IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMM ARBITRATION PETITION (L) NO.8122 OF 2023
WITH
INTERIM APPLICATION (L) NO.8124 OF 2023

ECGC Ltd. …Petitioner

Versus

Nifty Labs Pvt. Ltd. …Respondent

Mr. Sharan Jagtiani, Senior Advocate, Mr. Nirman Sharma, Ms. Apurva Manvani, Mr. Roopadaksha Basu, Ms. Heenal Wadhwa and Mr. Ahmed Padela, i/b. The Law Point for the Petitioner.

Mr. Aakash Rebello with Burzin Somandy, Mansi Gade and Swati Chaudhary i/b. Ms. Tejaswita Nalawade for the Respondent.

CORAM : R.I. CHAGLA J.

Reserved on : 20TH SEPTEMBER, 2024

Pronounced on : 19TH DECEMBER, 2024

J U D G M E N T:-

1. By this Commercial Arbitration Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (“the Arbitration Act”) the arbitral award dated 16th December, 2022 (“impugned Award”) has been challenged. By the impugned Award

the learned Arbitrator has allowed the claim of the Respondent and directed the Petitioner to pay an amount of INR 7,50,00,000/- along with interest @ 9% p.a. from 1st September, 2021.

2. By consent of parties the Commercial Arbitration Petition itself has been heard at the admission stage.

3. The Petitioner is a company registered under the Companies Act, 1956, wholly owned by the Government of India which provides export credit insurance to cover the exporters against the risk of non-payment from foreign buyers.

4. The Respondent had made certain shipments to the insured buyer '*The Chemical Source, Egypt*' which remained unpaid by the buyer. Accordingly, the Respondent had filed a claim under the Single buyer Exposure Policy ("SBE Policy"). It is pertinent to note that there was no arbitration clause in the SBE Policy for adjudication of disputes.

5. Further, it is pertinent to note that the Respondent had prior to availing of the SBE Policy, had availed of Shipment Comprehensive Risk Policy ("SCR Policy") under which it had applied

for a "Credit Limit Application for the first time on a buyer" for a credit limit of INR 6 Crore; whereas the amount approved by the Petitioner is amount INR 2.50 Crore. Since, the Respondent desired enhanced limits for coverage for a particular buyer, the Respondent was advised to separately obtain an SBE cover for that particular buyer. Consequently, the Respondent had applied for separate SBE Policy in respect of the said buyer viz. The Chemical Source, Egypt for the period of 13th October, 2016 to 30th September, 2017 as the export risk to be covered for that particular buyer viz. The Chemical Source, Egypt was much higher.

6. A claim was notified by the Respondent under the SBE Policy due to the default committed by the said buyer vide claim form dated 15th March, 2018 which was to the tune of INR 9,27,97,781/- only. Since, the Petitioner had approved credit limit under SBE Policy and increased the SBE Policy's exposure to INR 7.50 Crore, the Respondent filed a claim with the Petitioner on account of non payment of dues from the said buyer and sought reimbursement of INR 7.50 Crore under SBE Policy from the Petitioner.

7. The claim of the Respondent was rejected by the

Petitioner for a variety of reasons including but not limited to:-

(i) Non-Disclosure of material facts in the Poposal Form of the SBE policy.

(ii) Violation of terms and conditions of the SBE Policy.

(iii) Violation of terms and conditions of the SCR Policy.

8. The Respondent's contention is that in the refudation letter dated 3rd July, 2018, the Petitioner had not alleged that there was non disclosure under the SBE Policy.

9. The Respondent made representation against such rejection of claim and requested the Petitioner to reconsider the claim, which was finally decided by the Independent Review Committee ("IRC") of the Petitioner and vide its decision dated 3rd March, 2021, the IRC rejected the representation of the Respondent.

10. The Respondent vide its notice dated 7th July, 2021 challenged the rejection of claim and decision of the IRC and invoked arbitration. It is the Petitioners contention that the Respondent in its arbitration invocation notice did not specify the policy or the

arbitration clause which it sought to invoke. The Petitioner vide its response dated 28th July, 2021 whilst dealing with the allegations of the Respondent, also expressly pointed out that there is no arbitration clause under the SBE Policy and hence they are not aggreable to participate for arbitration.

11. The Respondent vide its response dated 31st August, 2021 for the first time contended that they are invoking arbitration under the SCR Policy and since the transaction is a 'composite transaction', the arbitration clause of the SCR Policy would be applicable for the present dispute.

12. The Petitioner vide letter dated 3rd September, 2021 agreed to participate in the proceedings but strictly without prejudice to the rights of the Petitioner to raise objections regarding the jurisdiction of the learned Arbitrator to adjudicate the dispute.

13. The Petitioner has in the Statement of Defence raised an objection regarding the jurisdiction of the learned Arbitrator under Section 16 of the Arbitration Act. This was by way of Section 16 application preferred by the Petitioner before the learned Arbitrator. The categorical stance taken therein was that the two policies viz.

SCR and SBE Policies are independent and stand alone policies and in view of absence of arbitration clause in the SBE policy, the arbitration was not maintainable.

14. The learned Arbitrator dismissed the Section 16 application vide Order dated 2nd February, 2022 which is impugned in the present Arbitration Petition.

15. Thereafter, the arbitration proceeded with the Petitioner leading evidence as the Respondent elected not to lead any evidence. The Arbitration Proceedings culminated in the impugned award dated 16th December, 2022.

16. The present Petition has been filed challenging the impugned award along with impugned Order dated 2nd December, 2022 passed under Section 16 of the Arbitration Act.

17. Mr. Sharan Jagtiani, the learned Senior Counsel appearing for the Petitioner has submitted that the Petitioners' challenge to the impugned award and impugned order is premised on the following broad points:-

(i) Challenge on jurisdiction viz. admittedly, the SBE Policy

under which the claim was filed contains no arbitration clause. Whilst deciding the Section 16 application, the learned Arbitrator held the SBE policy to be off shoot of the SCR Policy and acted upon the arbitration clause under the SCR Policy, even though there is no specific incorporation. In the final award, the learned Arbitrator has rendered diametrically opposite findings holding that the policies are stand alone and obligations of one policy cannot be incorporated into the other.

(ii) The second broad point of challenge is a challenge on merits viz. non-disclosure under SBE Policy was an admitted position. It is trite law that any information sought in a Proposal Form would be presumed as material information. The learned Arbitrator by allowing the claim of the Respondent herein overlooked such intentional non disclosure and which only amounts to rewriting of the contract (which expressly states that the information in the Proposal Form forms the basis of the contract), but also against the doctrine of *uberimmae fides* which is a fundamental principle of insurance jurisprudence in India.

18. Mr. Jagtiani has submitted that the challenge on merits is

also with regard to the findings of the learned Arbitrator that non disclosure has been waived by the Petitioner on the ground that it did not form a part of the initial repudiation letter dated 3rd July, 2018. He has submitted that such finding on waiver is rendered without any specific pleading on waiver or evidence led on the said point. He has submitted that the finding is contrary to the material on record as the Petitioner has constantly taken the stand of non disclosure of shipment including in its initial repudiation letter dated 3rd July, 2018 (albeit under the SCR Policy) and in all correspondences thereafter. The learned Arbitrator has overlooked the material on record namely the said correspondences which are material evidence.

