination of the arbitral proceedings, subject to the provisions of article XXIV.

General considerations

48. Some support was expressed for the deletion of this article because it was not necessary to regulate in such detail the ending of the mandate of the arbitral tribunal. However, the view prevailed that the article should be retained since there may be other cases where the moment of termination of arbitral proceedings maybe important, like, for example, the continuation of the running of a limitation period or the possibility to institute legal proceedings before another forum on the same dispute.

Paragraph (1)

49. The Working Group adopted sub-paragraph (a) with the word "making" instead of the word "delivery".

50. Regarding sub-paragraph (b) it was suggested that the wording should define more clearly the moment of the termination of the arbitral proceedings. It was also suggested that sub-paragraph (b) should make clear whether an agreement of the parties to terminate arbitral proceedings covered only specific agreements to that effect or also cases where the parties had agreed in advance on a deadline for making the award.

51. Regarding sub-paragraph (c) it was suggested that, while the arbitral tribunal should be under an obligation to issue an order for the termination of the proceedings, in the absence of such an order the interested party should have a possibility to establish that the proceedings had terminated.

Paragraph (2)
52. The Working Group was of the view that the withdrawal of a claim should not ipso facto terminate arbitra1 proceedings since the defendant might have a legitimate interest in a final settlement of the dispute.

Paragraph (3)
53. There was general support for paragraph (3) of this article. It was noted that this paragraph should include a reference to article XXX (3) as suggested in foot-note 16 of document A/CN.9/WG.II/WP.44."

177. The Working Group then deliberated on the draft Article 33, which was renumbered as 'Article XXI'. The relevant observations read as under: -

"Article XXI
105. The text of article XXI as considered by the Working Group was as follows:

Article XXI

> *(1) If, during the arbitration proceedings, the parties agree on a settlement of the dispute, the arbitral tribunal shall either terminate the arbitration proceedings or, if requested by the parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms.*
>
> *(2) An award on agreed terms shall be made in accordance with the provisions of article XXII and shall state that it is an award. Such an award has the same status and executory force as any other award on the merits of the case.*

Paragraph (1)
106. The Working Group adopted this paragraph, subject to improvement of its wording along the following lines: "If, during arbitration proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms". Paragraph (2).

107. The Working Group adopted this paragraph. It was noted that the last sentence might later have to be modified in order to qualify this statement as regards reasons for recourse against such an award or its enforcement."

178. What can be discerned from the above is that while the draft Article 33 (now Article 30 of the UNCITRAL Model), which empowers the arbitral tribunal to issue an order for termination of proceedings under the said provision, was initially accepted by the Working Group, yet the phraseology of the provision underwent subtle changes in its Sixth Session. The words "*shall*

either issue an order for the termination of the arbitration proceedings" came to be omitted.

179. This occurred in light of the draft Article F (now Article 32 of the UNCITRAL Model), which empowered the tribunal to issue an order for the termination of proceedings. The scenario where the proceedings would be terminated in light of settlement of the disputes was consolidated into Article F sub-clause (1)(b).

180. The suggestion made in the Fifth Session that the provision on termination of proceedings should not require any order to that effect if the parties settle the dispute, was rejected. This was because it felt that it should be the parties, rather than the arbitral tribunal, who should have a say on whether the dispute has been settled.

181. This change occurred in light of certain suggestions by the State Members to the Working Group, who participated in the drafting of the Model Law from the Fifth Session. The Commission had decided "*to expand the membership of the Working Group to all States members*" and a total of 36 States along with several international

organisations participated and provided comments on the draft provisions.

182. These comments were compiled and put before the Working Group in its Fifth and Sixth Session as *'Analytical compilation of comments by Governments and International organizations on the draft text of model law on international commercial arbitration'* available in the Report of the Secretary General.

183. On the draft Article 33, Austria and Mexico suggested the removal of the discretionary power of the arbitral tribunal to record the settlement as an award, as the same, in their view, unjustifiably restricted party autonomy. The relevant observations read as under: -

> *"Austria and Mexico propose the deletion of the words 'and not objected to by the arbitral tribunal' in article 30(1). Austria considers that these words restrict the autonomy of the parties in an unjustified way since, if the subject-matter of the dispute is capable of being submitted to arbitration, the parties are free to settle the dispute without any restrictions by the arbitral tribunal. In the view of Mexico, the arbitral tribunal should not be able to oppose the recording in the form of an award of the settlement which the parties have reached."*

184. Yugoslavia, on the other hand, stated that there could be certain circumstances where the arbitral tribunal may have a reason to object. It suggested that the Model Law should spell out the criteria for such objection, such as where the settlement is incompatible with public policy. The relevant observations read as under: -

> *"In the view of Yugoslavia, it would be necessary to determine, at least by using general terms, the criteria on the basis of which the arbitra1 tribunal would be empowered to reject the parties' proposal to record their settlement in the form of an arbitral award. Objections of the arbitral tribunal should be limited to establishing that the stipulated settlement is incompatible with the public order of the legal system applicable to the arbitration."*

185. The Asian-African Legal Consultative Organization (AALCO) suggested that where the parties settle the dispute, they must be obliged to notify the arbitral tribunal of the same. It is only when the arbitral tribunal is appropriately notified by both parties that the dispute has been settled, should the proceedings be terminated by the tribunal. The relevant observations read as under: -

> *"3. AALCC is of the view that if the parties settle the dispute during the arbitral proceedings they must be obliged to notify the arbitral tribunal, and the arbitral tribunal should terminate the proceedings only upon receipt of such notification. Paragraph (l) of article 30, therefore, needs to .be amended accordingly."*

186. Keeping in mind the above suggestions, the Working Group noted the possibility that a settlement may be ambiguous or subject to conditions which would be unacceptable to the tribunal. Accordingly, it decided that there were fewer dangers of injustice in requiring both parties to simply intimate the tribunal about the settlement of the dispute, upon which the arbitral tribunal would terminate the proceedings, and if it has no objection, proceed to record the same by way of an award.

187. Thus, the expression "*shall issue an order for termination of proceedings*" was omitted from the draft Article 33 / Article XXI (now Article 30 of the UNCITRAL Model), and the concept of termination of proceedings upon settlement of the dispute, came to be incorporated in the draft Article F (now Article 32 of the UNCITRAL Model), more particularly in clause (1)(b) thereof, where the proceedings could be terminated pursuant to an agreement between the parties in this regard.

188. The aforesaid indicates that the Working Group considered the draft Article F (now Article 32 of the UNCITRAL Model) to be the

sole provision under which the arbitral proceedings could be terminated in terms of an order by the arbitral tribunal. The other instances which allow the arbitral tribunal to terminate the proceedings, only make a reference to the power of the tribunal to terminate the proceedings enshrined in Article 32 of the UNCITRAL Model.

189. In the Seventh Session the draft provisions on the default of a party, settlement of disputes and termination of proceedings were put in their final placeholder numbers being Articles 25, 30 and 32 respectively of the UNCITRAL Model as it stands today. The relevant discussions on the aforesaid provisions are as under: -

> *"Article 25*
> *81. The text of article 25 as considered by the Working Group was as follows:*
>
> *Article 25.*
> *Default of a party Unless otherwise agreed by the parties, if, without showing sufficient cause.*
>
> *(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral proceedings shall be terminated;*
> *(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1),*

Variant A: the arbitral proceedings shall continue;

Variant B: the arbitral tribunal shall continue the proceedings without treating such failure as an admission of the claimant's allegations;

Variant C: the arbitral tribunal shall treat this as a denial of the claim and continue the proceedings; (c) any party fails [to comply with a request by the arbitral tribunal) to appear at a hearing, or to produce documentary evidence, the arbitral tribunal [may] [shall] continue the proceedings [and may make the award on the evidence before it].

82. The Working Group adopted that article, including, in subparagraph (b), the wording of variant B, and subparagraph (c) in the following modified form:

"(c) any party fai1s to appear at a hearing, or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it."

83. As regards the three variants presented in subparagraph (b), the Working Group, after deliberation, adopted the wording of variant B. That wording, while according certain discretion to the arbitral tribunal, contained a limitation which was considered useful in view of the fact that under many national laws on civil procedure default of the defendant in court proceedings was treated as an admission of the claimant's allegations.

84. It was suggested that the provision should be more elaborate and provide some guidance concerning certain procedural issues (e.g., how to establish the default and in what manner to conduct the proceedings and make the award). The Working Group, after deliberation, was agreed that a model law need not contain detailed procedural rules in that respect.

Article 30

109. The text of article 30 as considered by the Working Group was as follows:

Article 30. Settlement

(1) If. during arbitral proceedings. the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and. if requested by the parties and not objected to by the arbitral tribunal. record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and executory force as any other award on the merits of the case.

110. The Working Group adopted that article. subject to the replacement, in paragraph (2). of the words "executory force" by the word "effect".

Article 32

113. The text of article 32 as considered by the Working Group was as follows:

Article 32. Termination of proceedings

Variant A:

(1) The arbitral proceedings are terminated:

(a) by the making of the final award which disposes of all claims submitted to arbitration or

(b) by an agreement of the parties that the arbitral proceedings are to be terminated at a specified date [or after expiry of a specified period of time); or

(c) by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) After having given suitable notice to the parties. the arbitral tribunal shall issue an order for the termination of the arbitral proceedings

(a) when the claimant withdraws his claim. unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute or

(b) if for any other reason the continuation of the proceedings becomes unnecessary or inappropriate.

[Where the arbitral tribunal fails to issue an order of termination. any party may request from the Court specified in article 6 a ruling on the termination of the proceedings.]

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. subject to the provisions of articles 33 and 34 (4).

Variant B:
(1) The arbitral proceedings are terminated either by the final award or by agreement of the parties or by an order of termination [by the arbitral tribunal] [which the arbitral tribunal may issue when the continuation of the proceedings appears unnecessary or inappropriate].

(2) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. subject to the provisions of articles 33 and 34 (4).

114. The Working Group adopted that article. based on variant B. in the following modified form:

> *"(1) The arbitral proceedings are terminated either by the final award or by agreement of the parties or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.*
>
> *"(2) The arbitral tribunal*
>
> *(a) "shall issue an order for the termination of the arbitral proceedings when the claimant withdraws his claim. unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;*
>
> *(b) "may issue an order of termination when the continuation of the proceedings becomes for any other reason unnecessary or inappropriate.*
>
> *"(3) The mandate of the arbitral tribunal terminates with the termination of the arbitra1 proceedings, subject to the provisions of articles 33 and 34 (4)."*

115. While there was some support for the more elaborate draft provisions presented in variant A. the Working Group, after deliberation. decided in favour of variant B. for the sake of simplicity.

116. AI regards termination of the proceedings by an order of the arbitral tribunal, the Working Group adopted the more explicit wording "which the arbitral tribunal may issue when the continuation of the proceedings appears unnecessary or inappropriate" as well as the provision contained in paragraph (2) (a) of variant A. in order to give some indication of the reasons for an order of termination."

190. In the Seventh Session several significant alterations were made to the Article(s) 25, 30 and 32 of the UNCITRAL Model. The expression "*shall issue an order for termination of proceedings*" was omitted from the Articles 25 and 30 respectively, and was exclusively retained in Article 32.

191. Thereafter, the Article(s) 25 and 30 merely specified that the proceedings shall terminate, if the claimant fails to communicate its claims or the parties arrive at a settlement of the dispute, respectively.

192. The Article 32 further allowed a party to approach the designated national court having jurisdiction over the arbitral tribunal in the event the tribunal fails to issue an order for the termination of proceedings. Lastly, the expression – "*issue an order of termination when the continuation of the proceedings becomes for any other reason unnecessary or inappropriate*" was employed to confer a discretion on the arbitral tribunal to terminate the proceedings.

193. A slew of comments was received by the Commission on the contours of the Article(s) 25, 30 and 32 of the UNCITRAL Model.

194. The Soviet Union suggested that instead of providing the termination of arbitral proceedings by any agreement between the parties on this behalf under clause (1) of Article 32, it would be apposite if the same is placed under clause (2) that stipulates when the tribunal would be empowered to issue an order for the termination of proceedings.

195. According to the Soviet Union, the agreement of the parties to terminate arbitration is only a ground on which the proceedings can be terminated by the tribunal. The Soviet Union further suggested that the word "*inappropriate*" be replaced from the expression "*when the continuation of the proceedings becomes for any other reason unnecessary or inappropriate*" in Article 32. According to the Soviet Union, Article 32 should only specify the circumstances or grounds on which the proceedings can be terminated rather than conferring discretion to an arbitral tribunal to terminate the proceedings by use of the word "*inappropriate*". The relevant observations read as under: -

> *"1. The Soviet Union states that from the juridical and technical point of view arbitral proceedings may be terminated by an award or by an order of the arbitra1 tribunal, but not directly by an agreement of the parties. Such agreement by the parties rather serves as a ground for an order for the termination of proceedings. For this reason it is proposed to move the reference to the agreement of the parties from paragraph (1) to paragraph (2)(a) of article 32."*
>
> *xxx xxx xxx*
>
> *3. In the view of the Soviet Union, the reference in paragraph (2)(b) to the case where the continuation of proceedings becomes unnecessary or inappropriate is unclear. It is proposed to replace the word "inappropriate", which gives too much discretion to an arbitral tribunal, by the word "impossible" (following the example of article 34(2) of the UNCITRAL Arbitration Rules) or by the word "pointless" or any similar word."*

196. The above suggestions, were ultimately accepted, and Article 32 was reformulated to only specify the grounds on which the proceedings can be terminated by the arbitral tribunal.

197. Several more suggestions were also made by various State Members on the wording of the Article 32. Despite the fact that these suggestions were not accepted in entirety, yet the reasoning given for the rejection of these suggestions in the *travaux préparatoires* on the UNCITRAL Model are significant.

198. Austria had suggested that the provision should define the criteria for the "withdrawal of a claim" to avoid uncertainties insofar as termination of proceedings is concerned.

> *"2. Austria suggests specifying in article 32(2)(a) criteria for the withdrawal of a claim, in order to avoid uncertainty about the termination of arbitral proceedings. The following rewording of paragraph (2)(a) is proposed:*
>
> > *"(a) shall issue an order for the termination of the arbitral proceedings when the claimant withdraws his claim either before the communication of the statement of defence by the respondent or with the consent of the respondent if the latter has already communicated his statement of defence or by waiver of the claimant's rights to the subject-matter;".*

199. However, the aforesaid suggestion was rejected for the reasons evident in the *travaux préparatoires* on the UNCITRAL Model. The preparatory works on the UNCITRAL Model note that the provision of Article 32 was intended to enumerate only the circumstances that would automatically lead to a termination of proceedings. It was incorporated to stipulate those situations and circumstances that rendered the continuation of proceedings impossible or unnecessary. The relevant observations read as under: -

> *"Two variants were discussed and put to the table for consideration. The first suggested enumerating all those circumstances that would automatically lead the tribunal to terminate proceedings, further noting that such circumstances should be explicitly spelt out. The second variant suggested limiting the termination of proceedings only to those cases that rendered continuation of proceedings impossible or unnecessary. All other circumstances would not lead to termination. It was stated that: 'If this approach is taken, a special rule on termination of arbitral proceedings may be regarded as superfluous because it would cover the cases when termination is a self-evident consequence. A draft article F was thus framed [...]"*
>
> (Emphasis supplied)

200. Thus, it was deemed not necessary to articulate the manner in which a claim could be withdrawn. As long as such withdrawal resulted in the proceedings becoming unnecessary or impossible, it would suffice the requirements of Article 32.

201. This is the precise reason why the Working Group in its Seventh Session, ***first***, chose not to alter clause (a) of Article 32 and ***secondly***, substituted the word "may" in clause (b) (now clause (c)) to make it obligatory for the arbitral tribunal to terminate the proceedings where its continuation becomes impossible or unnecessary. The relevant observations read as under: -

"37. Article 32, paragraph 2, subparagraph (b): The text states that where the arbitral proceedings become unnecessary or inappropriate, the arbitral tribunal "may" order the termination of the proceedings. The word "may" indicates a right and not an obligation. Consequently, despite a conviction that the proceedings have become unnecessary or inappropriate, the arbitral tribunal may, nevertheless, order their continuation. On what grounds? To what purpose? In whose interest? The text does not state. It is clear that the continuation of such proceedings would be nothing more than a waste of time, effort and money. We therefore propose that paragraph 2 be amended as follows:

> *"2. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:*
>
> *(a) The claimant withdraws (no change).*
>
> *(b) The arbitral proceedings become, for any other reason, unnecessary or inappropriate."*

202. Canada expressed concerns that the draft of provision of Article 32 gave unchecked discretion to the arbitral tribunal to terminate the proceedings. Accordingly, it proposed that the provision should enable the aggrieved party to seek a review of the decision of the arbitral tribunal by the national courts having jurisdiction. The relevant observations read as under: -

"1. Canada states that paragraph (2)(b) apparently gives the arbitral tribunal complete discretion to terminate the proceedings whenever it decides that the continuation of the proceedings becomes "unnecessary or inappropriate". It

might be desirable to provide that such a decision is reviewable by the Court.

203. Yugoslavia also expressed similar concerns that the grounds specified in the draft of Article 32 were too general and vague, which could potentially result in wrongful terminations. The relevant observations read as under: -

> *"2. In the view of Yugoslavia, the grounds for the termination of arbitral proceedings specified in paragraph (2)(b) are too general and vague and may result in terminating the proceedings even where this is not in the interest of the parties. Thes suggestion is that an attempt. be made to identify some grounds more precisely."*

204. However, these concerns became irrelevant when the Working Group in its Seventh Session accepted the suggestion put forth by Egypt and curtailed the discretion of the arbitral tribunal to terminate the proceedings under the draft of Article 32. The relevant observations read as under: -

> *"Egypt had set out its objection as regards the tribunal's potential permissive power to terminate proceedings that were otherwise unnecessary or impossible. It was emphasised that the tribunal should possess no discretion in the matter as this was clearly a waste of time and money and was not in the parties' interest.9 This is sensible because despite the fact that the parties possess the right to petition the courts on this matter, a potentially discretionary power conferred upon the tribunal may have led to an unnecessary and prolonged tug-of-war. It was at the sixth session of Working Group II that the provision began to finally resemble its existing*

manifestation. Draft article F stated, for the first time, that proceedings shall be terminated also by a final award, in addition to an agreement of the parties and through an order by the tribunal on the grounds already explained in previous sessions.10 At the seventh session, two alternative variants were put forward, but these did not differ from each other in any substantial way and are reflective of the final version of article 32. However, two issues are worth highlighting. First, a bracketed proposal was suggested in the f irst and most elaborate variant whereby if the tribunal fails to issue a termination order despite the existence of the situations set out in article 32, then the parties are entitled to make a request to the courts. As we already stated, the Egyptian proposal definitively settled this matter by curtailing the tribunal's discretionary powers. Second, both variants required that prior to the issuance of a termination order, the tribunal provide appropriate notice to the parties.11 Neither of these two considerations survived the final draft (despite the latter's existence in article 34 of the UNCITRAL Arbitration Rules), although it is certainly good practice for the tribunal to forewarn the parties about its intention to terminate proceedings. At the end of the seventh session, the final version of the article was adopted.12 The 2006 revision of the Model Law did not affect article 32."