19. Mr. Jagtiani has then dealt in detail with the findings in Section 16 Order of the learned Arbitrator. He has submitted that the findings in the impugned Order are contrary to Section 31(3) of the Arbitration Act as it has been passed without any reason or basis.

20. Mr. Jagtiani has submitted that the SBE Policy which forms the subject of claim in the arbitration proceedings admittedly did not contain an arbitration clause. He has submitted that the SBE Policy on the contrary contains a jurisdiction clause which states that

the Court at Mumbai or at the place of issue of policy will have jurisdiction over any matter arising out of, concerning or relating to the SBE policy. This is under Clause 20 of the SBE Policy which is titled "Law and Jurisdiction". He has submitted that this clause makes it clear that for issues relating to SBE Policy, the parties never intended to confer jurisdiction on any forum other than the Civil Court.

21. Mr. Jagtiani has submitted that even in the arbitration invocation notice dated 7th July, 2021, the Respondent contends that SCR and SBE Policies are stand alone policies and there cannot be co-relation between the two policies. He has submitted that the said Notice is silent on the relevant clause of the policy under which the arbitration is invoked. The invocation letter had been objected to by the Petitioner by pointing out that the SBE Policy does not contain any arbitration clause and hence, the Petitioner cannot participate in any Arbitration proceedings.

22. Mr. Jagtiani has submitted that it is only for the first time by subsequent letter dated 31st August, 2021, did the Respondent inform the Petitioner that the arbitration clause under the SCR Policy

is being invoked. The only justification to such invocation under the SCR Policy was that since it was the Petitioner's case that the SBE Policy was issued in conjunction with SCR Policy, they constitute a composite transaction and thus the arbitration clause under the base policy may be invoked for the disputes under all other agreements which are interlinked.

23. Mr. Jagtiani has submitted that it is the entire case of the Respondent for invoking arbitration under the SCR Policy is premised on the contention of the Petitioner that SBE policy was issued in conjunction with SCR Policy. However, diametrically opposite stance has been taken by the Respondent on merits of their claim viz. that the two policies are stand alone policies and the obligation clauses of the SCR Policy cannot be read into the SBE Policy.

24. Mr. Jagtiani has submitted that there is no incorporation of the arbitration clause of the SCR Policy into the SBE Policy, express and or by implication. This is also not the pleaded case of the Respondent in the arbitration proceedings. Even during the arguments, the Respondent categorically stated that they are not relying on Section 7(5) of the Arbitration Act i.e. agreement by

incorporation to justify jurisdiction of the learned Arbitrator.

25. Mr. Jagtiani has submitted that the SCR and SBE Policies do not constitute a composite transaction. He has submitted that in a plethora of cases, including ***Olympus Superstructure Pvt. Ltd. Vs. Meena Vijay Mehta Khetan***[1] at paragraphs 28 to 30 and ***JSW Steel Ltd. V/s. Bellary Oxygen Co. Pvt. Ltd.***[2] at paragraphs 60 to 63, it has been held that a composite transaction is where one contract cannot be performed without the aid of the other. He has submitted that merely because both the contracts are credit risk insurance contracts and are executed between the same parties, do not make them a composite transaction.

26. Mr. Jagtiani has submitted that to constitute a composite transaction the underlying transaction has to be composite in nature and not the dispute resolution clause. He has submitted that the dispute resolution clause merely sets out the procedure for enforcement of the rights under the contract and if the underlying transaction is stand-alone, the dispute resolution clause cannot be composite in nature, unless it is expressly stated so.

---

1 (1999) 5 SCC Pg.651.

2 2022 SCC OnLine Bom. 5166.

27. Mr. Jagtiani has submitted that the Respondent has at all times including when the Petitioner in its correspondences / repudiation letters took the ground of non-declaration of the SCR Policy as an issue, vehemently disputed this position. The Respondent has contended that the two policies are stand alone policies and the contentions of the Petitioner regarding synchronization are frivolous. This is borne out from the letters dated 7th July, 2021 and 31st August, 2021 addressed by the Respondent.

28. Mr. Jagtiani has submitted that it is the Respondent's contention that the clause of the SCR Policy cannot be incorporated under the SBE Policy, save and except the arbitration clause as there is an overlap of dispute resolution clause. He has submitted that it is unfathomable that two agreements are independent and stand-alone in their scope and operation and only for the purpose of invoking arbitration are a composite transaction. He has submitted that the Respondent cannot selectively pick and choose terms of the insurance policy as per its convenience.

29. Mr. Jagtiani has submitted that the Respondent's contention that the Petitioner had only advanced arguments for

treating the challenge of jurisdiction as a challenge in the nature of Order VII Rule 11 of the Code of Civil Procedure, 1908 is factually incorrect. He has submitted that the Petitioner in its Statement of Defence had set out a comprehensive challenge to the jurisdiction of the learned Arbitrator including the lack of arbitration agreement under the SBE Policy as well as the contradictory stance taken by the Respondent in its statement of claim. The aspect of Order VII Rule 11 of the CPC was one of the limbs of argument taken before the learned Arbitrator. The Petitioner had pointed out the inherent contradiction in the pleadings of the Respondent wherein the Respondent on the one hand contended that the SCR Policy and the SBE Policy are stand alone policies, whereas in complete contradiction the Respondent contended that the arbitration clauses of the two policies are synchronized. It was in view of the Respondent attempting to pitch its case of jurisdiction on the contention of the Petitioner that the two policies are synchronized, the Petitioner had submitted that the jurisdiction of the forum must be decided from the case set out in the Plaint. In support of this submission, the Petitioner placed reliance upon the decision of ***Nuziveedu Seeds Ltd. Vs. Mahyco Monsanto Biotech (India) Pvt. Ltd.***[3]

3 (2020) AIR Bom. Page 519.

at paragraph 281, wherein this Court has stated that the jurisdiction of any forum is dependent on the allegations made in the Plaint, (in this case the Statement of Claim) and does not depend on the defences raised in the Written Statement. He has submitted that though this judgment was relied upon, the learned Arbitrator did not even deal with the said judgment in the Order under Section 16.

30. Mr. Jagtiani has submitted that the pleaded case of the Respondent is that the two policies are stand-alone policies and in the light of the such pleading, the arbitration under the SCR Policy could not have been invoked unless the Respondent proves that the clause stands specifically incorporated (which has been given up during the arguments before this Court).

31. Mr. Jagtiani has submitted that in order to demonstrate that the two policies are composite in nature, this required leading of evidence on such point. However, there is a failure of Respondent to lead evidence in this regard and which is completely fatal to its case to establish that the arbitration agreement in one agreement stood extended / incorporated in the other agreement.

32. Mr. Jagtiani has submitted that the learned Arbitrator

has merely given conclusions that the transaction is composite and that "*SCR is the comprehensive policy, SBE is an offshoot on certain specific situations*".

33. Mr. Jagtiani has submitted that the learned Arbitrator has by holding that since the parties and the subject matter is the same, it involves a composite transaction. Reliance has been placed by the learned Arbitrator on ***Olympus Superstructure (Supra)*** and ***Chloro Controls India Pvt. Ltd. V/s. Severn Trent Water Purification Inc. & Ors.[4].*** He has submitted that these judgments are not at all applicable in the facts of the present case. Further, these judgments also do not state that merely because the parties are the same in two contracts, the arbitration agreement of one contract can be read into another contract.

34. Mr. Jagtiani has submitted that the learned Arbitrator ought to have decided the issues of interlinking at Section 16 stage. Without deciding such interlinking between two policies, the learned Arbitrator could not have assumed jurisdiction. He has submitted that the learned Arbitrator did not decide this fundamental question whilst assuming jurisdiction and held that the said issue will be

4 (2013) 1 Supreme Court Cases 641.

decided at the stage of final hearing. In fact, the learned Arbitrator has gone to the extent of recording that "*it was not called upon to decide whether there is in fact interlinking or not*", when that was a key question the learned Arbitrator was called upon to decide at the stage of Section 16. He has in this context placed reliance upon the relevant portion of paragraph 15 of the impugned Order. He has submitted that there is patent illegality committed by the learned Arbitrator as without deciding or rendering finding on the aspect of interlinking it could not have assumed jurisdiction.

35. Mr. Jagtiani has submitted that the learned Arbitrator in the impugned order under Section 16 held that the SCR is a comprehensive policy and SBE is an offshoot. However, while rendering the final award on merits, the learned Arbitrator held that there is no interlinking between the two policies and in the absence of specific provision expressly incorporating the SCR Policy obligations into the SBE Policy, the same cannot be applied for SCR Policy. He has submitted that it is an incomprehensible conclusion drawn by the learned Arbitrator that the general provisions of one policy will apply to another and not the obligations thereof. He has submitted that once the arguments of synchronization is rejected, it

has to be rejected in entirety and cannot be taken in piecemeal for the purpose of arbitration clause.

36. Mr. Jagtiani has accordingly submitted that impugned Order dated 2nd February, 2022 passed by the learned Arbitrator determining its jurisdiction apart from being unreasoned and non speaking is also perverse and contrary to fundamental principles of arbitration law.

37. Mr. Jagtiani has then addressed the Petitioner's challenge to the merits of the impugned Award.

38. Mr. Jagtiani has submitted that it is well settled that information sought in a Proposal Form are material in nature and it is a fundamental principle of *uberimmae fides* or utmost good faith associated with an insurance contract. Any non-disclosure in the Proposal Form renders an insurance policy voidable at the instance of the insurer (Petitioner).

39. Mr. Jagtiani has submitted that the Respondent while submitting the Proposal Form for the SBE Policy was under an obligation to disclose shipments made to the buyer in the preceding

one year. The Respondent under the relevant column in the Proposal Form dated 28th September, 2016 (Column 12) has submitted its prior experience with the buyer as "N.A." and "NIL". This is inspite of the fact that the Respondent had admittedly made four shipments to the buyer in the preceding 12 months out of which two shipments were overdue on the date of submission of the Proposal Form. This is extremely critical for an underwriter insurer.

40. Mr. Jagtiani has submitted that in view of the admitted and intentional non-disclosure on part of the Respondent, the Petitioner had rightly rejected the claim of the Respondent.

41. Mr. Jagtiani has submitted that the Respondent in its Statement of Claim tried to justify such non-disclosure on the basis that (i) only adverse experience had to be disclosed and that there is no adverse experience as the buyer had paid for the shipments albeit with delay; (ii) it was not incorrect but incomplete disclosure and onus was on the Petitioner to ask for clarification and (iii) in any event the non-disclosure is not material and does not affect the underwriting decision of the Petitioner.

42. Mr. Jagtiani has submitted that the learned Arbitrator

has also noted such non-disclosure. However, inspite of such non-disclosure, the learned Arbitrator allowed the claim on the basis that such non-disclosure is insignificant and waived by the Petitioner.

43. Mr. Jagtiani has submitted that the Respondent while submitting the Proposal Form expressly undertook that all information provided in the Proposal Form are true and that they have not misrepresented or omitted any material information which may have a bearing on the policy. The Respondent further acknowledged that the representations and facts in the Proposal Form shall form the basis of the policy and truth of such representations shall be condition precedent for the liability of the Petitioner and enforcement thereof under the policy. He has referred to the relevant paragraph of the Proposal Form namely Clause 4 in this context. Further, Clause 1 of the SBE policy makes it clear that the policy is issued on the basis of the information provided in the Proposal Form. Thus, any non-disclosure in the Proposal Form goes to the root of the contract and renders it voidable at the instance of the insurer, Petitioner herein.

44. Mr. Jagtiani has submitted that the learned Arbitrator by

declaring such non-disclosure as "not very significant" has infact re-written the terms of the contract which is not permissible as the learned Arbitrator being a creature of the contract had to adjudicate within the four corners of the contract. He has submitted that this is also in breach of basic principles of insurance laws and hence an implausible view taken by the arbitrator.

45. Mr. Jagtiani has relied upon the decision of the Supreme Court in ***Reliance Life Insurance Company Vs. Rekhaben Nareshbhai Rathod***[5] at paragraph 28 which holds that information sought in a Proposal Form is presumed to be material in nature. Further, he has placed reliance also on paragraph 29 of the said decision which holds that contracts of insurance are covered by principles of utmost good faith. Further, in paragraph 30 of the said decision, the Supreme Court has held that the contractual duty so imposed is such that any suppression, untruth or inaccuracy in the statement in the Proposal Form will be considered as a breach of the duty of good faith and will render the policy voidable by the insurer.

46. Mr. Jagtiani has also referred to the decision of the Supreme Court in ***Manmohan Nanda Vs. United India Insurance Co.***

5 (2019) 6 SCC 175.

Ltd.[6] at paragraphs 42, 43, 43.1 to 43.4 which has taken a similar view. In paragraph 43.4 it has been held that where the space for an answer is left blank, leaving the question un-answered, the reasonable inference may be that there is nothing to enter as an answer. If in fact there is something to enter as an answer, the insurers are mislead in that their reasonable inference is belied.

47. Mr. Jagtiani has submitted that the witness of the Petitioner had specifically clarified and deposed that if the buyer is defaulter, he cannot be covered. The Petitioner's witness had further clarified that failure on part of a buyer to pay within due date constitutes a default and that the Petitioner does not cover such buyer. The relevant portion of the evidence is in paragraph 22 of the Affidavit of Evidence.

48. Mr. Jagtiani has also referred to the cross examination of the Petitioner's witness wherein he has reiterated that the past experience of the buyer is material information. The relevant portion of the cross examination is Question and Answer 49 and 50.

49. Mr. Jagtiani has submitted that the Respondent

6 2022 4 SCC 582.

contended that it only had to declare prior adverse experience with the buyer and not all prior experience. He submits that this contention is totally flawed as the Proposal Form mandated disclosure of all prior experience and was not restricted only to adverse prior experience. The Respondent was well aware of the same as demonstrated in other Proposal Forms submitted by the Respondent where the Respondent had submitted details of all shipments made with that particular buyer in the past one year.