205. What can be discerned from the above discussion is that: -

(i) ***First,*** Article 32 of the UNCITRAL Model, which is *pari-materia* to Section 32 of the Act, 1996, was intended to be the only provision pertaining to the power of the arbitral tribunal to terminate the proceedings. The provision was drafted due to the impending need felt by the Working Group for a dedicated provision on the termination of

proceedings that enumerates all the circumstances that could lead to such termination and provide certainty in respect of the important consequences flowing therefrom. The relevant observations read as under: -

> *"38. The Working Group considered the question whether it would be appropriate to include in the model law a provision on termination of arbitral proceedings (on the basis of a note by the Secretariat, WP.4l, paras. 38-41 and draft article F).*
>
> *39. There was wide support in the Working Group for the view that the model law should contain a provision on termination of arbitral proceedings. Such a provision would be useful because it would provide certainty in respect of important consequences of the termination of arbitral proceedings.*
>
> *xxx xxx xxx*
>
> *41. It was also suggested that the model law should contain a rule empowering the arbitral tribunal to decide whether it was appropriate to terminate the proceedings after the tribunal gave suitable notice to the parties of its intention to terminate the proceedings."*

(ii) ***Secondly,*** that Article 32 was introduced in the Model Law only after the provisions of Articles 25 and 30 respectively, as the Working Group felt that the termination of proceedings envisaged under the aforesaid two provisions should not be automatic, rather it must require a specific

order in that regard by the arbitral tribunal. The entire purport behind drafting Article 32 stemmed from the Working Group's realisation that a separate provision was required to supplement the "termination of proceedings" envisaged under Articles 25 and 30 of the UNCITRAL Model, respectively. The relevant observations read as under: -

> *"40. The prevailing view was that there should be no automatic termination of arbitral proceedings and that a procedural decision by the arbitral tribunal was needed for terminating the arbitral proceedings. However, it was suggested that the wording should indicate that a special order of termination was not always necessary, for example, when the dispute was settled by an agreement of the parties or by an award on the merits of the claim."*
>
> *xxx xxx xxx*
>
> *Despite the fact that this was not a controversial provision, some concerns were voiced in the initial stages of the drafting process as to whether or not a provision concerning termination of proceedings was really required. However, the majority view prevailed, whereby this was felt to be important for the parties, including for the calculation of limitation periods, whether the tribunal could alter the award or issue an additional award, as well as others. When the issue of termination of arbitral proceedings was mooted in the preparatory stages of the work of Working Group II, reference was made to article 34 of the UNCITRAL Arbitration Rules, without much elaboration.5 Draft article 24(a) iterated the principle now found in article*

> *25(a) of the Model Law, whereby if the claimant fails to communicate his statement of claim in due time without showing sufficient cause, the tribunal shall issue a termination order. It was only during the fifth session of Working Group II that the issue was given significant attention. Two variants were discussed and put to the table for consideration. The first suggested enumerating all those circumstances that would automatically lead the tribunal to terminate proceedings, further noting that such circumstances should be explicitly spelt out. The second variant suggested limiting the termination of proceedings only to those cases that rendered continuation of proceedings impossible or unnecessary. All other circumstances would not lead to termination. It was stated that: 'If this approach is taken, a special rule on termination of arbitral proceedings may be regarded as superfluous because it would cover the cases when termination is a self-evident consequence. A draft article F was thus framed [...]"*
>
> (Emphasis supplied)

(iii) ***Lastly,*** the Working Group itself considered that the scheme formed by Article(s) 25 and 30, insofar as they provide for the termination of proceedings, has to be construed in light of Article 32 of the UNCITRAL Model. Article(s) 25 and 30 of the UNCITRAL Model were only concerned with setting forth the general principles and certain situations when the proceedings could be terminated. In all such circumstances, the termination would still nevertheless be governed by

Article 32 of the UNCITRAL Model. The Working Group noted in the context of Article 30, that in the event of a settlement of the dispute by the parties, the proceedings would be terminated in terms of Article 32 sub-clause (2). Similarly, the *travaux préparatoires* on the UNCITRAL Model notes that a default by the claimant in terms of Article 25(a) would in essence attract the provision of Article 32(2)(c), i.e., it would render the proceedings unnecessary or impossible. The relevant observations read as under: -

> *"127. The view was expressed that this article should set forth principles in a general way without detailed procedural rules.*
>
> *xxx xxx xxx*
>
> *Article 32. Termination of proceedings*
> *Article 32 (l)*
> *26. Mr. LEBEDEV (Union of Soviet Socialist Republics) drew attention to his delegation's written comment in document A/CN.9/263 (p. 44). <u>The Commission had already approved in article 30 (l) the principle that if there was a settlement between the parties, the proceedings should be terminated by the arbitral tribunal. For the sake of consistency with that, the reference to the agreement of the parties should be transferred from paragraph (l) of article 32 to paragraph (2)</u>. He thought that was only a drafting point. Also, by describing the award as "final", the article introduced a new concept.*
>
> *xxx xxx xxx*

Paragraph 1 addresses the question as to which actions of the tribunal serve to terminate arbitral proceedings. Only two are mentioned, namely a final award or a termination order issued by the tribunal as prescribed in paragraph 2 of article 32. Although what constitutes a final award is covered in several places in the Model Law, it is instructive to set out some key features here because there is no general definition therein. The same applies as regards the construc tion of the term 'order'. The termination of arbitral proceedings by means of an award is the normal avenue that terminates proceedings, provided, of course, that the award has indeed become final and is not subject to further challenges under articles 33 and 34 of the Model Law, or other additional challenges under the law of the seat. The termination of proceedings other than through an order is exceptional and is elaborated in paragraph 2 of article 32.

Paragraph 2 enumerates three situations whereby the tribunal is obliged (with limited discretion in subparagraph (b)) to terminate the proceedings. Some Model Law jurisdictions, as is the case with section 608(2)(1) of the ZPO, expand on these, adding in the case at hand a fourth situation, namely where the claimant fails to file his claim. This situation is also covered in article 25(a) of the Model Law. No doubt, this may well be encompassed within subparagraph 2(c) of article 32 given its broad ambit."

(Emphasis supplied)

II. Section 32 of the Act, 1996 and the import of the expression "Mandate of Arbitral Tribunal".

206. The provision of Section 32 is contained in Chapter VI of the Act, 1996 which is titled "*Making of arbitral award and termination of proceedings*".

207. The marginal note appended to Section 32 of the Act, 1996 reads "*Termination of proceedings*". The marginal note along with the expression "*The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2)*" used in Section 32 sub-section (1) leaves little to imagination.

208. The aforesaid expression clearly stipulates that the termination of arbitral proceedings under the Act, 1996 can occur in only two ways. The arbitral proceedings come to an end either through the passing of the final award or by an order of the arbitral tribunal under sub-section (2) of Section 32.

209. No other provision in the Act, 1996 except Section 32 empowers the arbitral tribunal to pass an order of termination of proceedings. Section(s) 25(a), 30 and 38 of the Act, 1996 only state that the arbitral tribunal shall terminate the proceedings in the circumstances enumerated therein.

210. Section 25 clause (a) of the Act, 1996 stipulates that if the claimant fails to communicate his statement of claim "*the arbitral tribunal shall terminate the proceedings*". Similarly, Section 30 sub-section (2) provides that if the parties settle the dispute during the arbitral proceedings "*the arbitral tribunal shall terminate the proceedings*". The Second Proviso to Section 38 also states that where none of the parties pay the deposit as required by the arbitral tribunal, in respect of a claim or a counter-claim, then "*the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be*".

211. This clearly indicates that any order for termination of proceedings by the arbitral tribunal would squarely fall within the provision of Section 32 sub-section (2). The use of the words "shall" and "or" in the expression "*The arbitral proceedings **shall** be terminated by the final arbitral award **or** by an order of the arbitral tribunal under sub-section (2)*" clearly show that the arbitral proceedings can come to an end in only two distinct ways, as specified in sub-section (1).

212. The Explanatory Notes on the UNCITRAL Model, more particularly on Article 32 clearly states that only two actions by the arbitral tribunal can result in the termination of proceedings, namely, the passing of the final award or the issuance of an order for termination of proceedings as prescribed in paragraph (2) of the said provision. The termination of arbitral proceedings by means of a final award is the general rule and whereas the issuance of an order in terms of paragraph (2) is an exception. The relevant observations read as under: -

> "*Paragraph 1 addresses the question as to which actions of the tribunal serve to terminate arbitral proceedings. Only two are mentioned, namely a final award or a termination order issued by the tribunal as prescribed in paragraph 2 of article 32. Although what constitutes a final award is covered in several places in the Model Law, it is instructive to set out some key features here because there is no general definition therein. The same applies as regards the construction of the term 'order'. The termination of arbitral proceedings by means of an award is the normal avenue that terminates proceedings, provided, of course, that the award has indeed become final and is not subject to further challenges under articles 33 and 34 of the Model Law, or other additional challenges under the law of the seat. The termination of proceedings other than through an order is exceptional and is elaborated in paragraph 2 of article 32*."

(Emphasis supplied)

213. The provisions of Section(s) 25(a), 30 and 38 of the Act, 1996, merely enumerate the different circumstances in which the

arbitral tribunal would be empowered to pass an order for termination of proceedings under sub-section (2) of Section 32.

214. This is further fortified from the marginal note to Section 32 of the Act, 1996. It is trite to say that, in the absence of any inherent conflict or contradiction between the marginal note and the substantive parts of a particular provision, the marginal note may be used to aid in the interpretation of the provision.

215. This is further evident from the discussions of the Working Group on the UNCITRAL Model Law, which decided to adopt Article 32 (corresponding Section 32 of the Act, 1996) in order to ensure that the arbitral proceedings should not terminate automatically unless an order to that effect is passed by the arbitral tribunal.

216. At the time of preparation of the UNCITRAL Model, both the Articles 25 and 30 respectively, had stipulated that the proceedings shall terminate if the claimant does not file its statement of claims or where the parties arrive at a settlement of the dispute, respectively. The Working Group was concerned that, there could be a situation where, even without the indulgence of the arbitral tribunal, the proceedings could simpliciter come to an

end as soon as the conditions stipulated in Article(s) 25 and 30 were fulfilled.

217. Accordingly, it decided to adopt a dedicated provision relating to termination of proceedings that would explicitly require an arbitral tribunal to issue a formal order to such effect in order to bring the arbitral proceedings to an end. It was with this view that Article 32 was incorporated in the UNCITRAL Model Law. At the cost of repetition, the relevant observations are once again reproduced below: -

> *"38. The Working Group considered the question whether it would be appropriate to include in the model law a provision on termination of arbitral proceedings (on the basis of a note by the Secretariat, WP.4l, paras. 38-41 and draft article F).*
>
> *39. There was wide support in the Working Group for the view that the model law should contain a provision on termination of arbitral proceedings. Such a provision would be useful because it would provide certainty in respect of important consequences of the termination of arbitral proceedings.*
>
> *40. The prevailing view was that there should be no automatic termination of arbitral proceedings and that a procedural decision by the arbitral tribunal was needed for terminating the arbitral proceedings. [...]"*

(Emphasis supplied)

218. One another reason for why the termination of proceedings in terms of Sections 25, 30 or 38 of the Act, 1996 respectively, have to be construed in terms of Section 32 of the said Act, is in view of the Chapters under which the aforesaid provisions are contained.

219. Section 25 of the Act, 1996 is contained in Chapter V which deals with the "*Conduct of arbitral proceedings*". The discussions of the Working Group on UNCITRAL Model, particularly Article 25 thereof, indicate that the considerations that weighed with it for its enactment had nothing to do with empowering the arbitral tribunal to terminate the proceedings. Rather it was due to the apprehension that some jurisdictions were wary of decisions rendered *ex-parte*.

220. The object underlying Article 25 of the UNCITRAL Model and the corresponding Section 25 of the Act, 1996 is to ensure that a party cannot thwart arbitration by simpliciter not participating in the arbitral proceedings and thereby leaving the other party in a lurch. It was enacted to expressly recognise the circumstances and the manner in which an arbitral tribunal could continue with the arbitral proceedings even in the absence of one party.

221. Thus, Section 25 of the Act, 1996 only deals with the continuation of the arbitral proceedings, more particularly the manner in which the proceedings would progress in the absence of one party.

222. Likewise, Section 30 of the Act, 1996 also only stipulates the form and manner in which the arbitral tribunal may pass an award recording the settlement of dispute by the parties. It only goes to the extent of laying down how the arbitral tribunal is expected to proceed if the parties arrive at a settlement during the course of the arbitral proceedings. It does not in itself empower the arbitral tribunal to terminate the proceedings, rather only ascribes the circumstances that could enable the tribunal to terminate the proceedings in terms of Section 32(2) of the Act, 1996.

223. Similarly, Section 38 of the Act, 1996 is contained in Chapter X, titled "*Miscellaneous*". Sub-section (1) thereof, empowers the arbitral tribunal to direct the deposit of a certain amount as advance towards the cost it likely expects to incur in respect of the continuation of the proceedings. The aforesaid provision is omnibus in nature and applies to every stage of the arbitral proceedings.

224. Sub-section (3) of Section 38 is of significance. It stipulates that once the proceedings stand terminated, the arbitral tribunal shall furnish the account of all the deposits received by it, and return any unexpended balance to the parties.

225. What is particularly noteworthy is that Section 38 sub-section (3), insofar as its application is concerned, does not speak about the termination of proceedings in certain circumstances. Irrespective of the provision under which the proceedings come to be terminated by the arbitral tribunal, the said provision would require the arbitral tribunal to render the accounts to the parties.

226. To put it simply, irrespective of whether the proceedings are terminated either under Section(s) 25, 30 or 32, the arbitral tribunal, as per sub-section (3) of Section 38 is obliged to furnish the account of all the deposits received by it and return any unexpended balance to the parties.

227. The statutory design of Section 38 of the Act, 1996 itself acknowledges that the power to retain deposits is co-terminus with the subsistence of arbitral proceedings. Once the proceedings

stand terminated, sub-section (3) mandates the arbitral tribunal to render accounts and return unspent deposits.

228. Thus, it would be logically inconsistent to say that although sub-section (3) of Section 38 would be attracted where the proceedings are terminated in terms of Section 32 sub-section (2), yet, when it comes to the termination of proceedings on account of default of the parties in paying the requisite costs, such termination would be distinct, and not attract the provision Section 32 of the Act, 1996.

229. In the absence of anything to the contrary, one part of a provision cannot be isolated and confined to a narrow field of operation by giving it a restrictive or selective interpretation while the remaining parts of the provision are read in an expansive manner and construed to apply to the entirety of the Act, 1996.

230. A provision cannot be read in an inconsistent manner. It must be read as a whole, every sub-section forming part thereof must be given a harmonious, consistent and purposeful interpretation, so as to give effect to the legislative intent underlying the enactment. It is impermissible to dismember a provision and ascribe to it

multiple meanings divorced from its textual and contextual setting.

231. The Chapter in which the provision of Section 38 is contained along with the general applicability of the sub-section(s) contained therein, clearly suggests that the said provision does not vest a separate and distinct power in the arbitral tribunal to terminate the proceedings and rather only enumerates one another circumstance in which the proceedings could be terminated by the arbitral tribunal.

232. Viewed in this conspectus, it is not open to contend that termination of proceedings arising out of non-payment of costs in terms of Section 38 of the Act, 1996 stands on a different footing from a termination under Section 32(2). The statute does not recognise such a dichotomy, nor does the scheme of the Act, 1996 warrant such an interpretation.

233. We may now look into the decision of this Court in ***SREI Infrastructure*** (supra).

234. A two-Judge Bench of this Court in ***SREI Infrastructure*** (supra) held that the termination of proceedings under Section 25(a) of the Act, 1996 was wholly distinct in nature from a termination under Section 32(2) of the Act, 1996 for two reasons: -

(i) ***First,*** that Section 25(a) of the Act, 1996, more particularly the termination that takes place in lieu thereof occurs at a stage where the arbitral proceeding is yet to be started. The use of the word "*sufficient cause*" in the said provision indicates that the proceedings can be terminated only when no sufficient cause is shown by the claimant for his default in filing the statement of claim.

(ii) ***Secondly,*** that unlike Section 32 of the Act, 1996, the legislature in its wisdom, consciously omitted the phrase "*the mandate of the Arbitral Tribunal shall terminate*" in Section 25(a) of the Act, 1996. This clearly indicates that the nature of termination under the two provisions is distinct from each other.

235. Similarly, in ***Sai Babu*** (supra), another coordinate bench of this Court reiterated that the omission of the expression "*the mandate of the Arbitral Tribunal shall terminate*" in Section 25(a) clearly

indicates that the termination of proceedings thereunder is different in nature from that under Section 32(2) of the Act, 1996.

236. We are unable to agree with the views expressed by this Court in ***SREI Infrastructure*** (supra) and ***Sai Babu*** (supra) insofar as they hold that the termination of proceedings under Sections 25(a) and 32(2) of the Act, 1996 are distinct from one another.

237. This is because, it would be logically indefensible to say that the termination of proceedings in terms of Section 25(a) takes place at a different stage, more particularly prior to the commencement of arbitral proceedings. We say so because Section 21 of the Act, 1996 clearly states that "*the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent*". A claimant under the scheme of the Act, 1996 is expected, rather required to communicate its statement of claims only after the commencement of the arbitral proceedings.