50. Mr. Jagtiani has submitted that the Respondent was well aware of its obligations and details to be filled in the Proposal Form under Clause 12 and can neither contend ignorance nor ambiguity of Clause 12. He has submitted that the Respondent has in correspondence admitted that they misconstrued the requirement of disclosure to be limited to only adverse experience. He has submitted that it is well settled that misconstruction or mistake in filling up a form is a state of mind which has to be factually proved. The Respondent by electing not to lead evidence has failed to prove that non-disclosure was an inadvertent error.

51. Mr. Jagtiani has submitted that the impugned Award

passed by the learned Arbitrator which overlooks such admitted and intentional non-disclosure is against the principal *uberimmae fides* or utmost good faith which is fundamental for insurance contracts.

52. Mr. Jagtiani has submitted that impugned award proceeds on the alleged waiver by the Petitioner to disregard the admitted non-disclosure in the Proposal Form solely on the ground that the same was not taken up by the Petitioner in the initial repudiation letter dated 3rd July, 2018.

53. Mr. Jagtiani has submitted that the Respondent has never pleaded waiver. Neither in the statement of claim nor in any correspondence (including arbitration invocation notice) had the Respondent asserted that the ground of non-disclosure of the Proposal Form cannot be taken as the same did not form a part of the initial repudiation letter dated 3rd July, 2018.

54. Mr. Jagtiani has submitted that the learned Arbitrator has by coming to the conclusion of the waiver overlooking crucial evidence wherein the Petitioner took the stance of non-disclosure committed a patent illegality.

55. Mr. Jagtiani has submitted that it is well settled that for establishing waiver, the same is not only to be pleaded but proved beyond doubt. He has placed reliance upon the decisions of ***V.M. Salgaonkar & Brothers V/s. Board of Trustees of the Port of Mormugao and Anr.***[7] at paragraphs 23 and 24 in this context. He has further relied upon the decisions of the Supreme Court in ***Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Ors.***[8]**,** paragraphs 5 and 6, ***Rajankumar & Brothers V/s. Oriental Insurance Co. Ltd.***[9] at paragraphs 39 – 41, ***Sikkim Subha Associate V/s. State of Sikkim***[10] at paragraph 16a and ***Kalparaj Dharamshi V/s. Kotak Investment Advisors Ltd.***[11] at paragraphs 117-121, whereas similar view has been taken.

56. Mr. Jagtiani has submitted that the legal test of demonstrating waiver has not been met in the present case. The decision relied upon by the learned Arbitrator in ***Manmohan Nanda (Supra)*** to support his findings relating to waiver stands on a different footing completely. In that case, the insurer was aware of the condition which was disclosed by the insured in the Proposal

7 (2005) 4 SCC 613.
8 (1979) 2 SCC 409.
9 (2020) 4 SCC 364.
10 (2001) 5 SCC 629.
11 (2021) 10 SCC 401.

Form. Inspite of knowledge, the insurer proceeded with issuance of contract. This, the Supreme Court held as a ground of waiver. In the present case, the Petitioner - insurer came to know of non-disclosure much after issuance of the policy. Hence, the principles of waiver enunciated in the case of ***Manmohan Nanda(Supra)*** cannot be imported.

57. Mr. Jagtiani has submitted that the Petitioner in the present case neither expressly nor by their conduct have conveyed that they have given up their intention to exercise their right to avoid the contract.

58. Mr. Jagtiani has submitted that the Petitioner has never affirmed the claim at any stage. On the contrary, it rejected the claim since the inception on the grounds of suppression of shipment details (albeit under SCR Policy). He has placed reliance upon paragraph 2 of the repudiation letter dated 3rd July, 2018 in this context. He has submitted that 85% of the shipments stated in the said paragraph 2 also included the four shipments which were not disclosed under the SBE Proposal Form. The inclusion of the same 85% of the shipments with reference to failure to disclose is fatal to the argument on

waiver. He has also placed reliance upon specific ground related to non-disclosure in the SBE Proposal Form was taken in subsequent correspondences viz. letters dated 17th September, 2018, 31st December, 2018, 24th December, 2019 and 3rd March, 2021 (decision of Independent Review Committee - IRC). The Respondent in response correspondence has also attempted to justify the non-disclosure on grounds that they misunderstood the terms of Clause 12 of the Proposal Form as "Past Adverse Experience" and "Past Experience". The Respondent has also whilst invoking arbitration by notice dated 7th July, 2021 challenged the decision of the IRC on merits. The learned Arbitrator in the impugned award holds that the decision of the IRC is relevant for the purpose of dispute.

59. Mr. Jagtiani has submitted that when the rejection of the IRC was inter alia on the ground of non-disclosure, the same can never be construed as waived. It was the Respondent who had requested the Petitioner to review / reconsider its decision and the Petitioner based on the request of the Respondent reconsidered the decision and took the ground of non-disclosure. Thus, no waiver can be construed against the Petitioner. The learned Arbitrator has completely disregarded this vital evidence while rendering the

Award.

60. Mr. Jagtiani has submitted that the decisions relied upon by the Respondent namely, ***Galada Power and Telecommunication Ltd. Vs. United India Insurance Co. Ltd.***[12] and ***JSK Industries Pvt. Ltd. Vs. Oriental Insurance Co. Ltd.***[13] to support the findings on waiver by the learned Arbitrator are distinguishable on facts. He has submitted that in the facts of those cases, the insurer tried to supplement their rejection with new grounds much after initiation of legal proceedings, mostly at the Appellate / Revisionary stage. This is clearly distinguishable from the present case where the ground of non-disclosure was taken by the Petitioner immediately after the first repudiation letter i.e. for the first time on 17th September, 2018 and thereafter has been consistently taken in all further correspondences including the final decision of the IRC on 3rd March, 2021. Hence, the judgments relied upon by the Respondent are not applicable to the facts of the present case.

61. Mr. Jagtiani has submitted that the impugned award is patently illegal and against the fundamental principles of Indian

12 (2016) 14 SCC 161.
13 (2022) SCC OnLine SC 1451.

jurisprudence. He has submitted that the impugned Award is unintelligible and passed without any reason. The impugned Award purports to render a finding on one of the most critical aspect of the matter as regards non-disclosure on the part of the Respondent and its effect stating that the non-disclosure is not "very significant". There is absolutely no reasoning in the impugned Award on this aspect. The effect of the impugned award is to re-write the well settled principle of utmost good faith as applicable to insurance contracts in as much as it creates a dangerous precedent for insurer who relies on Proposal Form and representation of insured as regards material information. He has submitted that there is no reasoning in the impugned award as regards the finding of waiver in as much as the findings of waiver could have only proceeded on the basis of a reasoning of clear knowledge of the insurer and affirmation of contract, subsequent thereto. The impugned Award without such any reasoning renders a finding of waiver against the Petitioner.

62. Mr. Jagtiani has submitted that it is a well settled principle of law that an Award without reasons is required to be set aside under Section 34 of the Act. He has placed reliance on the following decisions:

(i) ***Associate Builders Vs. Delhi Development Authority***[14] in paragraph 28, 29 and 42.