238. Furthermore, as far as the requirement of existence of a "*sufficient cause*" is concerned for the termination of proceedings under

Section 25(a), the said expression only indicates when the arbitral tribunal would be empowered to terminate the proceedings. The existence of a sufficient cause is only a rider on when it would be permissible for the tribunal to terminate the proceedings. It does not in any way alter the nature of the order for termination, once passed by the arbitral tribunal. Moreover, the expression "*sufficient cause*" used in the substantive part of Section 25, applies to all sub-clauses of the said provision.

239. The Working Group on the UNCITRAL Model itself acknowledged that the introductory sentence to Article 25, more particularly the phrase "*sufficient cause*" governed all three sub-paragraphs of the provision. The relevant observations read as under: -

> "*32. The CHAIRMAN said that in his view there was no contradiction, since the introductory sentence governed all three subparagraphs. Under the Soviet Union proposal, the tribunal would be bound to comply with a request for continuation of the proceedings made by one of the parties under subparagraph (c) only if the defaulting party had not shown sufficient cause*."

240. Thus, it is manifestly clear that the aforesaid expression has nothing to do with the nature of the order for termination of

proceedings. The provision only stipulates the circumstances in which it would be permissible for the arbitral tribunal to terminate the proceedings i.e., where the claimant fails to communicate its statement of claims within the specified period without any sufficient cause for such default.

241. The expression "*the mandate of the Arbitral Tribunal shall terminate*" is undoubtedly unique to the provision of Section 32 of the Act, 1996. However, the use of the said expression is in no manner intended to convey that the nature of termination under Section 32(2) is distinct from the termination of proceedings under the other provisions of the Act, 1996.

242. The expression "*mandate of the Arbitral Tribunal*" only refers to the obligation of the arbitral tribunal to administer the arbitration by conducting the proceedings in order to adjudicate upon the dispute referred to it. It is merely descriptive of the function entrusted to the tribunal, namely, the authority and duty to adjudicate the disputes before it.

243. As such, the termination of mandate of the arbitral tribunal signifies nothing more than the cessation of the authority of the tribunal to proceed further in the reference. It denotes an end to the tribunal's jurisdiction over the subject matter of the arbitration in that particular reference and cannot be construed as creating a specialised form of termination distinct from the other provisions of the Act, 1996.

244. Irrespective of whether the proceedings are terminated on account of the rendition of a final award, or by the withdrawal of claims, or on account of default by the claimant, or the intervention of any impossibility in the continuation of the proceedings, the legal effect remains the same, inasmuch as the arbitral tribunal thereafter stands divested of authority to act in the reference.

245. When the arbitral proceedings are terminated on account of default of a party in communicating its statement of claims as per Section 25(a) of the Act, 1996, the consequence that flows from such termination is no different from a termination in terms of Section 32 of the said Act. In both scenarios, the tribunal ceases to

possess any authority to adjudicate upon the dispute referred to it.

246. Similarly, once the dispute stands resolved by agreement of the parties and the tribunal either records such settlement in the form of an arbitral award or otherwise orders the termination of proceedings in terms of Section 30 of the Act, 1996, the duty of the arbitral tribunal to adjudicate the dispute also comes to an end. There remains no *lis* for adjudication by the tribunal and consequently no function for it to discharge. The termination of proceedings, by operation of Section 30 of the Act, 1996, thus attains the same effect and finality as under Section 32 of the said Act.

247. The aforesaid may be looked at from one another angle. The omission of the expression "*the mandate of the Arbitral Tribunal shall terminate*" in Sections 25, 30 and 38 of the Act, 1996 respectively, is for the simple reason that the said provisions do not pertain to the manner in which the arbitral proceedings come to an end, rather only prescribe the circumstances in which the proceedings may be terminated. Section 32 of the Act, 1996 on the other hand, explicitly

relates to the termination of proceedings, and thus, the legislature in order to provide certainty as regards the consequences of such termination, incorporated the aforesaid expression.

248. This is fortified from the deliberations of the Working Group that led to the enactment of Article 32 of the UNCITRAL Model, as already discussed aforesaid.

249. The other reason why this expression has been omitted may be understood from Section 38 of the Act, 1996. The Second Proviso to Section 38 sub-section (2) empowers the arbitral tribunal to suspend or terminate the proceedings for a particular claim or counter-claim in respect of which the requisite deposits have not been made by the parties.

250. When the arbitral tribunal terminates the proceedings in respect of a particular claim or counter-claim, it does not mean that the entire proceedings have terminated, rather only signifies the end of the proceedings for that particular claim or counter-claim, as the case may be. There could be situations where the proceedings may be terminated in respect of one particular claim, but in respect of

the other claims and counter-claims, the proceedings could be continuing. In such circumstances, the mandate of the arbitral tribunal would also continue to survive *de hors* the termination in respect of a particular claim or counter-claim, as the case may be.

251. Thus, the common thread that runs across Sections 25, 30 32 and 38 of the Act, 1996 respectively, is that although the arbitral proceedings may terminate for varied reasons, yet the consequence of such termination remains the same i.e., the arbitral reference stands concluded and the authority of the tribunal stands extinguished.

252. The termination of proceedings under Section(s) 25 and 38 of the Act, 1996, is not a trivial procedural formality. It envisages a situation where a claimant due to his own belligerence, fails to communicate its statement of claims, without any sufficient cause or does not pay the requisite costs required by the arbitral tribunal to function.

253. Under the scheme of the Act, 1996, parties are empowered to refer their disputes to an arbitral tribunal. The arbitral tribunal which

in turn is in *seisin* of the dispute, has a positive duty to adjudicate and resolve the dispute that has arisen between the parties.

254. This reference however, is singular, not perpetual. It ordains one arbitral process, not an indefinite series of retry attempts. Once the arbitral tribunal is seized of a dispute, the mechanism contemplated under the Act, 1996 cannot be again reinvoked to refer the same dispute to another tribunal.

255. Likewise, once the proceedings before the arbitral tribunal, come to an end, either by way of a final award or an order for termination of the proceedings in the situations envisaged under the Act, 1996, the reference also comes to an end, and attains finality.

256. We say so, because if the claimant is allowed a fresh arbitration, it would reduce the entire mechanism into a farce. It would lead to a situation where the claimant would have no incentive to pursue the proceedings with diligence.

257. Arbitration is built on procedural self-responsibility. Its edifice is the idea that each party must advance its case diligently, without

dependence on judicial paternalism. Section(s) 25 and 38 of the Act, 1996 respectively, insofar as they empower the termination of proceedings on account of default by a party, crystalize this principle.

258. The consequence of termination is not a trivial procedural formality. It has been enshrined to penalise inertia and recalcitrance of the parties.

259. To permit a party who by its own contumacious conduct allowed the proceedings to be terminated in the first instance, to again set the entire mechanism under the Act, 1996 in motion before another set of arbitrators, would defeat the procedural self-responsibility that the parties carry with themselves into arbitration. It would give a license to the parties to proceed carelessly, miss deadlines, cause disruption, and if the proceedings are terminated then simply restart them once again.

260. Arbitration is not infinite. Arbitrator availability is scarce; administrative capacity at institutions is finite; the arbitral process itself is resource-sensitive. A claimant who can repeatedly initiate

proceedings after default squanders the finite capital of the arbitral system.

261. Allowing such default also runs the risk of opening the floodgates of 'Tribunal Hopping'. If a party senses the possibility of an unfavourable outcome, it can simply let the proceedings get terminated by his wilful conduct, and then re-initiate arbitration before another tribunal.

262. Thus, it is imperative that the termination of proceedings either under Section 25 or Section 38 of the Act, 1996 respectively, is construed to be an order for the termination of proceedings within the meaning of Section 32(2) of the Act, 1996.

263. An order terminating the proceedings on account of the claimant's failure to file the statement of claims or to deposit the requisite fees in terms of Section(s) 25 and 38, is in essence an order under Section 32(2) of the Act, 1996.

264. The decision of the Delhi High Court in ***PCL Suncon*** (supra) which held that Section 32 of the Act, 1996 is exhaustive and covers all

cases of termination of arbitral proceedings under the Act, 1996, lays down the correct proposition of the law.

265. Similarly, the decision of the Bombay High Court in ***Datar Switchgear*** (supra) insofar as it lays down that the power of the arbitral tribunal to terminate the proceedings under the scheme of the Act, 1996 lies only in Section 32(2) and that the use of the word "termination" in Section(s) 25, 30 and 38, merely denotes the consequence that would ensue in the circumstances envisaged therein, is also correct.

266. The power of the arbitral tribunal to terminate the proceedings is available only under Section 32(2) of the Act, 1996. The other provisions, namely, Section(s) 25, 30 and 38 of the Act, 1996, only denote the circumstances in which the tribunal would be empowered to take recourse of Section 32(2) and thereby, terminate the proceedings.

B. <u>Remedy under the Act, 1996 against an order terminating the arbitral proceedings</u>.

267. As discussed in the earlier parts of this judgment, this Court in ***Lalitkumar V. Sanghvi*** (supra) and ***SREI Infrastructure*** (supra) respectively, acknowledged that there was an apparent lacuna in the scheme of the Act, 1996.

268. It observed that where the mandate of the arbitrator terminates, either as a result of the arbitrator withdrawing from the office, or upon agreement of the parties, the Act, 1996 stipulates the recourse that would be available namely, to seek appointment of a substitute arbitrator in terms of Section 15 of the Act, 1996.

269. However, in the event the arbitral proceedings are terminated and, in consequence thereof, the mandate of the arbitral tribunal also terminates, the Act, 1996 is completely silent on the remedy that may be availed against the same. None of the provisions in the Act, 1996 address the course of action that would be available to a party against an order terminating the arbitral proceedings.

270. A seven-Judge Bench of this Court in ***SBP & Co. v. Patel Engg. Ltd.*** reported in **(2005) 8 SCC 618** expressly disapproved the approach of various High Courts entertaining challenges to the

procedural orders passed by the arbitral tribunal under their supervisory jurisdiction in terms of Article 227. This Court held that the Act, 1996 is a complete code, and that unless a party aggrieved by any order of the arbitral tribunal has statutory right of appeal against such order under the Act, 1996, the party would have no choice but to wait until the award is passed to raise its grievances whilst assailing the final award. The relevant observations read as under: -

> *"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227*

of the Constitution of India. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage."

271. Accordingly, this Court in ***SBP & Co.*** (supra) held that the supervisory jurisdiction of the High Courts cannot be invoked to interfere with the orders passed by an arbitral tribunal.

272. In ***Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.*** reported in **(2022) 1 SCC 75** a three-Judge Bench of this Court held that although the scheme of the Act, 1996 is a complete code in itself without there being scope for any judicial interference beyond what is permitted therein, yet, a legislative enactment by itself cannot curtail a constitutional right, particularly that under Article 227 of the Constitution. It held that in exceptional circumstances an order passed by the arbitral tribunal would be amenable to challenge under Article 227, if the party aggrieved

therefrom is either left remediless under the statute or a clear "bad faith" is shown by one of the parties. The relevant observations read as under: -

> *"13. The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.*
>
> *xxx xxx xxx*
>
> *18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a constitutional right. In Nivedita Sharma v. COAI, this Court referred to several judgments and held : (SCC p. 343, para 11)*
>
> > *"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation – L. Chandra Kumar v. Union of India[6]. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that*

> *the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."*
> *(emphasis supplied)*

> *It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear "bad faith" shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient."*
> (Emphasis supplied)

a. Contradictory Views on the subject.

273. In ***Lalitkumar V. Sanghvi*** (supra) the appellants therein, aggrieved by the order for termination of the arbitral proceedings, preferred a fresh application under Section 11 of the Act, 1996 for seeking appointment of a new arbitrator. The said application came to be rejected by the High Court. The High Court had observed that the appropriate remedy against the termination of arbitral proceedings lies by way of a petition under Article 226 read with 227 of the Constitution and not Section 11. In appeal, this Court made the following pertinent observations: -

(i) ***First,*** placing reliance on ***SBP & Co.*** (supra), it was reiterated that the supervisory jurisdiction of the High Courts cannot be invoked to interfere with the orders passed by an arbitral tribunal. It observed that under the scheme of the Act, 1996 specific provisions have been enacted enumerating the circumstances in which the order passed by the arbitral tribunal may be challenged by way of an appeal under Section 37. Except in these limited circumstances in which a right of appeal has been provided, a party aggrieved by an order of the arbitral tribunal cannot challenge the same by invoking the writ jurisdiction. The relevant observations read as under: -

> *"7. [...] That application came to be dismissed by the order under appeal in substance holding that such an application invoking Section 11 of the Act is not maintainable – with an observation that "the remedy of the applicant is by filing a writ petition not an application under Section 11 of the Act".*
>
> *8. Within a couple of weeks thereafter, the original applicant died on 7-10-2012. The question is whether the High Court is right in dismissing the application as not maintainable. By the judgment under appeal, the Bombay High Court opined that the remedy of the appellant lies in invoking the jurisdiction of the High Court under Article 226 of the Constitution. <u>In our view, such a view is not in accordance with the law declared by this Court in SBP & Co. v. Patel Engg.</u>*

Ltd. The relevant portion of the judgment reads as under: (SCC p. 663, para 45)

> *"45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution [of India]. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution [of India]. Such an intervention by the High Courts is not permissible.""*

(Emphasis supplied)

(ii) ***Secondly,*** that merely because there is no provision under the Act, 1996 for an appeal against an order terminating the arbitral proceedings, does not mean that a fresh application under Section 11 would be maintainable. It observed that where any controversy arises regarding the termination of the mandate of the arbitrator, Section 14(2) empowers the court to decide on the same. Since the termination of proceedings under Section 32 also brings the mandate of the arbitrator to an end, this Court held that a cumulative reading of Section 14 and Section 32 would indicate that the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court. The relevant observations read as under: -

> *"8. [...] That need not, however, necessarily mean that the application such as the one on hand is maintainable under Section 11 of the Act.*
>
> *xxx xxx xxx*
>
> *10.3. Section 14 declares that "the mandate of an arbitrator shall terminate" in the circumstances specified therein. [...] Section 14(2) provides that if there is any controversy regarding the termination of the mandate of the arbitrator on any of the grounds referred to in clause (a) then an application may be made to the Court – "to decide on the termination of the mandate".*

> *12. On the facts of the present case, the applicability of clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29-10-2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-section (2), clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the Arbitral Tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided under Section 14(2)"."*

274. In ***SREI Infrastructure*** (supra) this Court drew a distinction between the termination of arbitral proceedings under Section 25(a) and that under Section 32(2) of the Act, 1996. It held that in the former, since there is no termination of the mandate of the tribunal, a remedy by way of a recall application could lie. In other words, the arbitral tribunal could entertain a recall application against the termination of proceedings under Section 25(a), and if the circumstances warrant, it would be empowered to revive the said proceedings. However, where the proceedings are terminated under Section 32(2) of the Act, 1996, the mandate of the tribunal also ceases; hence there would be no scope for a recall application. The relevant observations read as under: -

"22. [...] Sub-section (3) of Section 32 further provides that the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings subject to Section 33 and sub-section (4) of Section 34. Section 33 is the power of the Arbitral Tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature or to give an interpretation of a specific point or part of the award. Section 34(4) reserves the power of the court to adjourn the proceedings in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. On the termination of proceedings under Sections 32(2) and 33(1), Section 33(3) further contemplates termination of the mandate of the Arbitral Tribunal, whereas the aforesaid words are missing in Section 25. When the legislature has used the phrase "the mandate of the Arbitral Tribunal shall terminate" in Section 32(3), non-use of such phrase in Section 25(a) has to be treated with a purpose and object. The purpose and object can only be that if the claimant shows sufficient cause, the proceedings can be recommenced.

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26. There cannot be a dispute that the power exercised by the Arbitral Tribunal is quasi-judicial. In view of the provisions of the 1996 Act, which confers various statutory powers and obligations on the Arbitral Tribunal, we do not find any such distinction between the statutory tribunal constituted under the statutory provisions or Constitution insofar as the power of procedural review is concerned. We have already noticed that Section 19 provides that the Arbitral Tribunal shall not be bound by the rules of procedure as contained in the Civil Procedure Code. Section 19 cannot be read to mean that the Arbitral Tribunal is incapacitated in drawing sustenance from any provisions of the Code of Civil Procedure.

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33. We endorse the views of the Patna High Court, the Delhi High Court and the Madras High Court as noted above,

insofar as they have held that the Arbitral Tribunal after termination of proceedings under Section 25(a) on sufficient cause being shown can recall the order and recommence the proceedings."

(Emphasis supplied)

275. In ***Bharat Heavy Electricals Limited v. Jyothi Turbopower Services Private Limited***, reported in **2016 SCC OnLine Mad 4029**, one of us; Mahadevan J., held that there is a fine distinction between the inherent power of review and the power of procedural review. In the former, the power is exercised in respect of a decision on merits. Whereas, in the latter, the power is exercised in respect of the conduct of its own procedure. Under the Act, 1996, an arbitral tribunal does not have the power to review its own decision on merits, however, it does have the implied power to procedural review, i.e., to recall an order for termination of proceedings. The relevant observations read as under: -

"18. The learned Arbitrator has also opined that an order under Section 25(a) of the said Act cannot be construed to be an award as there is no decision on merit and thus, it may not be possible to maintain an appeal under Section 34 of the said Act (reliance was placed on the decision of the Division Bench of the Delhi High Court in ATV Projects India v. IOC, (2013) 200 DLT 553). The learned Arbitrator thus opined that since a party cannot be without a remedy, what should be the remedy in such a situation needed to be examined. The Tribunal, while accepting that there cannot be

any power of review inherent in character, that proposition would apply to decision on merits. <u>However, with respect to procedural review, the implied power is available with the Tribunal to deal with petitions similar to the ones in the present case. The observations made by the Hon'ble Supreme Court in Grindlays Bank Ltd. v. The Central Govt. Industrial Tribunal, reported in (1981) 2 SCC 150 : AIR 1981 SC 806, in latter part of para 13 were specifically referred to</u>, which are once again extracted as under:

> *"13. ……Furthermore, different considerations arise on review. The expression 'review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a Court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in Patel Narshi Thakershi ase ((1971) 3 SCC 844 : AIR 1970 SC 1273) held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every Court or Tribunal."*

19. The Division Bench's opinion of the Delhi High Court in ATV Projects India Ltd. case (supra) was referred to to support the conclusion where paras 17 and 18 of the judgment read as under:

> *"17. We may in this regard also notice that the legislature, in Section 25, has not provided for termination of proceedings automatically on default by a party but has vested the discretion in the arbitral tribunal to, on sufficient cause being shown condone such default. We are of the view that no distinction ought to be drawn between showing such sufficient cause before the*

proceedings are terminated and after the proceedings are terminated. If the arbitral tribunal is empowered to condone default on sufficient cause being shown, it matters not when the same is shown. It may well high be possible that the sufficient cause itself is such which prevented the party concerned from showing it before the proceedings terminated. It would be a pedantic reading of the provision to hold that the arbitral tribunal in such cases also stands denuded. Once the legislature has vested the arbitral tribunal with such power, an order of termination cannot be allowed to come in the way of exercise thereof.