(ii) Mc Dermott Interntional Inc. Vs. Burn Standard Co. Ltd.[15] at paragraph 55, 56 and 57.

(iii) Union of India Vs. Recon, Mumbai[16] at paragraph 15 and 17.3.

(iv) Board of Control for Cricket in India Vs. Deccan Chronicle Holdings Ltd.[17] at paragraph 176, 184, 274 to 277, 292 to 294.

(v) Dyna Technologies Vs. Crompton Greaves[18] at paragraph 34, 35, 39, 40 and 42.

(vi) Assistant Commissioner Vs. M/s. Shukla and Brothers.[19] at paragraph 23 to 28.

63. Mr. Jagtiani has submitted that the impugned Award is contrary to the terms of the contract and has placed reliance upon

14 (2015) 3 SCC 49.
15 (2006) 11 SCC 181.
16 (2020) 6 MhLJ 509.
17 (2021) (4) Bom CR 481.
18 (2019) (20) SCC 1.
19 (2010) 4 SCC 785.

the decisions of the Supreme Court in ***Board of Control for Cricket in India Vs. Deccan Chronicle Holdings Ltd.***[20] at paragraphs 211 to 221 and ***Interocean Shipping (India) Pvt. Ltd. Vs. ONGC***[21] at paragraph26, 27 and 30 which have held that the learned Arbitrator cannot decide beyond the terms of the contract.

64. Mr. Jagtiani has submitted that SBE Policy has made it clear that the same was issued based on the information supplied in the Proposal Form. Allowing a claim under the SBE Policy, in teeth of admitted non-disclosure, the learned Arbitrator has acted in contradistinction to the form settled principles of law and thus the Award is vitiated due to such reason.

65. Mr. Jagtiani has submitted that the Award is passed on issues of waiver despite specific pleadings. Further, the Award is passed in absence of evidence / ignoring vital evidence on record.

66. Mr. Jagtiani has submitted that there are contrary irreconcilable / inherent contradistinction in the Section 16 order and the final Award which have been impugned.

---

20 2021 (4) Bom CR 481.

21 2022 SCC OnLine Bom 1699.

67. Mr. Jagtiani has accordingly submitted that the present case meets the parameters prescribed under Section 34 of the Arbitration Act and consequently the impugned Award is liable to be set aside. He has accordingly prayed for the Arbitration Petition under Section 34 to be allowed and impugned Order passed under Section 16 dated 2nd February, 2022 and the impugned Award dated 16th December, 2022 be quashed and set aside.

68. Mr. Aakash Rebello, the learned Counsel for the Respondent has submitted that the Petitioner by the present Petition is asking the Court to sit in Appeal from the Award of the Arbitral Tribunal that is based on an interpretation of the Clauses of the Contract including the Arbitration Clause. This is not permissible.

69. Mr. Rebello has submitted that the Arbitral Tribunal in the Section 16 Order has expressly stated that it was not deciding the question of interconnection. It only examined whether it could decide the question of interconnection. On interpreting the Arbitration Clause under the SCR Policy, it held that rejection of a claim made under the SBE policy, but rejected under the SCR policy was a dispute that "related to the SCR Policy". This is a possible

interpretation and cannot be interfered with by a Court in Section 34.

70. Mr. Rebello has submitted that the decision of the Tribunal is well reasoned on all material and relevant points. The Tribunal has correctly held that an insurance Company cannot go beyond the repudiation letter. This is a well settled position of law set out by the Supreme Court and the IRDA Regulations.

71. Mr Rebello has submitted that if a portion of the Form is marked as N/A (i.e. Not Applicable), it is the obligation of the insurance Company to make further inquiries. It would not be considered as a non-disclosure.

72. Mr. Rebello has further elaborated on the Petitioner's challenge to jurisdiction. He has submitted that fallacy in the argument of the Petitioner is to assume (and without showing any case law or other authority) that the test for whether the arbitration agreement under one contract can apply to another, and the test for whether an ordinary term has been incorporated from one contract to another is the same. In fact, these are separate inquiries. He has submitted that therefore, the inquiry before the Tribunal is first whether the question of interconnection is a dispute that falls under

an arbitration clause. Once jurisdiction is established, the well known test of incorporation would apply to the substantive clauses of the contract.

73. Mr. Rebello has submitted that the findings in Section 16 Order about the distinction are prescient in that they foreshadow the findings of the Supreme Court in the judgment of ***Cox and Kings Ltd. V/s. SAP India***[22] that question / tests of / for applicability of the arbitration clause and the substantive terms of a contract are different. He has in this context placed reliance upon paragraph 128 of the said decision. He has submitted that the Court then approves the separate test as set out in Discovery Enterprises when it can be said that an arbitration agreement will cover a relationship outside the four corners of that particular contract.

74. Mr. Rebello has submitted that the Respondent's (the original Claimant) pleadings draw a distinction between dispute resolution and substantive obligations under the policies. He has in this context placed reliance upon paragraph 4 (iv) of the Reply to the Section 16 Application.

22 (2023) SCC OnLine SC 1634.

75. Mr. Rebello has submitted that the Petitioners Statement of Defence infact contains various admissions that the SCR and SBE Policies were synchronized. He has further referred to paragraphs 6 and 45 of the Statement of Defence. He has further submitted that the Statement of Defence in paragraph 8 seeks to overcome these admissions by taking a without prejudice plea. This plea fails to take into account the difference between being subject to an arbitration clause and assuming obligation under a different contract.

76. Mr. Rebello has submitted that the Section 16 Order correctly notes the judgments in ***Chloro Controls (Supra)*** and ***Olympus (Supra)*** that the parties and subject matter are the same. The Tribunal applies the test of a rational businessman and arrives at the conclusion that disputes under the SBE Policy must be referred to arbitration.

77. Mr. Rebello has submitted that the Arbitral Tribunal in the award, at page 79 clearly set out the test that applies to the imposition of substantive obligations under one contract into another, is that of incorporation. The Tribunal has considered that there are no provisions expressly incorporating the SCR Policy

obligations into the SBE Policy. Further, the obligations of the SCR Policy do not apply to the SBE Policy as the SBE Policy has detailed terms and conditions independent of the SCR Policy. The Claimant did not accept the credit limit for this buyer offered by the Respondent under the SCR Policy and opted to have shipments to the buyer covered under the SBE Policy. There are different sets of disclosures required under each policy. The obligation to disclose shipments under Clause 8(a) of the SCR Policy are not applicable to exports covered under the SBE Policy. He has referred to the evidence of Mr. Venu Madhav in Question 35 where he states that declaration under SCR policy are waived off. He has submitted that mere provision of additional financial benefits cannot lead to the conclusion of SCR Policy terms being applicable to the shipments covered under the SBE Policy.

78. Mr. Rebello has submitted that the Arbitral Tribunal has applied the legal test of incorporation to the substantive terms of the SCR policy and the SBE policy and holds that the substantive disclosure obligations under one contract (SCR Policy) do not apply under the other contract (SBE Policy).