18. There is another reason for us to hold so. The emphasis of the Arbitration Act is to provide an alternative dispute resolution mechanism. The provisions of the Act ought to be interpreted in a manner that would make such adjudication effective and not in a manner that would make arbitration proceedings cumbersome. A view that the arbitral tribunal is precluded, even where sufficient cause exists, from reviving the arbitral proceedings and the only remedy available to a party is a writ petition and which remedy is available only in the High Court often situated at a distance from the place where the parties are located, would be a deterrent to arbitration. It is also worth mentioning that Section 19(2) of the Act permits the parties to agree on the procedure to be followed by the arbitral tribunal. The parties may, while so laying down the procedure, provide for the remedy of review/revival of arbitral proceedings and which agreement would be binding on the arbitral tribunal. If the arbitral tribunal in such a situation would be empowered to, on sufficient cause being shown, revive the arbitral proceedings, we see no reason to, in the absence of such an agreement hold the arbitral tribunal to be not empowered to do so. If it were to be held that such power of review/recall is not

available to an arbitral tribunal, the arbitral tribunal would not be competent to set aside an order under Section 25(b) also, compelling the respondent against who, proceedings have been continued, to file a writ petition, making the continuation of proceedings before the arbitral tribunal a useless exercise."

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21. Learned counsel for the petitioner, in support of his plea, referred to the judgment of the Hon'ble Supreme Court in Kapra Mazdoor Ekta Union v. Management of Birla Cotton Spinning and Weaving Mills Ltd., (2005) 13 SCC 777. In the context of an award under the Industrial Disputes Act, 1947, the scope of the two types of review, one procedural and other on merits was examined. The question whether a Tribunal was functus officio having earlier made an award which was published by the appropriate Government was examined and in that context, it was observed that the jurisdiction of the Tribunal had to be seen on the date of the application made to it and not the date on which it passed the impugned order. On application of principles discussed, it was held that where a Court or quasi-judicial authority having jurisdiction to adjudicate on merits proceeds to do so, the judgment or an order can be reviewed on merit only if the Court or the quasi-judicial authority is vested with the power of review by express provision or by necessary implication. However, the procedural review belongs to a different category. Illustratively, this situation is stated to arise where the Court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so, commits a procedural illegality, which goes to the root of the matter and invalidates the proceeding itself and consequently, the order passed therein. There may also be cases where there may be absence of notice to the opposite party or under a mistaken impression that the notice has been served or the matter is taken up on the date other than specified.

> *26. The views of both the Delhi and the Calcutta High Courts are consistent in this behalf that the appropriate course of action to follow in such a situation would be to move the Tribunal itself seeking recall of the order and the exercise of power of such recall would be within the meaning of procedural review. Whether, in the given facts of the case, such a power is to be exercised favourably or not in favour of the applicant would be a matter on the factual matrix of the case and that stage has not even arisen in the present case."*
>
> (Emphasis supplied)

276. The decision of ***Bharat Heavy Electricals*** (supra) further held that the Act, 1996 is a complete code in itself. It held that the courts have no power under Section 11 to entertain a second request for appointment of an Arbitrator unless the order terminating the proceedings is set aside. Similarly, the parties also cannot invoke the writ jurisdiction of the High Court to challenge the order for termination of the proceedings. The only recourse available to the parties is to file an application for the recall of the order terminating the proceedings. The relevant observations read as under: -

> *"16. On the aspect as to what would be the remedy available in case of the proceedings being terminated, learned counsel for the petitioner submitted that it could only be by way of another petition being filed under Section 11 of the said Act. We may note here the submission of the learned counsel for the first respondent/claimant that though this plea may*

prejudice his client, still what was sought to be contended by the learned counsel for the petitioner would not be correct as the arbitration clause provided for the mode of appointment of the Arbitrator. The first respondent would, thus, be required to once again invoke the arbitration clause giving a right to the petitioner to appoint the Arbitrator before the jurisdiction of the Court under Section 11 could be so invoked. However, the impugned order has referred to the judgment of the Bombay High Court in Dilnawaz Kohinoory v. Boman Kohinoor, reported in holding that the Court has no power under Section 11 of the said Act to deal with a second request for appointment of an Arbitrator unless the order closing the proceedings was set aside. Such a view has also been adopted by the learned Judge of the Calcutta High Court in NRP Projects Pvt Ltd. v. Hirat Mukhapadhyay, reported in 2013 (1) Cal LJ 621 in para 71 of the judgment. The latter judgment also is good for the proposition that an aggrieved party is not entitled to maintain a writ petition under Article 226 of the Constitution of India, a view also adopted by the Division Bench of the Delhi High Court in Awasthi Construction Co. v. Govt, of ACT of Delhi, reported in 2012 SCC online Del 443.

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27. We reject the plea of the learned counsel for the petitioner that on termination of proceedings under Section 25(a) of the said Act, the Arbitrator becomes functus officio, as he is a persona designata. Both the methods of appointment of Arbitrator are possible, i.e. by consent or through the process of Court. The position would not be different in the two situations. It is not as if there is a better sanctity to the appointment of an Arbitrator which enlarges the power if he is appointed by mutual consent, while there are abridged powers if he is not appointed by the Court.

28. Thus, we conclusively hold that the appropriate remedy in case of termination of proceedings under Section 25(a) would require the Arbitral Tribunal itself to be moved, which

would then examine the aspects on merits as to why the order does or does not require to be recalled.

29. We are also in agreement with the views of both the Calcutta and Delhi High Courts and in view of the aforesaid finding, that the remedy under Article 226 of the Constitution of India is not really available as the aforesaid is the appropriate remedy. The invocation of jurisdiction of this Court by the petitioner is, in turn, predicated on a belief that either of the parties aggrieved have to approach this Court under its extraordinary writ jurisdiction. However, we have already explained the remedy available and any further challenge to an order which may be passed in such application would, in turn, depend on the fate of it. The said Act is a complete code in itself and the basis is that there should not be periodic judicial intervention in arbitration proceedings. Were a favourable order to be passed commencing arbitration proceedings, the option would only be to challenge the award, if so advised, under Section 34 of the said Act. Similarly, if the application was to be dismissed, the position would really be no different."

(Emphasis supplied)

277. In ***M/s VAG Educational Services v. Aakash Educational Services Ltd.*** reported in **2022 SCC OnLine Del 3401**, the Delhi High Court held that a petition under Article 227 would be maintainable against an order terminating the proceedings under Section 32(2) of the Act, 1996.

278. In the said case, the respondent-claimant therein withdrew its claims before the arbitral tribunal, consequent to which, the proceedings came to be terminated by the arbitrator in terms of

Section 32(2)(a) of the Act, 1996. Sometime thereafter, the respondent-claimant, filed an application before the arbitrator seeking recall of the order for termination of the proceedings. The respondent-claimant stated that that his counsel had no instruction to withdraw the claims, and the same had occasioned due to an inadvertent miscommunication. Accordingly, the arbitrator allowed the aforesaid recall application and restored the proceedings. The relevant observations read as under: -

> *"3. The issue in controversy is brief. Arb. Case No. 110/18, which was continuing between the petitioner and the respondent before a learned sole arbitrator, was withdrawn by the respondent, as the claimant in the arbitral proceedings on 21-9-2019. [...]*
>
> *4. Subsequently, the respondent, as the claimant in the arbitral proceedings, moved an application seeking recall of the afore-extracted order dated 21-9-2019. It was sought to be contended, therein, that no consent, for withdrawal of the arbitral proceedings, had been granted either by the authorised representative or by the "proxy counsel" who was present on behalf of the respondent claimant.*
>
> *5. However, during the pendency of the said application, an affidavit was filed by the counsel representing the respondent claimant, adopting an entirely different stand. In the said affidavit, it was sought to be contended that the learned counsel had inadvertently signed the withdrawal order sheet of the arbitral proceedings, as her instructions, from her Senior Counsel were to withdraw another matter pending before the same learned sole arbitrator.*

6. As such, the affidavit effectively gave up the plea, in the application, that the order dated 21-9-2019, of the learned sole arbitrator, terminating the arbitral proceedings as withdrawn, was passed in error or without authorisation. Learned counsel for the respondent claimant accepted responsibility for having signed the withdrawal application, but pleaded that it was owning to an inadvertent mistake.

7. By the impugned order dated 18-1-2020, the learned arbitrator allowed the aforenoted application of the respondent claimant and restored the arbitral proceedings, observing that a party could not be permitted to be prejudiced owing to fault of counsel. However, the learned arbitrator took exception to the assertions in the application which, he felt, questioned his impartiality in the proceedings. He, therefore, recused from the proceedings and allowed parties to appoint an alternate arbitrator."

279. Aggrieved by the aforesaid, the appellant therein challenged the restoration of the arbitral proceedings before the High Court by way of a petition under Article 227 of the Constitution. The High Court held as under: -

(i) ***First,*** the High Court placing reliance on ***SBP & Co.*** (supra) and ***Bhaven Construction*** (supra), held that ordinarily procedural orders passed by the arbitral tribunal are not amenable to challenge under Article 227 of the Constitution, as the grounds for challenging the same can always be raised by an aggrieved party while assailing the final award

under Section 34 of the Act, 1996. The relevant observations read as under: -

> *"9. I had initial misgivings regarding the maintainability of the present petition, predicated on the judgments of the Supreme Court in SBP & Co. v. Patel Engg. Ltd. and Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.*[2] *However, having heard Ms Agarwal, learned counsel for the petitioner and on a careful perusal of the said decisions, the situation which obtained in those cases appears distinguishable from that which obtains in the present case. The position of law which emerges from the decisions in SBP & Co. case*[1] *and Bhaven Construction case which has also been adopted in earlier decisions rendered by me, is that interlocutory orders passed during arbitral proceedings cannot be challenged under Article 227 of the Constitution of India, as the grounds on which such orders are sought to be challenged would be available as grounds to challenge the final award which may come to be passed in the arbitral proceedings. In such circumstances, the decisions in SBP & Co. case*[1] *and Bhaven Construction case require the challenger to await the passing of final award in the arbitral proceedings and to reserve the grounds on which the interlocutory order is sought to be challenged for being urged in the challenge to the final arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 Act ("the 1996 Act"), should such occasion arise."*

(ii) ***Secondly,*** the High Court observed that the revival of proceedings by the arbitral tribunal after its termination in terms of Section 32(2) of the Act, 1996, however, was a distinct situation. Such an order for restoration of the

proceedings would be amenable to challenge under Article 227. This according to the High Court was in view of Section 32 sub-section (3), which stipulates that once the proceedings are terminated, the mandate of the arbitral tribunal would also terminate with it. The arbitrator in such a scenario becomes functus officio and ceases to have jurisdiction to entertain any further applications or pass any orders in the proceedings save for the limited power to pass orders in terms of Section 33 of the Act, 1996. The relevant observations read as under: -

> *"10. The situation that obtains in the present case is clearly distinct. The court, in the present case, is seized with the issue of whether an Arbitral Tribunal which has terminated the arbitral proceedings as withdrawn could, thereafter, entertain an application for recall of the said order and revive the arbitral proceedings.*
>
> *11. The legal position that emanates from the statute, in this regard, appears fairly clear. Section 32 of the 1996 Act deals with "termination of proceedings" [...]*
>
> *12. A case in which the claimant withdraws his claim and, on that basis, the arbitral proceedings are terminated, falls within Section 32(2)(a). Sub-section (3) of Section 32 ordains that, with the termination of the arbitral proceedings, the mandate of the arbitral proceedings would also terminate. This is made subject only to Sections 33 and 34(4) of the 1996 Act [...]*

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> *15. By operation of Section 32(3), the mandate of the learned sole arbitrator terminated on 21-9-2019. Once the mandate of an arbitrator terminates, the arbitrator is rendered functus officio. He has no jurisdiction, thereafter, to entertain any application or pass any orders in the proceedings. The limited orders which an arbitrator, whose mandate stands terminated, may pass, are restricted to orders under Section 33 of the 1996 Act, which, as already noted, does not apply in the present case.*
>
> (Emphasis supplied)

280. Accordingly, the High Court held that the arbitrator entertaining a recall application after the termination of proceedings under Section 32(2) of the Act, 1996 and subsequently, passing an order for the restoration of the same was without jurisdiction, and was thus set-aside and quashed. The relevant observations read as under: -

> *"16. The sequitur is obvious. The learned arbitrator, at the time of passing the impugned order, was coram non judice, as his mandate stood terminated on 21-9-2019.*
>
> *17. The impugned order, therefore, has been passed without jurisdiction and, accordingly, cannot be allowed to remain. Resultantly, the order dated 18-1-2020, passed by the learned sole arbitrator is quashed and set aside. The order dated 21-9-2019 shall revive."*

281. What has been conveyed in so many words by the Delhi High Court in ***VAG Educational Services*** (supra) is that any procedural order passed by the arbitrator, even if the same terminates the proceedings, will not be amenable to challenge under Article 227 of the Constitution. It is only in exceptional circumstances, where the arbitrator passes an order, after being rendered functus officio, would the remedy lie under Article 227.

282. To put it simply, the Delhi High Court in ***VAG Educational Services*** (supra) entertained the petition under Article 227, not because the Act, 1996 ostensibly provides no remedy against an order for termination or restoration of proceedings, but solely for the reason that the arbitral tribunal, after the termination of its mandate, had acted without any jurisdiction.

283. Thus, both the Madras High Court in ***Bharat Heavy Electricals*** (supra) and the Delhi High Court in ***VAG Educational Services*** (supra), have held that the Act, 1996 is a complete code. Any procedural order passed by the arbitral tribunal, terminating the proceedings will not be amenable to challenge under Article 227 of the Constitution.

284. However, the aforesaid two decisions take divergent views on the power of the arbitral tribunal to entertain a recall application, after the termination of the proceedings.

285. ***Bharat Heavy Electricals*** (supra) holds that the arbitral tribunal does have the limited procedural power to review its own orders insofar as the conduct of arbitral proceedings is concerned, albeit in the context of a termination under Section 25(a) of the Act, 1996.

286. Whereas, ***VAG Educational Services*** (supra) holds that such power to review is not available to an arbitral tribunal, atleast insofar as termination of proceedings under Section 32(2) is concerned. This is in view of Section 32 sub-section (3) of the Act, 1996, which stipulates that the termination of proceedings consequently terminates the mandate of the arbitrator as-well, as also held in ***SREI Infrastructure*** (supra).

287. However, in regards to the aforesaid proposition of law, the observations made in one another decision of the Delhi High Court in ***Future Coupons Pvt. Ltd. v. Amazon.Com NV Investment***

Holdings LLC reported in **2022 SCC OnLine Del 3890** are significant.

288. In ***Future Coupons*** (supra) the petitioners therein filed an application under Section 32(2)(c) of the Act, 1996, seeking termination of the proceedings *inter-alia* on the ground that by virtue of the subsequent developments, no dispute survived for adjudication. The said application came to be rejected by the arbitral tribunal. Aggrieved therefrom, the petitioners filed a petition under Article 227 before the High Court. The relevant observations read as under: -

> *"44. In the wake of the aforesaid order dated 17th December 2022 of the CCI, the petitioners applied, to the learned Arbitral Tribunal, under Section 32(2)(c) of the 1996 Act, seeking termination of the arbitral proceedings. Inasmuch as this Court is not entering into the merits of the impugned order dated 28th June 2022, whereby the said application was dismissed by the learned Arbitral Tribunal, it would not be appropriate for this Court to detail the rival contentions of the parties in that regard. Suffice it to state that the petitioners' contention was that, with the approval contained in the order dated 28th November 2019, granted by the CCI to the Combination having been placed in abeyance by the subsequent order dated 17th December 2021 of the CCI, the FCSHA and FCSSA and FRSHA could no longer be acted upon and that, therefore, that no dispute survived for adjudication in the arbitral proceedings. In that view of the matter, the petitioners contended that the arbitral proceedings were required to be terminated under Section 32(2)(c) of the 1996 Act.*

45. Further, contended FRL, were the learned NCLT to admit the application filed by Bank of India under Section 7 of the IBC, a moratorium would invariably be put in place in terms of Section 14(1) of the IBC. Any such moratorium, if put in place, would render further continuance of the arbitral proceedings illegal and impermissible. On this ground, too, therefore, FRL sought termination of the arbitral proceedings under Section 32(2)(c).

46. The learned Arbitral Tribunal has rejected the said application by the impugned order dated 28th June 2022.

47. Though, till then, no moratorium in terms of Section 14(1) of the IBC had been put in place by the learned NCLT, the learned Arbitral Tribunal, in para 161 of the impugned order dated 28th June 2022, rejected FRL's submissions, observing that, even if a moratorium under Section 14(1) of the IBC were to be imposed by the learned NCLT, such a moratorium would operate only against FRL and not against the Biyanis who could continue to participate in the proceedings. As such, the learned Arbitral Tribunal opined that the imposition of such a moratorium would not amount to an interdiction, on the learned Arbitral Tribunal, concluding hearings and passing an Award, and would in any case remain in force only till it was in place.

48. The learned Arbitral Tribunal further expressed the view that the effect of the order dated 17th December 2021 of the CCI on the FCSHA, FCSSA and FRSHA were matters which are required to be examined in detail, and could not constitute a justifiable basis to terminate the arbitral proceedings midway under Section 32(2)(c). The CCI order dated 17th December 2021, according to the learned Arbitral Tribunal, could not be said to have rendered the continuation of the arbitral proceedings "unnecessary" or "impossible", being the only two exigencies statutorily envisaged by Section 32(2)(c), in which the arbitral proceedings could be terminated.