79. Mr. Rebello has submitted that the Tribunal has applied two different tests to the question of jurisdiction and substantive obligations in line with the judgment in ***Cox and Kings (Supra).***

80. Mr. Rebello has submitted that question of whether the Tribunal has jurisdiction depends on whether the Tribunal can decide the dispute between the parties. This has been held by the Supreme Court in ***Olympus Superstructures Pvt. Ltd. (Supra), Cox and Kings (Supra)*** and ***Chloro Controls India Pvt. Ltd. (Supra).*** He has further placed reliance upon the decision of the Supreme Court in ***Inder Singh Rekhi V/s. Delhi Development Authority[23].***

81. Mr. Rebello has submitted that the dispute in the present case is whether there can be a rejection of claim under the SBE Policy on grounds of non-compliance with the SCR Policy. This is undoubtedly a dispute relating to the SCR Policy. He has submitted that the claim has been asserted under the SBE policy and has been partly repudiated under the SCR Policy. The dispute is thus whether or not there is interlinking between the SCR and SBE Policies.

82. Mr. Rebello has submitted that the Arbitration Clause

23 (1988) 3 Supreme Court Cases 338.

under the SCR Policy is wide enough to cover such a dispute as can be seen from the Clause 33 which reads thus:-

> *"33. If any dispute or difference arises out of or in relation to this policy between the parties, such dispute / difference shall be referred to a sole arbitrator to be appointed by ECGC in writing Arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The venue of the arbitration shall be Mumbai.*

83. Mr. Rebello has submitted that the Arbitration Clause in the SCR Policy makes a crucial distinction between the disputes arising "out of" the SCR policy and "in relation to " the SCR Policy. He has submitted that the question before the Tribunal and this Court is whether a dispute about the extension of the disclosure requirements under the SCR Policy to the SBE Policy is a dispute "in relation to" the SCR Policy. He has submitted that it is inconceivable that it is not. A dispute is the assertion of one thing and the denial of it by another person.

84. Mr. Rebello has submitted that it is settled law that the term "in relation to" is of the widest amplitude. He has in this context placed reliance upon the decision of the Supreme Court in ***Gujarat Urja Vikas Nigam Ltd. V/s. Amit Gupta & Ors.***[24] at paragraphs 50, 51,

24 (2021) 7 SCC 209.

52 and 53. He has also placed reliance upon decision of the Supreme Court in ***Renusagar Power Co. Ltd. Vs. General Electric Company & Anr.***[25] *at paragraph 25.*

85. Mr. Rebello has submitted that the present Arbitration Clause draws a distinction between dispute arising out of the SCR Policy and in relation to the SCR Policy. On the interpretation of the Petitioner, the words "in relation to" would be rendered superfluous and redundant. He has in this context placed reliance upon the decision of the Supreme Court in ***State of MP V/s. UP Bridge Corporation***[26] at paragraph 23.

86. Mr. Rebello has referred to the decision of the Supreme Court in ***Olympus Superstructures (Supra)*** where he submits a similar situation arose. In that case there are two different agreements with two separate dispute resolution clauses. Though both were arbitration clauses, one provided for Sole Arbitrator while the other provided for a Tribunal of three. One of the main arguments of Counsel challenging the Awards was that the arbitration clause under agreement 1 did not permit the Tribunal to

25 (1984) 4 SCC 679.
26 2020 SCC OnLine SC 1001.

adjudicate disputes under the second Agreement – IDA. He has placed reliance upon paragraphs 25 to 30 of the said decision, wherein the Court holds that the dispute that arose under both agreements could be said to arise "in relation to" the 1st agreement. It does not matter that both were arbitration agreements.

87. Mr. Rebello has submitted that reliance placed upon the judgment of this Court in ***Nuziveedu Seeds Ltd. V/s. Mahyco Monsanto***[27] by the Petitioner in support of their contention that what must be looked at to decide jurisdiction is the "claim" and not the "dispute" is misplaced. Such contention is directly contrary to the judgments of the Supreme Court in ***Cox and Kings (Supra), Choloro Controles (Supra)*** and ***Inder Singh Rekhi (Supra).*** He has submitted that in ***Nuziveedu Seeds Ltd. (Supra)*** while analyzing what is the subject matter, the Court first assessed what is the "dispute" between the parties. He has referred to paragraph 231 of the said decision. He has submitted that the Court then specifically holds that the Tribunal has infact considered both the Statement of Claim and defence. In this context, he has placed reliance upon the paragraphs 275, 276 as well as paragraph 280. The judgment no where states that what must

27 2020 SCC OnLine Bom 816.

be looked at is only the claim, as in that case it held that the Tribunal had infact looked at all the pleadings. He has submitted that in ***Niziveedu Seeds Ltd. (Supra)***, the issue involved was not whether the dispute was covered by the arbitration clause or not. The question was whether the jurisdiction of the Tribunal was ousted by the Competition Act. In that context he has placed reliance on paragraphs 228 to 230 of the said decision. He has submitted that it was in the context of the defence raised by the Respondent that the issue that arose raised issues of competition law which would oust the jurisdiction of the Civil Court / Tribunal. Therefore, the dispute was not arbitrable. It was in this context the Court said that to determine whether or not relief could be granted, a Court must look at the Statement of Claim. This is borne out from the paragraph 310 of the said decision.

88. Mr. Rebello has submitted that the Court in ***Nuziveedu (Supra)*** arrived at a conclusion that merely because a defence was raised would not mean that the jurisdiction of the Civil Court was ousted. This was therefore, clearly a case of window-dressing where a plea had been taken to avoid arbitration. Thus, the said decision is not applicable to the present case.

89. Mr. Rebello has submitted that the Arbitral Tribunal has dealt with the Petitioners only argument i.e. that to ascertain jurisdiction the "Statement of Claim" has to be looked at and not the defence and has found on merits against the Petitioner. This finding was not assailed in arguments by the Petitioner.

90. Mr. Rebello has submitted that the Award on merits is well reasoned in all material and relevant points. He has submitted that the Arbitral Tribunal has considered the question of whether non-declaration of shipment under Clause 8(a) of the SCR Policy could be the ground to repudiate a claim under the SBE Policy. The Tribunal after analyzing the SBE and SCR Policies held that it could not be the case and has provided cogent reasons. The finding of the Tribunal is that the terms of the SCR Policy were not applicable to the SBE Policy. Consequently, a claim under the SBE Policy could not be repudiated for any alleged breach of the terms of the SCR Policy.

91. Mr. Rebello has submitted that whilst the Petitioner has issued the SCR Policy and SBE Policy on a synchronized basis, the onerous terms and obligations under the SCR policy cannot be foisted upon the Petitioner for a standalone claim made under the terms of

the SBE Policy. Consequently, any repudiation of the claim under the SBE Policy on account of allegations of violation of the terms of the SCR Policy is impermissible.

92. Mr. Rebello has submitted that the Arbitral Tribunal has correctly held that an insurance company cannot go beyond the repudiation letter. He has submitted that this is a settled position of law laid down by the Supreme Court and the IRDA Regulations. He has submitted that it is an admitted position that on the date of repudiation, the Petitioner was aware of the alleged non-disclosures by the Respondent. Subsequently, the Petitioner added to the grounds of this repudiation letter by alleging non-disclosures in the SBE Policy. The Arbitral Tribunal has held that an insurance company cannot go beyond the grounds set out in the repudiation letter and would be deemed to have waived all the grounds that have been taken beyond the said repudiation letter. In light of this view taken by the Tribunal, it has ruled that the issue of non-disclosure is not relevant.