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> *55. These two petitions, under Article 227 of the Constitution of India, as already noted, assail the aforesaid order dated 28th June 2022, passed by the learned Arbitral Tribunal on the petitioners' application under Section 32(2)(c) of the 1996 Act and the procedural order No. 10 dated 11th October 2022 passed by the learned Arbitral Tribunal on Amazon's application under Section 23(3) of the 1996 Act."*

289. The High Court held that the petitioners therein could not have invoked Article 227 to assail the procedural order passed by the arbitrator refusing to terminate the proceedings for the following reasons: -

(i) ***First,*** that as per the decisions of ***SBP & Co.*** (supra) interlocutory orders passed in the arbitral proceedings, except to the limited extent permitted under Section(s) 34 and 37 of the Act, 1996 are otherwise immune from challenge under Article 227. ***Bhaven Construction*** (supra) on the other hand carves out two exceptional circumstances where such an order would be amenable to challenge under Article 227. This being, where the order is assailed on the ground of want of good faith or where if not for the remedy

under Article 227, the aggrieved litigant would be left remediless. The relevant observations read as under: -

> *"77. The ratio decidendi that emerges from para 45 of SBP is clear and unequivocal. Challenges to orders/awards passed in arbitral proceedings have either to be under Section 37(2) or under Section 34(1) of the 1996 Act. [...]*
>
> *81. SBP, thus, keeps, completely outside the reach of Article 227 of the Constitution of India, interlocutory arbitral orders.*
>
> *82. Bhaven Constructions envisages, however, one more circumstance in which an interlocutory order of an Arbitral Tribunal could be challenged under Article 227 of the Constitution of India, which is where the order is assailed on the ground of want of good faith. Save and except for this limited caveat - which is unlikely to apply in a majority of cases - Bhaven Constructions reinforces the law enunciated in SBP, by holding that Article 227 of the Constitution of India would be available to a litigant aggrieved by an interlocutory arbitral order only where, but for Article 227, the aggrieved litigant is remediless. Dealing with a contention, advanced before it, that the 1996 Act, being an instrument of parliamentary legislation, could not curtail the constitutional remedy envisaged by Article 227 [...]*
>
> *83. Bhaven Constructions, therefore, in a sense clarifies SBP by restricting the amenability to challenge under Article 227 of the Constitution of India, or interlocutory arbitral orders, to cases where, either, want of good faith is pleaded, or the party is otherwise remediless."*
>
> (Emphasis supplied)

(ii) ***Secondly,*** that the expression "remediless" used in ***Bhaven Construction*** (supra) has to be construed in light of the scheme of the Act, 1996. Any order or award passed by the arbitral tribunal that can be challenged within the confines of Section(s) 34 and 37 of the Act, 1996 would not be amenable to challenge under Article 227, since a statutory remedy has been already provided under the Act. Even where no statutory remedy exists under the Act, 1996 against any order passed by the arbitral tribunal, the same cannot be assailed by invoking Article 227, if the ground for challenging such an order can be raised at the time of seeking the setting aside of the final award under Section 34. The relevant observations read as under: -

> *"77. The ratio decidendi that emerges from para 45 of SBP is clear and unequivocal. Challenges to orders/awards passed in arbitral proceedings have either to be under Section 37(2) or under Section 34(1) of the 1996 Act. Section 37(2) permits challenges against orders passed at the interlocutory stage in the arbitral proceedings either where a plea under Section 16(2) or (3) of the 1996 Act is allowed or where a prayer for grant of interim measure under Section 17(1) is allowed or refused. In the first case, the appeal would lie under Section 37(2)(a), whereas in the second, the appeal would lie under Section 37(2)(b).*

78. An interlocutory order of an Arbitral Tribunal would also be susceptible to challenge, under the 1996 Act, where it is an "interim award", as the definition of "arbitral award", in Section 2(c) of the 1996 Act, includes an "interim award". [...]

79. Interim awards of Arbitral Tribunals are, therefore, amenable to challenge under Section 34 of the 1996 Act, without waiting for the final award to be passed. Else, challenges to interlocutory orders have to be restricted to clauses (a) and (b) of Section 37(2); the former applying where the learned Arbitral Tribunal has allowed an application under Section 16(2) or (3) and the latter where it has refused to grant an interim measure of protection under Section 17.

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84. It is important to understand, in this context, what the Supreme Court intended to convey by the use of the word "remediless", as it is often sought to be contended - as has also been contended before me in the present case - that, as the 1996 Act does not contain any provision whereunder the impugned interlocutory order could be challenged, the party is, in fact, remediless. The mere fact that there is no statutory provision under which, at that stage, the aggrieved litigant could challenge the interim Award of the Arbitral Tribunal, is not sufficient to regard the litigant as remediless against the said order. SBP and Bhaven Construction, read conjointly, make it clear that, even if the challenge to the impugned order can be made one of the grounds of challenge to the final Award which may come to be passed, that suffices as a remedy for the aggrieved litigant. In such a case, the litigant has to wait till the final Award is passed and, only thereafter, can vent his grievances, both against the interlocutory as well as against the final Award."

(Emphasis supplied)

(iii) ***Lastly,*** it held that insofar as orders passed under Section 32(2) of the Act, 1996 are concerned, where such an order does not result in the termination of the arbitral proceedings, no remedy would lie under Article 227. Any party aggrieved therefrom would be required to wait for the final award to be passed and then raise those grounds under Section 34 of the Act, 1996, more particularly as to why the proceedings ought to have been terminated. However, where an order passed under Section 32(2) results in the termination of the proceedings, the same may be challenged under Article 227, as there is no other provision under the Act, 1996 to otherwise challenge such an order. The relevant observations read as under: -

> *"86. For the aforesaid reasons, and with all due respect to Mr Rohatgi, the contention does not appear, to me, to merit acceptance. What the argument overlooks is that the impugned order does not allow an application under Section 32(2). It dismisses it. The order does not, therefore, terminate the arbitral proceedings. Had it allowed the application of the petitioners under Section 32(2), then, perhaps, Amazon might have had a remedy under Article 227, on the ground that the arbitral proceedings had come to an end, and there was no provision in the 1996 Act, whereunder the order could otherwise be challenged. In such a case, Amazon would be "remediless". Where, however, as in the present case, the application of the petitioners, under*

Section 32(2)(c) of the 1996 Act has been dismissed, the arbitral proceedings continue. The remedy under Section 34, to challenge the final award in the arbitral proceedings, therefore, subsists. Among the grounds of challenge - if, assuming, the award was against the petitioners and they chose to challenge it - could be included the grounds on which the petitioners seek to assail the impugned orders as well. Thus, the petitioners are not "remediless". They have a remedy, but they have to bide their time.

87. Clipping of arbitral wings is against the basic ethos of the 1996 Act. Allowing free flight to arbitration is the very raison d'etre of the reforms that the UNCITRAL arbitral model sought to introduce. The 1996 Act, founded as it is on the UNCITRAL model, is pervaded by the same philosophy.

88. I have, in Easy Trip Planners, Siddhast Intellectual Property Innovations and VRS Natarajan, among others, consistently followed the decisions in SBP and Bhaven to hold that an interlocutory order in arbitral proceedings, which does not terminate the arbitration or bring it to an end, cannot be challenged under Article 227 of the Constitution of India.

89. In Indian Agro Marketing Coop. Ltd., on which learned Senior Counsel for the petitioners chose to rely, only reinforces the position. the arbitral proceedings were terminated by allowing of an application filed under Section 16 of the 1996 Act. An application, seeking recall of the said order, was also dismissed by the learned Arbitral Tribunal. In that case, as the arbitral proceedings did not survive any further, and the order under challenge brought the proceedings to an end, I had entertained a petition under Article 227 of the Constitution of India.

90. Mr Rohatgi also cited my decision in MS Vag Educational Services v. Aakash Educational Services

Ltd.. That, again, was an extreme case, clearly distinguishable on facts and in law. In the said case, after terminating the arbitral proceedings, the learned arbitrator, suo motu, recalled his order and revived the proceedings. It was in these circumstances that I held that, as the arbitral proceedings stood terminated by the arbitrator himself, and as he had no powers to recall such an order of termination, the case merited interference under Article 227 of the Constitution of India.

91. In the present case, the learned Arbitral Tribunal has not terminated the arbitral proceedings; rather, it has dismissed the petitioners' application for terminating the proceedings. Vag Educational Services, therefore, does not help the petitioners.

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94. The orders under challenge are, plainly, interlocutory orders. The order dated 28th June 2022, forming subject matter of challenge in CM (M) 1141/2022, rejects the petitioners' application under Section 32(2)(c) of the 1996 Act, seeking termination of the arbitral proceedings. In case the arbitral proceedings deserved to be terminated in law, it would always be open to the petitioners to so urge, if ever an occasion arose for them to invoke Section 34 against any final Award that the learned Arbitral Tribunal may come to pass."

(Emphasis supplied)

290. Thus, there appears to be a cleavage of opinion expressed as regards what would be the appropriate remedy available to a party aggrieved by the order of termination of proceedings passed by the arbitral tribunal.

291. Although there are a plethora of other decisions by the various High Courts expressing a divergence of opinion in this regard, including some decisions that treat an order for termination of proceedings to be an 'award' under the Act, 1996 and thus amenable to challenge under Section 34 thereof, yet we do not wish to dwell any further on this aspect, particularly in view of the fact that such an order for termination of proceedings can by no stretch of imagination be construed to be an award.

292. In this regard, we may only say, that the grounds on which an award can be challenged under Section 34 of the Act, 1996 are wholly incompatible with the conditions required to pass an order for termination of proceedings under the Act, 1996, thereby indicating that it cannot be termed as an 'award'. Section 32 sub-section (1) of the Act, 1996 also clearly delineates that the arbitral proceedings terminate either by way of an award **OR** an order for termination of proceedings, thereby indicating that the latter is not an 'award'. The various discussions of the Working Group on this aspect are also unequivocal.

293. ***Lalitkumar V. Sanghvi*** (supra) holds that Section 14(2) empowers the court to decide on any controversy regarding the termination of the mandate of the arbitrator, which would also include the termination of the proceedings. A similar view has also been taken in ***Dani Wooltex*** (supra), wherein this Court entertained an application under Section 14 against an order terminating the proceedings under Section 32(2) of the Act, 1996.

294. ***SREI Infrastructure*** (supra) hold that the arbitral tribunal can entertain a recall application against the termination of proceedings, albeit in the context of Section 25(a).

295. The Delhi High Court in ***Future Coupons*** (supra) held that an order passed under Section 32(2) that results in the termination of the proceedings could be challenged under Article 227 of the Constitution.

296. Since the Act, 1996 provides no remedy against an order for termination of proceedings, it would serve the ends of justice if a purposive interpretation of the provision of Section 14 is adopted.

297. We are of the considered opinion that Section 14 sub-section (2), particularly the expression "*the Court to decide on the termination of the mandate*" should be given an expansive meaning to include any challenge to an order for termination of proceedings simpliciter. We say so because, the termination of proceedings in essence results in the arbitrator being absolved of its duty to administer the arbitration.

298. As already discussed in the foregoing parts of this judgment, an order for termination of proceedings has the effect of bringing the mandate of the arbitral tribunal also to an end, which by extension also terminates the mandate of the arbitrator.

299. Thus, in our opinion, until this lacunae in the Act, 1996 is not resolved, the parties aggrieved by an order of termination of proceedings should be permitted to challenge the same before a court under Section 14(2) of the Act, 1996.

300. In this regard, we may once again refer to the discussions of the Working Group on the draft Article 24 which later became Article 25 of the UNCITRAL Model.

301. During the drafting stage, the Working Group discussed two variants of Article 25. Both versions of the draft provision, contained a provision which empowered a party approach the 'Authority' specified in the then draft Article 17 to pass a direction to the arbitral tribunal to continue with the proceedings.

302. The underlying reason behind the inclusion of the aforesaid clause was due to the earlier discussions of the Working Group in its Third Session, wherein it was suggested that an arbitral tribunal should proceed *ex-parte* only with the permission of the national court having jurisdiction over the arbitral tribunal. At the cost of repetition, the relevant observations are reproduced below: -

> *"71. [...] If, however, there were to be a provision on this issue, one view was that it could provide that a court would decide, in the circumstances of each case, whether ex parte proceedings by the arbitral tribunal were permissible. [...]*

303. The Working Group eventually decided to omit the aforesaid clause from both versions of the draft Article 24 as it was felt that this introduced an unnecessary degree of court supervision which did not align with the Model Law's principle of minimal judicial interference. Ultimately it resolved to tweak the draft Article 24 to

empower the arbitral tribunal directly to proceed *ex-parte,* in certain situations of default of by a party, without the need for any permission.

304. Although the aforesaid clause never made it into Article 25 of the UNCITRAL Model, yet it is instructive in understanding the remedy that was once contemplated for a party aggrieved in terms of the situations envisaged under the now Article 25 of the UNCITRAL Model and corresponding Section 25 of the Act, 1996.

305. The draft Article 17 referenced in the aforesaid clause defined the authority that would exercise supervisory jurisdiction over the arbitral tribunals. As per the said draft Article, the national courts which were empowered to grant interim relief, appoint an arbitrator and appoint substitute arbitrators in terms of Articles 9, 11, 14 and 15 of the UNCITRAL Model, respectively (corresponding Sections 9, 11, 14 and 15, respectively) were designated as the 'Authority'.

306. What can be discerned from the aforesaid is that, the potential for national courts to have supervisory powers over the arbitral

tribunal in matters relating to the continuation of proceedings *ex-parte* were once envisioned. Although the above suggestion was omitted and the arbitral tribunals were themselves empowered to proceed *ex-parte,* yet one cannot lose sight of the fact that, the Working Group whilst omitting the above provision, never discussed what would happen in a situation of wrongful termination of proceedings by the arbitral tribunal.

307. Had the Working Group deliberated upon the above issue as-well, one cannot help but reach a presumptuous conclusion, that the Working Group might have allowed a party aggrieved by an order passed by the arbitral tribunal, to approach the national courts, at least insofar as it terminates the proceedings.

308. This to our minds, fortifies the view, that a remedy against the termination of proceedings, should very well be available in the form of a challenge under Section 14 of the Act, 1996.

309. However, we must not lose sight of the overarching reason why the Working Group had abandoned the idea of an aggrieved party approaching the national courts against any order under Article

25. The Working Group felt that the autonomy and wisdom of the arbitral tribunal to decide the correct course of action in the event of any default of the party should not be undermined. It opined that the arbitral tribunal, being in *seisin* of the proceedings was best suited to assess the conduct of the parties and then take an appropriate decision in terms of the provision.

310. What emerges from the aforesaid is that where an arbitral tribunal passes an order for terminating the proceedings under the Act, 1996, the appropriate remedy available to the parties would be to first file an application for recall of such order before the arbitral tribunal itself.

311. It is no more *res-integra* that there is a clear distinction between a procedural review and a review on merits as held in ***Hindustan Construction Company*** (supra). When applied to the Act, 1996, the irresistible conclusion that can be reached is that the power of review is available to an arbitral tribunal to the limited extent of curing a patent or procedural error. Thus, an arbitral tribunal has the power to entertain an application for recall of an order terminating the proceedings passed by it.

312. Upon such application being preferred, the arbitral tribunal, as held in ***Bharat Heavy Electricals*** (supra), would then be required to examine whether the order does or does not deserve to be recalled.

313. If a favourable order is passed for recommencing arbitration proceedings, the only option available to a party aggrieved therefrom, would be to participate in the proceedings and thereafter challenge the final award under Section 34 of the Act, 1996.

314. If, however, the recall application were to be dismissed, as held in ***Lalitkumar V. Sanghvi*** (supra), the party aggrieved therefrom, would be empowered to approach the court under Section 14(2) of the Act, 1996.

315. The court would then in turn examine whether the mandate of the arbitrator stood legally terminated or not. If it finds that the proceedings were not terminated in accordance with the law, it would be empowered to either set-aside the order of termination of proceedings and remit the matter back to the arbitral tribunal,

or, if the circumstances so require, proceed to appoint a substitute arbitrator in terms of Section 15 of the Act, 1996.

316. However, we make it abundantly clear that under no circumstances, can a party file a fresh application under Section 11 of the Act, 1996 and initiate a second round of arbitration.

C. Whether the order for termination of proceedings passed by the Sole Arbitrator could be said to be contrary to the decision of this Court in *Afcons* (supra).

317. As discussed above, the Sole Arbitrator in the present case had terminated the arbitral proceedings since neither party was willing to pay the arbitral fees in respect of either the claim or the counter-claim.

318. The Sole Arbitrator had initially determined the arbitral fees payable on the basis of the Statement of Claim filed by the appellants herein in accordance with the Fourth Schedule of the Act, 1996. The said fees were to be borne equally by both the parties.

319. The appellants herein never objected to the aforesaid determination of the fees by the Sole Arbitrator. Thereafter, when the respondents herein filed their counter-claim, the Sole Arbitrator revised the fees payable in terms of the Fourth Schedule of the Act, 1996.

320. However, both the appellants and the respondent herein raised certain objects to the revised arbitral fees determined by the Sole Arbitrator. The appellants had contended that the counter-claim filed by the respondents was an exaggerated estimation of the amount claimed and that they were not in a financial position to bear the arbitral fees for the total amount in dispute. The respondent on the other hand, contended that he was liable to pay only 25% of the total fees of arbitration.

321. Several hearings were conducted by the Sole Arbitrator on the issue of the fees liable to be paid by the parties. The Sole Arbitrator held that as per Section 38 of the Act, 1996, both the contesting parties, namely, the claimant and the respondent, are liable to bear the fees of arbitration in equal proportion. He further observed

that the fees payable had been in accordance with the Fourth Schedule of the Act, 1996 and with the consent of both the parties.

322. However, since neither party was willing to pay the arbitral fees in respect of either the claim or the counter-claim, the Sole Arbitrator terminated the proceedings by its order dated 28.03.2022.

323. The appellants herein have contended that the order passed by the Sole Arbitrator terminating the arbitral proceedings is contrary to the decision of this Court in ***Afcons*** (supra). It was submitted that the Sole Arbitrator had proceeded to revise the total arbitral fees payable by the parties without their consent, and thus, could be said to be bad in law.

324. In ***Afcons*** (supra), this Court was *inter-alia* called upon to examine the constitutional validity of the Fourth Schedule of the Act, 1996, and the manner in which the arbitral fees was required to be determined in terms of the Act, 1996. This Court upholding the validity of the Fourth Schedule of the Act, 1996 held that the fee model proposed in the Fourth Schedule was not mandatory. It held that the arbitral tribunal cannot unilaterally decide their own

fees, and any such determination invariably requires the consent of both the parties.

325. It held that in order to avoid unnecessary conflicts and litigation between the parties and the arbitrators, the fees of the arbitrators must be fixed in the very beginning of the arbitral proceedings. If the parties or the arbitrator(s), as the case may be, are not able to reach a consensus as regards the fees payable, then the arbitrator in such a case must decline the assignment and withdraw as an arbitrator. It held that once the terms of reference have been finalised between the parties and the arbitrators, it would not be open for anyone to vary or revise the same.

326. However, it held the fees so determined by the parties and the arbitrators would be amenable to revision as the arbitral proceedings progress, but such revision must be with the consent of all the parties. It clarified that the arbitral tribunal in no circumstances can unilaterally revise the arbitral fees that was initially agreed upon.

327. The relevant observations read as under: -

*"**C.2.4 Directives governing fees of arbitrators in ad hoc arbitrations***

101. Preliminary meetings in arbitration proceedings entail a meeting convened by the arbitral tribunal with the parties to arrive at a common understanding about how the arbitration is to be conducted. It generally takes place at an early stage of the dispute resolution process, prior to the ―written phase of the proceedings‖. Rules of certain international arbitral institutions provide for convening a preliminary meeting or case-management conference. The fees and expenses are typically addressed at this stage. We propose that this stage of having a preliminary hearing should be adopted in the process of conducting ad hoc arbitrations in India as it will provide much needed clarity on how arbitrators are to be paid and reduce conflicts and litigation on this issue.

102 These preliminary hearings should also be conducted when the fees are specified in the arbitration agreement. The arbitration agreement may have been entered into at an earlier point in time, even several years earlier. It is possible that at the time when the disputes between the parties arise, the fees stipulated in the arbitration agreement may have become an unrealistic estimate of the remuneration that is to be offered for the services of the arbitrator due to the passage of time. In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raises an objection to the fee being demanded by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment. Since the relationship between the parties and arbitrator(s) is contractual in nature, specifically with respect to the payment of remuneration, there must be a consensus on the fees to be paid.

103 It is possible that during the preliminary hearings, the parties and the arbitral tribunal may be unsure about the extent of time that needs to be invested by the arbitrator(s)

and the complexity of the dispute. It is also possible that the arbitral proceedings may continue for much longer time than was expected. In order to anticipate such contingencies, during the preliminary hearings, the parties and the arbitrator(s) should stipulate that after a certain number of sittings, the fee would stand revised at a specified rate. The number of sittings after which the revision would take place and the quantum of revision must be clearly discussed and determined during the preliminary hearings through the process of negotiation between the parties and the arbitrator(s). There is no unilateral power reserved to the arbitrator(s) to revise the fees on their own terms if they believe that an additional number of sittings would be required to settle the dispute. The fees payable to the arbitral tribunal in an ad hoc arbitration must be settled between the arbitral tribunal and the parties at the threshold during the course of the preliminary hearings. Resolution of the fees payable to the arbitral tribunal by mutual agreement during the preliminary hearings is necessary. Failing such an agreement, the arbitrator(s) who decline to accept the fee suggested by the parties (or any of them) are at liberty to decline the assignment. The fixation of arbitral fees at the threshold will obviate the grievance that the arbitrator(s) are arm-twisting parties at an advanced stage of the dispute resolution process. In such a situation, a party who is not agreeable to a unilateral revision of fees demanded by the arbitral tribunal in the midst of the proceedings has a real apprehension that its refusal may result in embarrassing consequences bearing on the substance of the dispute.

104 We believe that the directives proposed by the amicus curiae, with suitable modifications, would be useful in structuring how these preliminary hearings are to be conducted. Exercising our powers conferred under Article 142 of the Constitution, we direct the adoption of the following guidelines for the conduct of ad hoc arbitrations in India:

> *1. Upon the constitution of the arbitral tribunal, the parties and the arbitral tribunal shall hold preliminary hearings with a maximum cap of four*

hearings amongst themselves to finalise the terms of reference (the Terms of Reference‖) of the arbitral tribunal. The arbitral tribunal must set out the components of its fee in the Terms of Reference which would serve as a tripartite agreement between the parties and the arbitral tribunal.

2. In cases where the arbitrator(s) are appointed by parties in the manner set out in the arbitration agreement, the fees payable to the arbitrators would be in accordance with the arbitration agreement. However, if the arbitral tribunal considers that the fee stipulated in the arbitration agreement is unacceptable, the fee proposed by the arbitral tribunal must be indicated with clarity in the course of the preliminary hearings in accordance with these directives. In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raises an objection to the fee proposed by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment.

3. Once the Terms of Reference have been finalised and issued, it would not be open for the arbitral tribunal to vary either the fee fixed or the heads under which the fee may be charged.

4. The parties and the arbitral tribunal may make a carve out in the Terms of Reference during the preliminary hearings that the fee fixed therein may be revised upon completion of a specific number of sittings. The quantum of revision and the stage at which such revision would take place must be clearly specified. The parties and the arbitral tribunal may hold another meeting at the stage specified for revision to ascertain the additional number of sittings that may be required for the

final adjudication of the dispute which number may then be incorporated in the Terms of Reference as an additional term.

5. In cases where the arbitrator(s) are appointed by the Court, the order of the Court should expressly stipulate the fee that arbitral tribunal would be entitled to charge. However, where the Court leaves this determination to the arbitral tribunal in its appointment order, the arbitral tribunal and the parties should agree upon the Terms of Reference as specified in the manner set out in draft practice direction (1) above.

6. There can be no unilateral deviation from the Terms of Reference. The Terms of Reference being a tripartite agreement between the parties and the arbitral tribunal, any amendments, revisions, additions or modifications may only be made to them with the consent of the parties.

7. All High Courts shall frame the rules governing arbitrators' fees for the purposes of Section 11(14) of the Arbitration and Conciliation Act, 1996.

8. The Fourth Schedule was lastly revised in the year 2016. The fee structure contained in the Fourth Schedule cannot be static and deserves to be revised periodically. We, therefore, direct the Union of India to suitably modify the fee structure contained in the Fourth Schedule and continue to do so at least once in a period of three years."

(Emphasis supplied)

328. The principal contention raised on behalf of the appellants herein is that the Sole Arbitrator in the present case had revised the fees

without the consent of the parties, and as such the same is contrary to ***Afcons*** (supra).

329. However, we are not impressed with the aforesaid submission canvassed by the appellants herein. The Sole Arbitrator in the present case at hand, did not unilaterally revise the arbitral fees from what was initially agreed upon by the parties. The Sole Arbitrator *vide* its order dated 23.04.2021 merely revised the quantum payable in view of the counter-claim that was filed by the respondents herein.

330. The fees matrix on the basis of which the quantum of the arbitral fees was revised remained the same i.e., the determination of the revised fees by the Sole Arbitrator was on the basis of the Fourth Schedule of the Act, 1996, which the parties had initially agreed upon.

331. The High Court whilst appointing the Sole Arbitrator in the present case to adjudicate the disputes between the parties had directed that the fees payable to the Sole Arbitrator shall be

determined either in accordance with the Fourth Schedule of the Act, 1996 or as may be mutually agreed upon by the parties.

332. Pursuant thereto, the Sole Arbitrator determined the arbitral fees on the first hearing on the basis of the fees matrix in the Fourth Schedule of the Act, 1996. Neither the appellants nor the respondents raised any objections to the same at that stage. The Sole Arbitrator keeping in mind the fee matrix determined the fees payable on the basis of the claim amount filed by the appellants herein.

333. Thereafter, when the respondents herein filed their counter-claim, the Sole Arbitrator merely revised the quantum keeping in mind the Fourth Schedule of the Act, 1996.

334. This Court in ***Afcons*** (supra) held that under the Act, 1996, more particularly, Section 38 thereof, an arbitral tribunal is empowered to fix a deposit of costs for claims and counterclaims separately. The scheme of the Act, 1996 considers claims and counter-claims to be independent proceedings since the latter is not contingent upon the former. Thus, it held that the determination of fees under the Fourth Schedule should also be calculated separately for a

claim and counter-claim. It expressly rejected the contention that the term "sum in dispute" used in the schedule refers to a cumulation of the claim and the counter-claim. The relevant observations read as under: -

> *"117 Consequently, on the basis of the above analysis, the following principles emerge:*
>
> > *(i) the Arbitration Act treats claims and counterclaims on a par, and holds them subject to the same procedural timelines and requirements —*
> >
> > *(ii) <u>The Arbitration Act allows the Arbitral Tribunal to fix a deposit of costs for claims and counterclaims separately, recognising that they are distinct proceedings</u>*
> > *(iii) The Arbitration Act considers claims and counterclaims to be independent proceedings since the latter is not contingent upon the former - Rather, the Act protects the right of any respondent to raise a counterclaim in an arbitration proceeding, provided it arises from the arbitration agreement under dispute Further, in the event of a default in the payment of a deposit either for the claim or counterclaim, it specifically notes that the proceedings will be terminated only in respect of the claim, or as the case may be, the counterclaim in respect of which the default has occurred*
> >
> > *(iv) Though a counterclaim may arise from similar facts as a claim, the counterclaim is not a set-off and is not in the nature of a defence to the claim.*
> >
> > *(v) A counterclaim will survive for independent adjudication even if the claim is dismissed or withdrawn and the respondent to a claim would be entitled to pursue their counterclaim regardless of the pursuit of or the decision on the claim.*

xxx xxx xxx

136. [...] On a combined reading of Section 31(8), Section 31-A and Section 38(1), it is clear that : (i) separate deposits are to be made for a claim and counterclaim in an arbitration proceeding; and (ii) these deposits are in relation to the costs of arbitration, which includes the fee of the arbitrators. Therefore, prima facie, the determination of the fee under Schedule IV should also be calculated separately for a claim and counterclaim i.e. the term "sum in dispute" refers to independent claim amounts for the claim and counterclaim. Such an interpretation is also supported by the definition of claim and counterclaim, and by the fact that the latter constitutes proceedings independent and distinct from the former.

137. If this interpretation were to be discarded in favour of construing "sum in dispute" as a cumulation of the claim amount for the claim and counterclaim, it would have far-reaching consequences in terms of procedural fairness. First, under the proviso to Section 38(1), the Arbitral Tribunal can direct separate deposits for a claim and counterclaim. These are based on the cost of arbitration defined by a conjoint reading of Sections 31(8) and 31-A, which includes the arbitrators' fee. Hence, if the arbitrators were to charge a common fee for both the claim and counterclaim, they would have to then equitably divide that fee while calculating individual deposits for the purpose of the proviso to Section 38(1). Second, the second proviso to Section 38(2) provides that if the deposit is not made by both the parties, the Arbitral Tribunal can dismiss the claim and/or counterclaim, as the case may be. If the claim was to be dismissed in such a manner, it would lead to an absurd situation where the arbitrators' fee would have to be revised in the middle of the arbitration proceedings solely on the basis of the amount of the counterclaim. Third, under Section 23(2-A), the only requirement of a counterclaim is that it should arise out of the same arbitration agreement as the claim. However, the cause of action of a counterclaim may be entirely different from the claim and possibly far more complex. Therefore, determining

> *the arbitrators' fee on a combined basis for both the claim and counterclaim would thus not match up to the separate effort they would have to put in for each individual dispute in the claim and counterclaim*.
>
> (Emphasis supplied)

335. Undoubtedly, when the counter-claims were filed by the respondents herein, the Sole Arbitrator, as per ***Afcons*** (supra) was once again required to seek the consent of the parties for determining the fees on the basis of the Fourth Schedule in respect of the said counter-claims.

336. It does not appear from the material on record that the Sole Arbitrator had obtained the consent of both the parties before revising the fees payable in lieu of the counter-claims filed.

337. However, we cannot lose sight of one another significant observation made by this Court in ***Afcons*** (supra). This Court held that when one or both parties, or the parties and the arbitral tribunal, as the case may be, are unable to reach a consensus on the fee matrix, it would be open to the arbitral tribunal to determine the same in accordance with the Fourth Schedule of the Act, 1996. The Fourth Schedule of the Act, 1996 is the model fee

schedule that is binding on all. Thus, where the arbitral tribunal fixes the fee in terms of the Fourth Schedule, the parties would not be permitted to object to the same. The relevant observations read as under: -

> "*105 Conscious and aware as we are that (i) Arbitration proceedings must be conducted expeditiously; (ii) Court interference should be minimal; and (iii) Some litigants would object to even a just and fair arbitration fee, we would like to effectuate the object and purpose behind enacting the model fee schedule. When one or both parties, or the parties and the arbitral tribunal are unable to reach a consensus, it is open to the arbitral tribunal to charge the fee as stipulated in the Fourth Schedule, which we would observe is the model fee schedule and can be treated as binding on all. Consequently, when an arbitral tribunal fixes the fee in terms of the Fourth Schedule, the parties should not be permitted to object the fee fixation. It is the default fee, which can be changed by mutual consensus and not otherwise*."

338. Since the Sole Arbitrator in the present case at hand had revised the arbitral fees in accordance with the Fourth Schedule of the Act, 1996, it was no longer open for the parties to object to the same.

339. Although we are of the opinion that the Sole Arbitrator before proceeding to revise the arbitral fees in accordance with the Fourth Schedule of the Act, 1996 ought to have first sought the consent of both the parties, yet we are not inclined to hold the order passed

by the Sole Arbitrator terminating the arbitral proceedings to be bad in law on this ground.

340. We say so because, the Sole Arbitrator before terminating the proceedings enquired from both the parties whether they would be willing to pay the share of the fees for either the claim or the counter-claim.

341. The appellants herein submitted that they were not in a position to pay the arbitral fees for both the claim and the counter-claim, and could pay only their share of the fees only in respect of the claim.

342. As per Section 38 of the Act, 1996, both the contesting parties, namely, the claimant and the respondent, are responsible to bear the fees of arbitration in equal proportion. However, where either party defaults, the responsibility to pay the fees falls on the other party. A claimant is responsible for his own claims, and thus responsible to pay his share of fees in respect of the same. Likewise, the respondent is responsible to pay the share of fees for his counter claims. This responsibility extends to bearing the other

party's share as well, if the latter declines to pay, at least insofar as their claim or counter-claim, as the case may be, is concerned.

343. Since the appellants herein refused to pay the requisite fees for their own claims, the arbitral tribunal was left with no other alternative but to terminate the proceedings.

VI. FEW MEANINGFUL SUGGESTIONS

344. Before we close this matter, we deem it appropriate to refer to handful of international arbitration frameworks and rules to look at the practices adopted by international organisations and better understand the shortcomings that exist in the UNCITRAL Model and by extension in the Act, 1996.

A. International Perspective on the Framework on Termination of Arbitral Proceedings.

i. Singapore International Arbitration Centre Rules, 2025 (SIAC Rules).

345. The Singapore International Arbitration Centre Rules, 2025 (for short, the "**SIAC Rules**") constitute the procedural framework

governing arbitrations administered by the Singapore International Arbitration Centre. These rules operate as the governing code where parties, by agreement, designate SIAC as the institution for the resolution of their dispute.

346. The SIAC Rules regulate the initiation, conduct and termination of proceedings, subject to the agreement of the parties and the mandatory provisions of the law governing the seat of arbitration. They are a self-contained procedural code for the limited purpose of administering arbitrations under the institution that supplement the substantive law applicable to the contract or the curial law governing the arbitration agreement.

347. The SIAC Rules, although not entirely based on the UNCITRAL Model Law, nevertheless draws conceptual guidance from the principles underlying the Model Law and the key Articles thereunder.

348. Rule 43 of the SIAC Rules which is in substance similarly worded to Article 32 of the UNCITRAL Model (Section 32 of the Act, 1996),

contains the power of the arbitral tribunal to suspend or terminate the proceedings. The said Rule reads as under: -

> *"**43. Suspension, Settlement, and Termination***
> *43.1 The Registrar or the Tribunal, as appropriate, may suspend an arbitration in accordance with such terms as the parties have agreed or as otherwise provided in these Rules. The Registrar or the Tribunal may, after considering the views of the parties, order the tolling of any timelines.*
>
> *43.2 In the event of a settlement, the Tribunal shall issue an order terminating the arbitration or, if the parties so request, the Tribunal may record the settlement in the form of a consent award on agreed terms. The Tribunal is not obliged to provide reasons for a consent award or to include the settlement terms in the consent award.*
>
> *43.3 The Tribunal shall, after considering the views of the parties, issue an order terminating the arbitration where:*
> *(a) the Claimant withdraws its claim, unless the Respondent objects thereto and the Tribunal recognises a legitimate interest on the Respondent's part in obtaining a final settlement of the dispute or any orders as to costs;*
> *(b) the parties agree on the termination of the arbitration;*
> *(c) the Tribunal finds that the continuation of the arbitration has become unnecessary or impossible; or*
> *(d) the Registrar has deemed the relevant claims, counterclaims, or cross-claims to be withdrawn for non-payment of deposits in accordance with Rule 56.5(b).*
>
> *43.4 Prior to the constitution of the Tribunal, the Registrar shall have the power to terminate an arbitration in accordance with these Rules.*
>
> *43.5 An order of the Tribunal or the Registrar terminating the arbitration under this Rule 43 shall be effective on the date of such order, unless otherwise ordered by the Tribunal or the Registrar."*

349. Remarkably, in the entire framework of the SIAC Rules, each provision where an arbitral tribunal has been permitted to terminate the proceedings, a specific reference is made to the aforesaid Rule 43. This is in order to obviate the possibility of any confusion, that the power to terminate the proceedings is not scattered across various provisions, rather contained solely in Rule 43 thereof.

350. For instance, we may refer to Rule 44 of the SIAC Rules, which is substantially similar to Section 25 of the Act, 1996 and Article 25 of the UNCITRAL Model.