93. Mr. Rebello has submitted that it is an admitted position that the breach of the SBE Policy was not a ground for repudiation of

a claim in the repudiation letter dated 3rd July, 2018. On the said date, it is an admitted position that the Petitioner was fully aware of all the alleged non-disclosures under the SBE Policy. He has submitted that it is settled law that insurance company cannot go beyond the repudiation letter. In this context he has placed reliance upon ***Galada Power and Telecommunication Ltd. (Supra)*** and ***JSK Industries Pvt. Ltd. (Supra)***. He has submitted that this can also be seen from the regulations from the IRDA wherein an insurer must either accept or repudiate the policy within 30 days from the documents received. There is no provision for a second repudiation.

94. Mr. Rebello has submitted that since repudiation letter did not take the ground of non-disclosure under the SBE Policy, the same could not raised by the Insurance Company at a later date, and is deemed to be waived. The arguments of the Petitioner entirely ignored this aspect, and the same has not been argued at all.

95. Mr. Rebello has submitted that repudiation of the claim does not amount to termination of the contract. Consequently the law on repudiation is that having repudiated, the insurer can only rely on the grounds of repudiation which are sacrosanct and cannot

add amend or alter to the grounds.

96. Mr. Rebello has submitted that the Petitioner did not at deal with the IRDA Regulations at all, presumably because there was no answer to the same.

97. Mr. Rebello has submitted that if a portion of the Form is marked as n/a (i.e. not applicable), it is the obligation of the insurance company to make further inquiries. It would not be considered as a non-disclosure. He has in this context placed reliance upon the Answer of the Petitioner's witness to Question 30 which establishes that the Petitioner did not put any effort to seek clarifications from the Respondent. The failure of the Petitioner to seek clarification cannot now justify the wrongful repudiation of the claim of the Respondent by the Petitioner on this ground.

98. Mr. Rebello has submitted that the Respondent has time and again mentioned N/A in the experience with the buyer. He has in this context referred to the Respondent having applied for credit limit application under the SCR Policy for the same buyer, again following the same ritual of mentioned N/A in the application form, which had been considered favourably by the Petitioner and a limit of Rs.2.5

Crore was provided for the said buyer. Thus, establishing the conduct of the Petitioner and materializing the proposition that the response to the question (past experience with the buyer) is not material in the underwriting decision of the Petitioner. He has placed reliance upon ***Canara Bank V/s. United India Insurance Co.***[28] and ***Manmohan Nanda (Supra),*** in support of the proposition that the case of a response being blank or unacceptable by the insurer, the insurer must seek clarification from the insured for the said responses.

99. Mr. Rebello has submitted that the impugned Award analyzes all the issues in great detail and arrives at findings with respect to the same. The same is at the very least a possible view and ought not to be interfered with by a Court sitting in a challenge under Section 34 of the Arbitration Act. He has in this context placed reliance upon ***Kokan Railway V/s. Chenab Bridge Project***[29] at paragraph 19 to 29.

100. Mr. Rebello has submitted that Arbitration Petition be dismissed with costs.

101. Having considered the submissions, the challenge to the

28 MANU/SC/0131/2020 : 2020 3 SCC 455.
29 (2023) 9 SCC 86.

impugned Order under Section 16 shall first be considered. The Arbitral Tribunal has in the impugned Order concluded that the "*SCR is the comprehensive policy, SBE is an offshoot on certain specific situations*". In so holding, the Arbitral Tribunal has assumed jurisdiction and then decided to proceed with merits of the dispute.

102. I am of the view that the impugned Order under Section 16 is devoid of reasons for arriving at the aforementioned conclusion. The SBE policy admittedly does not contain an Arbitration Clause. In fact in Clause 20 of the SBE policy, the parties have agreed that "*the construction, validity and performance of this Policy*" as well as "*any matter arising out of concerning or relating to this policy*" would not be referred to any other Courts which includes Tribunals and other judicial forums constituted under any special statute other than the Court at Mumbai or at the Place of issue specified in the Schedule. Thus, the parties did not contemplate an arbitration agreement when it entered into it the "Law and Jurisdiction" Clause in the SBE Policy.

103. Further, in the arbitration invocation notice dated 7th July, 2021, the Respondent although invoking arbitration is silent on the relevant clause of the policy under which the arbitration is

invoked. Infact the Respondent contends that the SCR and SBE Policies are stand alone policies and that there cannot be co-relation between the two policies. It is only after the Petitioners had objected to the invocation by categorically pointing out that the SBE policy did not contain any arbitration clause and that the Petitioner would not participate in arbitral proceedings, did the Respondent by a second letter dated 31st August, 2021 inform the Petitioner that the Arbitration Clause under SCR Policy is being invoked. The contention of the Respondent is that this was in view of the Petitioner's case that the SBE Policy was issued in conjunction with the SCR Policy and constituted a composite transaction and accordingly the Respondent had invoked the Arbitration Clause under the base policy i.e. the SCR Policy for disputes under all other agreements which are interlinked.

104. I find much merit in the submission on behalf of the Petitioner that the Respondent has not made out a case for incorporation by reference i.e. incorporation of the Arbitration Clause of the SCR Policy into the SBE Policy by express and or by implication. Further, this is not the pleaded case of the Respondent in the arbitral proceedings that the Arbitration Clause in the SCR Policy stood incorporated into the SBE Policy by reference. Further, during

the course of arguments, the Respondent had also stated that they were not relying on Section 7(5) of the Arbitration Act i.e. agreement by incorporation to justify the jurisdiction of the learned Arbitrator. The contention of the Petitioner has at all times been that the SCR and SBE Policies do not constitute a composite transaction.

105. It has been held by the Supreme Court in ***Olympus Superstructure Pvt. Ltd. (Supra)*** and ***JSW Steel Limited (Supra)*** that a composite transaction is where one contract cannot be performed without the aid of the other. Further, to constitute a composite transaction, the underlying transaction has to be composite in nature and not merely the dispute resolution clause. The learned Arbitrator has in the impugned Award on merits held that the SCR Policy and the SBE Policy are stand alone policies and that the obligation clauses of the SCR policy cannot be read into the SBE Policy. However, a diametrically opposite stance has been taken in the Order passed in the Section 16 Application viz. the transaction is composite and that the SBE Policy is an offshoot of the SCR Policy, albeit on certain specific situations. This finding of the Arbitral Tribunal in my view is contrary to the settled law of composite transactions as aforementioned. Further, this finding is also contrary to the material

on record which includes the correspondence exchanged between the parties and the pleadings in the arbitral proceedings, where it has been the consistent stance of the Respondent that the two policies are stand alone policies and that the contentions of the Petitioner regarding synchronization are frivolous.