351. Rule 44, more particularly sub-rule (1) which allows the arbitral tribunal to terminate the proceedings where the claimant fails to submit his Statement of Claim within the time specified, clearly stipulates that such termination would take place by the passing of an order to such effect in accordance with Rule 43. The said rule reads as under: -

> *"**44. Non-participation and Non-compliance***
> *44.1 If the Claimant fails to submit a Statement of Claim within the time specified by the Tribunal, the Tribunal may, after considering the views of the parties, <u>issue an order terminating the arbitration in accordance with Rule 43, unless there are remaining matters which require determination</u>.*

44.2 If the Respondent fails to submit a Statement of Defence within the time specified by the Tribunal, or if at any point any party fails to avail itself of the opportunity to present its case in the manner directed by the Tribunal, the Tribunal may proceed with the arbitration without treating such failure in itself as an admission of any allegations.

44.3 If, without showing sufficient cause, any party fails or refuses to comply with these Rules or with any direction, decision, ruling, order, or award of the Tribunal, or to attend any meeting or hearing, the Tribunal may proceed with the arbitration. In these circumstances, the Tribunal may impose such sanctions as it deems appropriate and make an award on the evidence before it."

(Emphasis supplied)

352. Similarly, Rule 56 of SIAC Rules, which is similarly in nature to Section 38 of the Act, 1996, empowers the Registrar of the SIAC to determine and direct the deposit of a certain sum towards the cost of the arbitration. Rule 56.5 provides that where a party fails to pay the deposits as required, the proceedings may be suspended or deemed to be withdrawn without prejudice. The said rule reads as under: -

*"**56. Deposits***
56.1 The Registrar shall fix the deposits payable towards the estimated costs of the arbitration calculated in accordance with the amount in dispute under the Schedule of Fees. Unless the Registrar otherwise directs, 50 percent of such deposits shall be payable by the Claimant(s) and 50 percent of such deposits shall be payable by the Respondent(s). The Registrar may fix separate deposits for a claim, counterclaim, or cross-claim.

56.2 Where the amount in dispute is not quantifiable at the time the deposits are due, the Registrar shall make a provisional estimate of the costs of the arbitration and call for the deposits thereon. This estimate may be adjusted upon the quantification of the amount in dispute or in light of such information as may subsequently become available.
56.3 The Registrar may at any time direct the parties to make further or additional deposits towards the estimated costs of the arbitration.
56.4 Parties are jointly and severally liable for the costs of the arbitration. In the event that a party does not pay the deposits as directed, the Registrar may direct the other party to make payment of the deposits on its behalf.

56.5 <u>If a party fails to pay the deposits as directed, the Registrar may:</u>
(a) <u>direct the Tribunal and the SIAC Secretariat to suspend the conduct and administration of the arbitration in whole or in part; and/or</u>
(b) <u>set a time limit on the expiry of which the relevant claim, counterclaim, or cross-claim shall be considered as withdrawn on a without prejudice basis</u>.

56.6 All deposits towards the estimated costs of the arbitration shall be made to and held by SIAC. Any interest which may accrue on such deposits shall be retained by SIAC.

56.7 If a party pays the deposits towards the estimated costs of arbitration on behalf of another party, the Tribunal may issue an order or award for the reimbursement of such deposits paid."

353. Rule 43 sub-rule (3) specifically stipulates that the arbitral tribunal shall, after considering the views of the parties, issue an order for terminating the proceedings where the claim or the counter-claim,

as the case may be is deemed to be withdrawn due to non-payment of deposits in accordance with Rule 56.5(b).

354. What emerges from the above is that Rule 43 of the SIAC Rules encompasses and consolidates all the various modes of termination that has been envisaged under the UNCITRAL Model and the Act, 1996 into one single provision. The said rule incorporates the following: -

(i) The power to terminate the proceedings on account of default by the claimant in communicating its Statement of Claims, as provided under Section 25(a) of the Act, 1996 (which corresponds to Article 25 of the UNCITRAL Model).

(ii) The power to terminate the proceedings in the event the parties arrive at a settlement, as stipulated under Section 30 of the Act, 1996 (which corresponds to Article 30 of the UNCITRAL Model).

(iii) The power to terminate the proceedings in the event of withdrawal of the claims, or pursuant to an agreement between the parties to such effect, or where the proceedings are rendered unnecessary or impossible, as envisaged by

Section 32 of the Act, 1996 (which corresponds to Article 32 of the UNCITRAL Model).

(iv) The power to terminate the proceedings in case the parties fail to pay the deposit required by the arbitral tribunal, as stipulated under Section 38 of the Act, 1996.

355. Unlike the Act, 1996, where the "power" to terminate the proceedings has been referred to in various provisions, the SIAC Rules, more particularly Rule 43, make it abundantly clear, that the power of the arbitral tribunal to either suspend or terminate the proceedings, lies only under the said Rule.

356. The various grounds on which the proceedings can be terminated under the Act, 1996, more particularly under Section(s) 25, 30, 32 and 38 thereof, have also been consolidated into one single umbrella provision being Rule 43.

357. This consolidation of the various situations in which arbitral proceedings may be terminated into a single simplified provision eliminates the ambiguity surrounding the nature and legal effect of such an order of termination.

358. It removes the anomaly that still persists under the Act, 1996, more particularly the divergence in view as regards the nature of termination of proceedings under Section 25(a) and Section 32 of the said Act.

359. Where on the one hand, the termination of proceedings in terms of Section 25(a) has been construed to also mean the consequent termination of the mandate of the arbitral tribunal in terms of Section 32(2), as held in ***Datar Switchgear*** (supra) and ***PCL Suncon*** (supra).

360. On the other hand, as per ***SREI Infrastructure*** (supra) and ***Sai Babu*** (supra), the termination of proceedings under Section(s) 25(a), 32 and 38, have been construed as independent and distinct provisions that empower the tribunal to terminate the proceedings, as a consequence of which, the mandate of the arbitral tribunal has been understood to terminate only where the termination takes place in terms of Section 32(2), but not in cases where the proceedings are terminated in terms of Section 25 or 38 of the Act, 1996.

ii. London Court of International Arbitration Rules, 2020 (LCIA Rules).

361. Similarly, the London Court of International Arbitration Rules, 2020 (for short the "**LCIA Rules**") contains the procedural framework governing arbitrations conducted at the Institution.

362. The LCIA Rules prescribe the manner in which arbitral proceedings are to be commenced, the constitution of the arbitral tribunal and the conduct of proceedings including the powers of the tribunal to terminate the proceedings.

363. Article 22 of the LCIA Rules enumerates the various powers of the arbitral tribunal. Similar to the SIAC Rules, the power of the arbitral tribunal to terminate the proceedings has been provided in only one provision, namely, Article 22 sub-paragraph (xi). The circumstances in which the proceedings can be terminated thereunder are materially similar in nature to those contemplated under Section 32(2) of the Act, 1996 (*pari-materia* to Article 32 of the UNCITRAL Model). The said provision reads as under: -

> ***"Article 22 Additional Powers***
> *22.1 The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub- paragraph (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their*

views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:

(i) to allow a party to supplement, modify or amend any claim, defence, counterclaim, cross-claim, defence to counterclaim, defence to cross-claim and reply, including a Request, Response and any other written statement, submitted by such party;

(ii) to abridge or extend (even where the period of time has expired) any period of time prescribed under the Arbitration Agreement, any other agreement of the parties or any order made by the Arbitral Tribunal;

(iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute;

(iv) to order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the Arbitral Tribunal, any other party, any expert to such party and any expert to the Tribunal;

(v) to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant;

(vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal;

(vii) to decide the stage of the arbitration at which any issue or issues shall be determined, in what order, and the procedure to be adopted at each stage in accordance with Article 14 above;

(viii) to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to

cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination");

(ix) to order compliance with any legal obligation or payment of compensation for breach of any legal obligation or specific performance of any agreement (including any arbitration agreement or any contract relating to land);

(x) to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented expressly to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration; and

(xi) <u>to order the discontinuance of the arbitration if it appears to the Arbitral Tribunal that the arbitration has been abandoned by the parties or all claims and any counterclaims or cross-claims have been withdrawn by the parties, after giving the parties a reasonable opportunity to state their views</u>.

22.2 By agreeing to arbitration under the Arbitration Agreement, the parties shall be treated as having agreed not to apply to any state court or other legal authority for any order available from the Arbitral Tribunal (if formed) under Article 22.1, except with the agreement in writing of all parties.

22.3 The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.

22.4 The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from "ex aequo et bono",

"amiable composition" or "honourable engagement" where the parties have so agreed in writing.

22.5 Subject to any order of the Arbitral Tribunal under Article 22.1(ii), the LCIA Court may also set, abridge or extend any period of time under the Arbitration Agreement or other agreement of the parties (even where the period of time has expired).

22.6 Without prejudice to Article 22.1(xi), the LCIA Court may determine, after giving the parties a reasonable opportunity to state their views, that the arbitration shall be discontinued if it appears to the LCIA Court that the arbitration has been abandoned by the parties or all claims and any counterclaims or cross-claims have been withdrawn by the parties."

(Emphasis supplied)

364. Article 22 sub-paragraph (xi) empowers the tribunal, after giving the parties a reasonable opportunity of being heard, to order the discontinuance of the arbitration proceedings if it appears that the arbitration has been abandoned by the parties or that all claims and counter-claims have been withdrawn.

365. Thus, the LCIA Rules also contains one single source of the power of the arbitral tribunal to terminate or discontinue the proceedings, in the form of Article 22.

366. Article 24 of the LCIA Rules is also significant. It is in substance similar to Section 38 of the Act, 1996, inasmuch as it empowers the

LCIA Court to direct the parties to make advance payments towards the cost of arbitration, as determined under the Rules. The said provision reads as under: -

> "***Article 24 Advance Payment for Costs***
> *24.1 The LCIA Court may direct the parties, in such proportions and at such times as it thinks appropriate, to make one or more payments to the LCIA (the "Advance Payment for Costs") in order to secure payment of the Arbitration Costs under Article 28.1. Such payments by the parties may be applied by the LCIA to pay any item of such Arbitration Costs (including the LCIA's own fees and expenses) in accordance with the LCIA Rules.*
>
> *24.2 The Advance Payment for Costs shall be the property of the LCIA, to be disbursed or otherwise applied by the LCIA in accordance with the LCIA Rules and invested having regard to the interests of the LCIA. The parties agree that the LCIA shall not act as trustee and its sole duty to the parties in respect of the Advance Payment for Costs shall be to act pursuant to these LCIA Rules.*
>
> *24.3 In the event that, at the conclusion of the arbitration, the Advance Payment for Costs exceeds the total amount of the Arbitration Costs under Article 28.1, the excess amount shall be transferred by the LCIA to the parties in such proportions as the parties may agree in writing or, failing such agreement, in the same proportions and to the same parties as the Advance Payment for Costs was paid to the LCIA, subject to any order of the Arbitral Tribunal.*
>
> *24.4 The LCIA will make reasonable attempts to contact the parties in order to arrange for the transfer of the excess amount, using the contact details provided to the LCIA during the proceedings. If a response is not received from a party so contacted within 30 days, the LCIA will provide that party with written notice of its intention to retain the excess amount. If no response is received within a further 60 days,*

the party will be deemed irrevocably to have waived any right to claim and/or receive the excess amount.

24.5 Save for exceptional circumstances, the Arbitral Tribunal should not proceed with the arbitration without having ascertained from the Registrar that the LCIA is or will be in requisite funds as regards outstanding and future Arbitration Costs.

24.6 In the event that a party fails or refuses to make any payment on account of the Arbitration Costs as directed by the LCIA Court, the LCIA Court may direct the other party or parties to effect a further Advance Payment for Costs in an equivalent amount to allow the arbitration to proceed (subject to any order or award on Arbitration Costs).

24.7 In such circumstances, the party effecting the further Advance Payment for Costs may request the Arbitral Tribunal to make an order or award in order to recover that amount as a debt immediately due and payable to that party by the defaulting party, together with any interest.

24.8 Failure by a claiming, counterclaiming or cross-claiming party to make promptly and in full any required payment may be treated by the LCIA Court or the Arbitral Tribunal as a withdrawal from the arbitration of the claim, counterclaim or cross-claim respectively, thereby removing such claim, counterclaim or cross-claim (as the case may be) from the scope of the Arbitral Tribunal's jurisdiction under the Arbitration Agreement, subject to any terms decided by the LCIA Court or the Arbitral Tribunal as to the reinstatement of the claim, counterclaim or cross-claim in the event of subsequent payment by the claiming, counterclaiming or cross-claiming party. Such a withdrawal shall not preclude the claiming, counterclaiming or cross-claiming party from defending as a respondent any claim, counterclaim or cross-claim made by another party."

(Emphasis supplied)

367. In the event the parties default in making the necessary payments towards the cost of arbitration, as directed, then as per Article 24.5 the arbitral tribunal is mandated to not proceed any further with the arbitration until the requisite payments are made.

368. Furthermore, as per Article 24.8, the failure of the parties to make the requisite payment towards the cost of arbitration may be treated as a withdrawal of its claims or counter-claims as the case may be.

369. Where any claim or counter-claim is deemed to be withdrawn on account of default in payment of costs, the LCIA Court or the arbitral tribunal may stipulate any terms including the prescribing of a specific period within which if the necessary payment is made, the claim or the counter-claim, as the case may be would stand reinstated.

370. Thus, where all the claims (including the counter-claims) are deemed to be withdrawn account of non-payment of costs in terms of Article 24.8, the LCIA Court or the arbitral tribunal, as the case

may be, would be empowered to resort to its powers under Article 22 and order the discontinuance of the proceedings.

371. Similarly, the LCIA Rules do not stipulate the consequences that would ensue if the claimant fails to file his statement of claims within the specified period. The LCIA Rules leaves it to the wisdom of the arbitral tribunal to decide whether such failure to file the statement of claims amounts to abandonment of its claim or not.

372. This is because of the wide scope of Article 22 sub-paragraph (ix) which confers the arbitral tribunal with extensive powers and flexibility for terminating the arbitral proceedings. A failure to file the statement of claims can always be treated as an abandonment of claim in terms of Article 22(ix), and the arbitral tribunal in such circumstances would be empowered to terminate the proceedings.

373. Article 22 takes into account the various scenarios in which the proceedings may be terminated as envisaged by the different provisions of the UNCITRAL Model, as a whole.

374. Thereby avoiding the conundrum that exists in the UNCITRAL Model and the Act, 1996, more particularly the multiplicity of provisions pertaining to the power to terminate the proceedings, and the consequent confusion in regards to the nature and scope of each of those provisions.

375. One another vital feature of the LCIA Rules, more particularly Article 24.8 is that it enables the arbitral tribunal and the LCIA Court, as the case may be, to outline the consequences of a claim or counter-claim being deemed withdrawn. It allows the tribunal or the court to stipulate such terms as it thinks fit, for the reinstatement of the claims or counter-claims later in the proceedings, unlike the UNCITRAL Model and the Act, 1996, which leaves the consequences of a termination in ambiguity and up to imagination.

iii. Hong Kong International Arbitration Centre Rules, 2024 (HKIAC Rules).

376. The 2024 Administered Arbitration Rules of the Hong Kong International Arbitration Centre Rules (for short, the "**HKIAC Rules**") stipulates the procedural framework governing arbitrations conducted at the Institution.

377. The HKIAC Rules are of vital significance inasmuch as most of its substantive procedural framework have been devised along the lines of the UNCITRAL Model.

378. Article 37 of the HKIAC Rules in particular, mirrors Article(s) 30 and 32 of the UNCITRAL Model (corresponding to Section(s) 30 and 32 of the Act, 1996, respectively). The said provision reads as under: -

> "***Article 37 – Settlement or Other Grounds for Termination***
> *37.1 If, before the arbitral tribunal is constituted, a party wishes to terminate the arbitration, it shall communicate this to all other parties and HKIAC. HKIAC shall set a time limit for all other parties to indicate whether they agree to terminate the arbitration. If no other party objects within the time limit, HKIAC may terminate the arbitration. If any party objects to the termination of the arbitration, the arbitration shall proceed in accordance with the Rules.*
> *37.2 If, after the arbitral tribunal is constituted and before the final award is made:*
>
> *(a) the parties settle the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitration or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.*
>
> *(b) continuing the arbitration becomes unnecessary or impossible for any reason not mentioned in Article 37.2(a), the arbitral tribunal shall issue an order for the termination of the arbitration. The arbitral tribunal shall issue such an order unless a party raises a justifiable*

objection, having been given a reasonable opportunity to comment upon the proposed course of action.

37.3 The arbitral tribunal shall communicate copies of the order to terminate the arbitration or of the arbitral award on agreed terms, signed by the arbitral tribunal, to HKIAC. Subject to any lien, HKIAC shall communicate the order for termination of the arbitration or the arbitral award on agreed terms to the parties. Where an arbitral award on agreed terms is made, the provisions of Articles 35.2, 35.3, 35.5 and 35.6 shall apply.

(Emphasis supplied)

379. Article 37 sub-clause (2) envisages two circumstances in which the arbitral tribunal may issue an order for termination of the proceedings. ***First,*** where the parties arrive at a settlement in respect of the dispute, which is akin to Article 30 of the UNCITRAL Model and Section 30 of the Act, 1996. ***Secondly,*** where the continuation of the proceedings becomes unnecessary or impossible for any other reason, which is akin to Article 32 of the UNCITRAL Model and Section 32(2)(c) of the Act, 1996.

380. Interestingly, unlike the SIAC Rules or the LCIAC Rules, where the power of the arbitral tribunal to terminate the proceedings has been enshrined in one single provision, the HKIAC has several other provisions apart from the aforesaid Article 37, that enables

the tribunal to terminate the proceedings, similar to the UNCITRAL Model and the Act, 1996.