106. I am of the further view that the contention on behalf of the Respondent that the Petitioners had only advanced arguments for treating the challenge of jurisdiction as a challenge in the nature of Order VII Rule 11 of the Code of Civil Procedure, 1908 is contrary to the pleadings. The Petitioner has raised a comprehensive challenge to the jurisdiction of the learned Arbitrator in the Statement of Defence including the lack of arbitration agreement under the SBE Policy as well as the contradictory stand taken by the Respondent in the Statement of Claim. The argument on Order VII Rule 11 of the CPC was one of the arguments taken before the learned Arbitrator. This was only to show that there has been a contradictory stand taken by the Respondent in the pleadings viz. that the SCR Policy and SBE Policy are stand alone policies. Further, in the decision of this Court relied upon by the Petitioner viz. ***Nuziveedu Seeds Ltd. (Supra),*** this Court has held that jurisdiction of any forum is dependent on

allegations made in the Plaint and does not depend on the defence raised in the Written Submission. The learned Arbitrator has failed to even consider this decision.

107. I do not find merit in the contention on behalf of the Respondent that the claim is not to be looked at but what is to be looked at is the dispute and since the Petitioner has contended that the SCR Policy is synchronized with the SBE Policy and constitutes a composite transaction, the jurisdiction of the Arbitral Tribunal will flow from such dispute and since the SCR Policy has an arbitration clause, the Arbitral Tribunal would have jurisdiction to determine the dispute. This contention cannot be accepted as on the one hand it is the Respondent's pleaded case that there is no overlap between the two policies and / or the policies are stand-alone policies, whereas on the other hand only for the purpose of the Arbitration Clause the Respondent has changed its stance viz. that the said two Policies are synchronized. The Arbitral Tribunal in accepting such contention, has in my view arrived at a finding which is perverse and amounts to a patent illegality as it overlooks the settled law.

108. The decision relied upon by the Respondent in ***Inder***

Singh Rekhi (Supra) on the meaning of dispute is not applicable in the present case as in that case, the Supreme Court had considered the meaning of dispute in the context of the date when the dispute arises for the purpose of limitation. There was no dispute in that case regarding existence of an arbitration agreement.

109. I find that the Arbitral Tribunal has failed to give reasons as to the conclusion that the SCR Policy is the comprehensive policy and the SBE is an offshoot on certain specific situations. This issue of interlinking was required to be decided at the Section 16 stage. The learned Arbitrator has infact recorded that "*it was not called upon to decide whether there is infact interlinking or not*", which in my view is a perverse finding considering that this would be the primary issue which the learned Arbitrator was called upon to determine at the stage of Section 16.

110. The reliance placed by the Respondent on the ***Olympus Superstructure Pvt. Ltd. (Supra)*** and ***Chloro Control (Supra)*** is misplaced reliance as these judgments are not applicable to the present case. In ***Olympus Superstructure Pvt. Ltd. (Supra),*** the party challenging the jurisdiction of the Arbitral Tribunal never raised an

objection under Section 16 and the same was raised for the first time in Section 34 proceedings. The two sets of agreements namely, the Agreements of Sale (Main Agreements) and Interior Design Agreement (IDA), both had arbitration clauses. The finding of the Court was that the execution of the IDA is connected with the execution of the Main Agreements and there is clear overlapping of the two sets of Agreement. It was in this context that the Court permitted the Arbitration under the Main Agreements to avoid a situation of conflicting awards regarding the overlapping in both Agreements. Thus, this is entirely distinguishable on the facts. In the present case, the SBE Policy does not have an arbitration clause and that the Petitioner had immediately raised an issue of jurisdiction along with its Statement of Defence. In fact the Respondent's contention has at all times been that the two policies are stand alone and there is no overlapping between the two policies. Thus, this decision cannot be applied in the facts of the present case.

111. Further, the decision in ***Chloro Control (Supra)*** relied upon by the Respondent is not applicable in the present case and is totally distinguishable. In that case, the Supreme Court had been faced with a principle of mother agreement and several satellite

agreements, which was so intrinsically connected with the mother agreement that performance of these satellite agreements was not possible without the mother agreement. The Supreme Court on the facts of that case observed that there was one principle agreement and the other satellite agreements were signed primarily to ensure performance of the principle agreement. The principle agreement and the satellite agreements constituted a composite transaction. Hence, this judgment is also clearly distinguishable. In the present case it is not the contention of the Respondent that the SBE Policy is an ancillary agreement performance of which is dependent on SCR Policy. On the contrary, the Respondent's contention at all times has been that the policies are stand-alone and synchronized which has been accepted by the learned Arbitrator in the impugned Award on merits.

112. Further, I find that the Arbitral Tribunal has relied upon ***Lords, Hoffmann, Premium Nafta Products Ltd. & Ors. V/s. Fili Shipping Co. Ltd. and Ors.***[30] to establish its jurisdiction. The judgment relied upon was passed in a completely different context. The issue that arose therein was whether the disputes under one

30 (2007) UKHL 40.

single contract was to be referred to the Arbitration. The contention was in relation to enforcing the agreement in arbitration whereas the counter contention was in relation to an argument of "bribery" requiring reference to a Civil Court. This was not a case of multiple contracts or composite transaction at all, and thus reliance by the learned Arbitrator on this judgment is entirely misplaced.

113. Accordingly, I find that the impugned Order dated 2nd February, 2022 under Section 16 of the Arbitration Act and by which the learned Arbitrator determined his jurisdiction is apart from being unreasoned and non-speaking, is perverse and contrary to fundamental principles of arbitration law.

114. Thus, the learned Arbitrator had no jurisdiction to adjudicate the disputes between the parties.

115. There have been arguments on the Arbitral Tribunal's findings on the merits of the dispute, in particular on waiver, namely that, the non-disclosure in the Proposal Form of the SBE Policy had been waived by the Petitioner, in that it was not one of the grounds of repudiation of the claim of the Respondent. However, given the above finding that the Arbitral Tribunal itself lacked jurisdiction and

the impugned Order under Section 16 of the Arbitration Act requires to be set aside, it would not be necessary to address these arguments. None the less, it does appear from the material on record and the pleadings that it was not the case of the Respondent that there had been a waiver by the Petitioner of the non-disclosure in the Proposal Form under the SBE Policy. It is well settled law that for establishing waiver, the same is not only to be pleaded but proved beyond doubt. The Respondent has not given evidence in the arbitral proceedings and hence, the learned Arbitrator has overlooked this material fact and thus in any event the impugned Award itself is contrary to the fundamental principles of Indian Law.

116. The learned Arbitrator although holding in the impugned Award that the SBE Policy and SCR Policy are stand alone policies has arrived at a diametrically opposite finding in the Section 16 Order and thus the impugned Award and impugned Order under Section 16 cannot stand together. They are required to be set aside. Further, the grounds raised in the Arbitration Petition meet the parameters prescribed under Section 34 of the Arbitration Act.

117. Accordingly, the Arbitration Petition under Section 34 of

the Arbitration Act is allowed and the impugned order under Section 16 dated 2nd February, 2022 and the impugned Award dated 16th December, 2022 is quashed and set aside.

118. The Interim Application is disposed of. There shall be no order as to costs.

[R.I. CHAGLA J.]