381. Article 41 which is closely linked to Section 38 of the Act, 1996, empowers the arbitral tribunal to determine and direct the parties to pay an advance for the costs of the arbitration. The said provision reads as under: -

> "***Article 41 – Deposits for Costs***
> *41.1 As soon as practicable after receipt of the Notice of Arbitration by the Respondent, HKIAC shall, in principle, request the Claimant and the Respondent each to deposit with HKIAC an equal amount as an advance for the costs referred to in Article 34.1(a), (b), (c) and (f). HKIAC shall provide a copy of such request to the arbitral tribunal.*
> *41.2 Where the Respondent submits a counterclaim or cross-claim, or it otherwise appears appropriate in the circumstances, HKIAC may request separate deposits.*
> *41.3 During the course of the arbitration, HKIAC may request the parties to make supplementary deposits with HKIAC. HKIAC shall provide a copy of such request to the arbitral tribunal.*
>
> *41.4 <u>If the required deposits are not paid in full to HKIAC within 30 days after receipt of the request, HKIAC shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made</u>:*
> *(a) <u>where the arbitral tribunal is not yet constituted, HKIAC may suspend or cease to administer the arbitration</u>;*
> *(b) <u>the arbitral tribunal may order the suspension or termination of the arbitration or continue with the arbitration on such basis and in respect of such claim or counterclaim as the arbitral tribunal considers fit</u>.*

41.5 If a party pays the required deposits on behalf of another party, the arbitral tribunal may, at the request of the paying party, make an award for reimbursement of the payment.

41.6 When releasing the final award, HKIAC shall render an account to the parties of the deposits received by HKIAC. Any unexpended balance shall be returned to the parties in the shares in which it was paid by the parties to HKIAC, or as otherwise instructed by the arbitral tribunal.

41.7 HKIAC shall place the deposits made by the parties in an account at a reputable licensed deposit-taking institution. In selecting the account, HKIAC shall have due regard to the possible need to make the deposited funds available immediately."

(Emphasis supplied)

382. In the event the aforesaid costs are not paid by the parties, Article 41.4 empowers the HKIAC, where the tribunal is yet to be constituted, or the arbitral tribunal, if so constituted, to either suspend or terminate the proceedings, in terms of clause (a) and (b), respectively.

383. Thus, the HKIAC Rules treats the power to terminate the proceedings for non-deposit of fees to be separate and distinct from a termination of proceedings under Article 37.2, on account of the proceedings being rendered unnecessary or impossible.

384. The above approach is similar to how Section(s) 32 and 38 of the Act, 1996 have been understood by the Delhi High Court in

Sushila Kumari (supra) and by this Court in ***Lalitkumar V Sanghvi*** (supra).

385. Similarly, Article 26 of the HKIAC Rules is to a large extent in consonance with Section 25 of the Act, 1996 and corresponding Article 25 of the UNCITRAL Model. The said provision reads as under: -

> "***Article 26 – Default***
> *26.1 If, within the time limit set by the arbitral tribunal, the Claimant has failed to communicate its written statement without showing sufficient cause for such failure, the arbitral tribunal may terminate the arbitration unless another party has brought a claim and wishes the arbitration to continue, in which case the arbitral tribunal may proceed with the arbitration in respect of the other party's claim.*
>
> *26.2 If, within the time limit set by the arbitral tribunal, the Respondent has failed to communicate its written statement without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration notwithstanding such failure.*
>
> *26.3 If any of the parties, duly notified under these Rules, fails to present its case in accordance with these Rules including as directed by the arbitral tribunal without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration and make an award on the basis of the evidence before it."*
>
> (Emphasis supplied)

386. Article 26.1 empowers the arbitral tribunal, in addition to its powers under Article(s) 37 and 41.4 of the HKIAC Rules, to terminate the proceedings, in the event the claimant, without

sufficient cause, fails to communicate his Statement of Claims, within the time specified.

387. What can be discerned from the above is that the HKIAC Rules similar to the UNCITRAL Model and the Act, 1996, contains various provisions that empower the arbitral tribunal to terminate the proceedings, in the different circumstances envisaged therein.

388. However, despite the aforesaid approach, the HKIAC Rules avoid the pitfalls that are present in the UNCITRAL Model and by extension in the Act, 1996, insofar as termination of proceedings is concerned.

389. Unlike Section 32 of the Act, 1996 and Article 32 of the UNCITRAL Model that has led to a divergence in view, as regards the source of the power of the arbitral tribunal to terminate the proceedings by use of the expression "*The arbitral proceedings shall be terminated by the final arbitral award* <u>*or by an order*</u> *of the arbitral tribunal under sub-section (2)*", none of the provisions which pertain to termination of proceedings employ the vague expression that has been used in Article 32 of the UNCITRAL Model, to connote that

the proceedings can be terminated only by virtue of an order under a particular provision.

390. The HKIAC Rules embrace the possibility that the proceedings can be terminated by the arbitral tribunal in exercise of its powers under the various provisions contained therein.

391. It furthermore avoids the biggest blunder that exists in the UNCITRAL Model. The UNCITRAL Model for reasons not known to us, uses the expression "*subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings*" for the termination of proceedings under Section 32, but omits the same insofar as the proceedings are terminated under the other provisions.

392. No reason whatsoever is discernible for why the aforesaid expression has been used in some provision and omitted in the other. This oversight has single handedly resulted in a huge mess and the contradictory views that have been expressed by several decisions of this Court and the various High Court. It has led to an interpretative dichotomy, where the nature and effect of

termination of proceedings are construed to be different, depending upon the provision under which the proceedings happen to be terminated.

393. The HKIAC Rules avoids the above oversight. None of the various provisions contained in the rules that pertain to the termination of proceedings use the aforesaid expression. The Rules do not specify different consequences that would ensue upon the termination of the arbitral proceedings under the various provisions contained therein. Rather, the termination of proceedings is construed to have only one single effect, that being the end of arbitration, irrespective of the specific rule in lieu of which the termination happens to take place.

B. Suggestions for the Arbitration and Conciliation Bill, 2024.

394. Before we close this matter, we would like to say something as regards the litigation which has unfolded before us.

395. The Arbitration Act that came into force in 1940, was the first legislative enactment that dealt with arbitration. Fifty years later,

the aforesaid legislation was replaced by the Arbitration and Conciliation Act, 1996.

396. The Act, 1996 has remained in force for almost thirty-years since its enactment. Various amendments to the Act, 1996 have been made over the years so as to ensure that arbitration proceedings are conducted and concluded expeditiously.

397. It is indeed very sad to note that even after these many years, procedural issues such as the one involved in the case at hand, have continued to plague the arbitration regime of India.

398. The Department of Legal Affairs has now, once again proposed to replace the existing legislation on arbitration with the Arbitration and Conciliation Bill, 2024. Unfortunately, even the new Bill has taken no steps whatsoever to ameliorate the position of law as regards the termination of proceedings by the arbitral tribunal.

399. The problem which originated forty years ago when the UNCITRAL Model Law on International Commercial Arbitration was first adopted in 1985, and thereafter continued to persist within the Act, 1996 that was drafted in accordance with the

Model Law, is still present in the new he Arbitration and Conciliation Bill, 2024.

400. As observed in ***Gayatri Balasamy v. M/s ISG Novasoft Technologies Ltd.*** reported in ***2025 INSC 605*** "*any uncertainty in the law of arbitration would be an anathema to business and commerce*".

401. It is high time, that the uncertainty surrounding the power of the arbitral tribunal to terminate the proceedings under the various provisions of the Act, 1996 are either consolidated into a single provision like the SIAC Rules and the LCIA Rules, or the contradictory phraseology used in the various provisions are tweaked to make the provisions consistent.

402. The Arbitration and Conciliation Bill, 2024 should explicitly provide the nature and effect of the termination of proceedings insofar as the authority of the arbitral tribunal is concerned to entertain a recall application. A proper remedy against an order terminating the proceedings is the need of the hour.

403. The Arbitration and Conciliation Bill, 2024 should make an effort to recognise the power of the arbitral tribunal to review its own

orders and should clearly delineate the extent and contours of such power.

404. The Parliament in its wisdom, should also consider the option of providing a statutory appeal in Section 37 of the Arbitration and Conciliation Bill, 2024 against an order terminating the proceedings, similar to an order passed by the arbitral tribunal under Section 16 when it accedes to a plea of lack of jurisdiction.

405. It will also be worthwhile, if the Arbitration and Conciliation Bill, 2024 delineates the future course of action that may be available to an aggrieved party, in the event the order for termination of proceedings is upheld.

406. The Parliament should take a policy decision whether a belligerent or erring party, who wilfully allows the proceedings to terminate due to its own contumacious conduct should be allowed to have a second bite at the cherry and reinitiate arbitration once again and whether the same claims can be reinstated or reintroduced in another proceeding.

407. Gary Born in his book the International Commercial Arbitration (3rd Edition) explained "*the legal effect of an order terminating arbitral proceedings, and the permissibility of re-instituting arbitration in respect of the same dispute, are matters ultimately regulated by the applicable national laws, rather than by any transnational principle of arbitral procedure*".

408. Thus, the question of whether a party should be allowed to reinitiate arbitration after its termination has to be answered by the national laws of a particular country.

409. In this regard, the provisions of the Code of Civile Procedure, 1908 may be significant. Though such termination does not partake the character or res-judicata, it may still operate as constructive res-judicata, inasmuch as the majority provisions of the stipulates that a party aggrieved by the dismissal of its suit has to ordinarily move the same court for seeking its restoration, and that the filing of a fresh suit, save for a limited circumstances is otherwise barred.

410. In our opinion, a party who has allowed the proceedings to terminate by its own obdurate stance, should ordinarily be not allowed to once again re-initiate arbitration.

411. To allow the same would lead to a chilling effect, where a devious party, if it finds that the proceedings are not progressing favourably towards his claims, could mischievously let the same terminate by its own actions and then re-initiate arbitration. It would allow mischievous parties a license to forum shop without fear.

412. At the same time, arbitration is not infinite. Every arbitration initiated under the Act, 1996 comes at the expense of several precious hours of the judicial time and resources. The pendency of arbitration proceedings due to unavailability of arbitrators is already alarming. If we are to add more unnecessary proceedings on top of this already overburdened system, then that, in our opinion would be the death knell of arbitration.

413. The final call however in regards to aforesaid lacunae in the Act, 1996 has to be ultimately taken by the Parliament.

414. In view of the aforesaid, we urge the Department of Legal Affairs, Ministry of Law and Justice to take a serious look at the arbitration regime that is prevailing in India and bring about necessary

changes while the Arbitration and Conciliation Bill, 2024 is still being considered.

VII. CONCLUSION AND THE FINAL ORDER

A. Summary of our legal discussion.

415. A conspectus of our legal discussion is as under: -

(I) Section 32 of the Act, 1996 is exhaustive and covers all cases of termination of arbitral proceedings under the Act, 1996. The power of the arbitral tribunal to pass an order to terminate the proceedings under the scheme of the Act, 1996 lies only in Section 32(2).

(II) Sections 25, 30 and 38 of the Act, 1996 respectively, only denote the circumstances in which the tribunal would be empowered to take recourse to Section 32(2) and thereby, terminate the proceedings.

(III) The use of the expression "*the mandate of the Arbitral Tribunal shall terminate*" in Section 32 of the Act, 1996 and its omission in Section(s) 25, 30 and 38 of the said Act, cannot be construed to mean that the nature of termination under Section 32(2) is distinct from a termination under the other aforesaid provisions of the Act, 1996.

(IV) The expression "*mandate of the Arbitral Tribunal*" is merely descriptive of the function entrusted to the tribunal, namely, the authority and duty to adjudicate the disputes before it. It refers to the obligation of the arbitral tribunal to administer the arbitration by conducting the proceedings in order to adjudicate upon the disputes referred to it.

(V) Irrespective of whether the proceedings are terminated on account of the passing of a final award, or by the withdrawal of claims, or on account of default by the claimant, or the intervention of any impossibility in the continuation of the proceedings, the legal effect remains the same, inasmuch as the arbitral tribunal thereafter stands divested of its authority to act in the reference.

(VI) The common thread that runs across Sections 25, 30 32 and 38 of the Act, 1996 respectively is that although the arbitral proceedings may get terminated for varied reasons, yet the consequence of such termination remains the same i.e., the arbitral reference stands concluded and the authority of the tribunal stands extinguished.

(VII) There is a clear distinction between a procedural review and a review on merits. The arbitral tribunal possesses the inherent procedural power to recall an order terminating the proceedings as such power is merely to correct an error apparent on the face of the record or to address a material fact that was overlooked. It does not tantamount to revisiting the findings of law or reappreciating the substantive issues already decided.

(VIII) Where an arbitral tribunal passes an order for terminating the proceedings under the Act, 1996, the appropriate remedy available to the parties would be to first file an application for recall of such order before the arbitral tribunal itself. The arbitral tribunal would then in turn be required to examine whether the order does or does not deserve to be recalled.

(IX) If a favourable order is passed for recommencing arbitration proceedings, the only option available to a party aggrieved therefrom, would be to participate in the proceedings and thereafter, challenge the final award under Section 34 of the Act, 1996.

(X) If, however, the recall application is dismissed, the party aggrieved therefrom, would be empowered to approach the court under Section 14(2) of the Act, 1996. The court would then in turn examine whether the mandate of the arbitrator stood legally terminated or not. If it finds that the proceedings were not terminated in accordance with the law, it would be empowered to either set-aside the order of termination of proceedings and remand the matter to the arbitral tribunal, or, if the circumstances so require, proceed to appoint a substitute arbitrator in terms of Section 15 of the Act, 1996.

B. Final Order.

416. In the present case, the fees of the entire arbitration had been determined by the Sole Arbitrator in accordance with the Fourth Schedule of the Act, 1996, with the consent of the appellants and the respondent herein.

417. As discussed in the earlier parts of this judgment, the decision of this Court in ***Afcons*** (supra) held that the fees stipulated in the Fourth Schedule is the model fee schedule, and is binding on all parties. When an arbitral tribunal fixes the fees in terms of the Fourth Schedule, the parties are not permitted to object to the same. At the cost of repetition, we again reproduce the relevant observations: -

> *"105 Conscious and aware as we are that (i) Arbitration proceedings must be conducted expeditiously; (ii) Court interference should be minimal; and (iii) Some litigants would object to even a just and fair arbitration fee, we would like to effectuate the object and purpose behind enacting the model fee schedule. When one or both parties, or the parties and the arbitral tribunal are unable to reach a consensus, it is open to the arbitral tribunal to charge the fee as stipulated in the Fourth Schedule, which we would observe is the model fee schedule and can be treated as binding on all. Consequently, when an arbitral tribunal fixes the fee in terms of the Fourth Schedule, the parties should not be permitted to object the fee fixation. It is the default fee, which can be changed by mutual consensus and not otherwise."*

418. Once the fees had been determined by the Sole Arbitrator in accordance with the Fourth Schedule of the Act, 1996, and the appellants herein had given their consent to the same, it was no longer open for them to refuse to deposit the said amount.

419. If at all, the appellants were facing any financial difficulty, the correct approach should have been to request the arbitrator to suspend the proceedings in terms of Section 38 sub-section (2) of the Act, 1996 till the time they could arrange the requisite sum.

420. We also do not approve the stance of the appellants insofar as they submitted that they were not in a position to pay the arbitral fees for both the claim and the counter-claim, and could pay their share of the fees in respect of the claim alone. This is particularly in view of the fact that the respondent herein was willing to pay his share of the arbitral fees for both the claim and the counter claim.

421. As per Section 38 of the Act, 1996, both the contesting parties, namely, the claimant and the respondent, are responsible to bear the fees of arbitration in equal proportion. However, where either party defaults, the responsibility to pay the fees falls on the other party.

422. Arbitration being a consensual mode of alternative dispute resolution, is built upon procedural self-responsibility. Section 38 enshrines this principle, by stipulating that each party would be responsible for paying the fees of arbitration for their own claims.

423. A claimant is responsible for his own claims, and thus responsible to pay his share of fees in respect of the same. Likewise, the respondent is responsible to pay the share of fees for his counter-claims. This responsibility extends to bearing the other party's share as well, if the latter declines to pay, at least insofar as their claim or counter-claim, as the case may be, is concerned.

424. In the present case, since the appellants herein refused to pay the requisite fees for their own claims, the arbitral tribunal was left with no other alternative but to terminate the proceedings. Without the requisite deposits being made, there was no possible way for the arbitral tribunal to effectively conduct the hearings. We, therefore, find no infirmity in the order passed by the arbitral tribunal terminating the proceedings.

425. However, we take note of the fact that the present dispute arose all the way back in the year 2020. Five years have gone by. When the proceedings came to be terminated, the position of law as regards the manner in which the fees are to be determined, was in a state of flux and uncertainty.

426. The aforesaid is evident from the fact that after the arbitral proceedings came to be terminated for the non-deposit of fees, the appellants promptly preferred a writ petition before the High Court of Punjab and Haryana challenging the validity of the Fourth Schedule of the Act, 1996 and the determination of fees by the Sole Arbitrator in lieu thereof.

427. Even the position of law as regards the termination of proceedings under the Act, 1996 and the consequences that flow therefrom, largely remained uncertain.

428. Had the appellants known beforehand, the sanctity and binding nature of the Fourth Schedule of the Act, 1996 and the finality that is attached to an order terminating the arbitral proceedings, perhaps their stance would have been different before the arbitral tribunal.

429. Thus, in view of the peculiar facts and circumstances of this case, and in order to ensure that the parties are not deprived of any means of adjudication of their dispute, we are inclined to extend

one last opportunity to the appellants herein to resolve the same through one another round of arbitration.

430. It has been more than three-years, that the order for termination of the proceedings came to be passed by the Sole Arbitrator. In such circumstances, we are of the view, that this is a fit case for the appointment of a substitute arbitrator to look into both the claims and the counter-claims filed by the appellants and the respondent, respectively.

431. The substitute arbitrator would be at liberty to conduct the hearings *de novo*, with the consent of both the parties, and having regard to the lapse of a considerable amount of time, permit the parties to amend their claims or counter-claims, as the case may be, if so required.

432. In the result, this appeal is partly allowed. The matter is remanded to the High Court for the appointment of a substitute arbitrator.

433. The High Court shall undertake the exercise for appointing an arbitrator within a period of two weeks from the date of receipt of this order.

434. Pending application(s), if any, shall stand disposed of.

435. The Registry shall forward one copy each of this judgment to all the High Courts and one copy shall also be forwarded to the Department of Legal Affairs, Ministry of Law & Justice, Government of India.

..... J.
(J.B. Pardiwala)

..... J.
(R. Mahadevan)

New Delhi;
08th December, 2025.