IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

OMP No's 94 & 851 of 2024 in
Execution Petition No. 19 of 2023

Reserved on: May 13, 2025

Decided on: June 02, 2025

State of Himachal Pradesh & ors. ...Petitioners/Original Claimant No. 2/DH/ Applicant.

Versus

E.I.H. Limited & ors. ...Respondents/Original Claimant No. 1/ JD/ Non-applicants.

Coram:

Ms. Justice Jyotsna Rewal Dua, Judge

[1]*Whether approved for reporting?*

For the petitioner/applicant : Mr. Dhruv Mehta, Senior Advocate with Mr. Prabhat Kumar, Advocate (through V.C.),Mr. Vivek Negi, Advocate and Mr. L.N. Sharma, Additional Advocate General for the petitioners/applicant in Ext. Pet. No. 19 of 2023 and for the respondents in Ext. Pet. No. 5 of 2023.

For the respondents/ non-applicants : Dr. Abhishek Manu Singhvi, Senior Advocate (through V.C.) and Mr. Rakeshwar Lall Sood, Senior Advocate with Mr. Arjun Lall, Ms. Priyanshi Sharma, Mr. Akash Thakur & Mr. Vidur Kapur, Advocates, for the petitioners in Ext. Petition No. 5 of 2023 and for the respondents/non-applicants in Ext. Pet. No. 19 of 2023

[1] *Whether reporters of Local Papers may be allowed to see the judgment? Yes.*

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Jyotsna Rewal Dua, Judge

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This order decides two applications moved by the State of Himachal Pradesh seeking further directions towards implementation of the Arbitral Award dated 23.07.2005.

Before delving into the applications, **basic background facts** be noticed:-

i) A Joint Venture Agreement (in short 'JVA') was executed between non-applicant/claimant No. 1/East India Hotels Limited (in short 'non-applicant/EIH') and applicant/ claimant No. 2/State of Himachal Pradesh (in short 'applicant/State') on 30.10.1995 with object to construct and run a luxury hotel commonly known as Hotel Wildflower Hall. The executants had certain rights as well as obligations under the JVA. Pursuant to the JVA, EIH & State

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formed a Joint Venture Company by the name of Mashobra Resort Limited (in short 'MRL') for running the hotel.

ii) A conveyance deed was executed by the applicant/State in respect of the property in question in favour of MRL on 06.02.1997.

iii) Dispute arose between the parties. According to the State, not only EIH failed to make the hotel fully commercially operational in the manner and time frame provided under the JVA but also illegally and unauthorizedly reduced the shareholding of State in MRL in violation of JVA and was conspiring to continue to reduce it further. The applicant/State resorting to relevant clauses of JVA, Allotment Agreement, Share Holders Agreement & Articles of Association terminated the JVA on 06.03.2002. Consequently, in accordance with Clause 11.1(b) of the JVA, the shares held by EIH in MRL were to be transferred to the State at stipulated sale consideration of 50% of the face value of shares plus ₹10/- as consideration for Technical Services; Assets of Joint Venture were to revert to State. The termination was confirmed by the Board of Directors' resolution dated 07.03.2002 removing EIH's Directors from the Board of MRL and forfeiting EIH's shares in MRL.

iv) Disputes between the parties were initially raised before the Company Law Board. Eventually while deciding Civil Review Petition No. 35 of 2003 in CWP No. 1266 of 2001 and Company Appeal No.1 of 2003, a Division Bench of this Court vide order

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dated 17.12.2003 appointed Mr. Justice R. P. Sethi (Retd.) as the sole Arbitrator. The order also determined the terms of reference for arbitration.

v) Learned Arbitrator passed the Award on 23.07.2005. Objections (Arb. Case No. 60 of 2005) filed by non-applicant/EIH under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the 'Act') against the Arbitral Award were dismissed by the Single Judge on 25.02.2016. Non-applicant/EIH's appeal under Section 37 of the Act (Arb. Appeal No. 11 of 2016) was also dismissed on 13.10.2022. No further challenge was laid against the Arbitral Award.

vi) Non-applicant/EIH and applicant/State filed their respective Execution Petitions No. 5 & 19 of 2023 for enforcement of the Arbitral Award. Both sides claimed certain rights thereunder and also sought to enforce obligations statedly fastened upon the other side.

vii) On 17.11.2023 an order was passed in the Execution Petitions which directed:-

> "i) Claimant No. 2 to reveal its option whether State of H.P. intends to resume the property by taking its possession in terms of the Award.
>
> ii) Claimant No. 1 to provide a time schedule for execution of cancellation deed for cancellation of conveyance deed dated 6.2.1997 and for further execution of lease deed in terms of the Award.

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iii) Claimant No. 1 and Claimant No. 2 will provide their respective calculations in respect of sum(s) payable under the Award by Claimant No. 1 to Claimant No. 2 alongwith simple interest @ 18% p.a. thereon."

viii) Applicant/State filed an application (OMP No. 612 of 2023 in Ext. Pet. No. 19 of 2023) on 07.12.2023 exercising its option to take possession of the joint venture property.

ix) While deciding OMP No. 612 of 2023 on 05.01.2024, the Executing Court held that non-applicant/EIH had failed to perform its part of obligations under the Arbitral Award dated 23.07.2005 within three months from the date it attained finality; Consequently, the Board of Directors resolution and Government decision dated 07.03.2002 have automatically revived; The State of Himachal Pradesh has become entitled to take possession and management of the Wildflower Hall Hotel alongwith entire property that was subject matter of the JVA. Non-applicant/EIH was directed to vacate the entire property that was subject matter of JVA and hand over the vacant and peaceful possession thereof to the applicant/State within a period of two months. Parties were further called upon to give their preference for appointment of reputed Chartered Accountants for settlement of disputed accounts of MRL in terms of the Arbitral Award dated 23.07.2005. Relevant paras of the order read as under:-

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> **"**27. In light of above discussion, it is held that non-applicants have failed to comply with the terms of award within the period of 3 months from the date it attained finality i.e. 13.10.2022. Consequently, the Board of Directors resolution and Government decision dated 07.02.2002 *(SIC 7.3.2002)* have automatically revived. The State of Himachal Pradesh has become entitled to take possession and management of the 'Wild Flower Hall Hotel' alongwith entire property that was subject matter of the JVA.
>
> 28. The non-applicants/execution petitioners in Ext. Pet. No. 05 of 2023, are directed to vacate the entire property that was subject matter of JVA and handover vacant and peaceful possession thereof to the State of Himachal Pradesh within a period of two months from the date of passing of this order.
>
> 29. Parties are further called upon to give their preferences for appointment of reputed chartered Accountants for settlement of disputed accounts of the MRL in terms of the award dated 23.07.2005, passed by learned Arbitrator.**"**

x) Non-applicant/EIH assailed the orders dated 17.11.2023 and 05.01.2024 before the Hon'ble Apex Court. Special Leave Petitions (C) Nos. 3969, 3986-3988 of 2024 were dismissed on 20.02.2024. However, notwithstanding the dismissal, non-applicant/EIH was granted time till 31.03.2025 for vacating and handing over the possession of the property to applicant/State.

2. Present applications

Claimant No. 2/State is the applicant in these two applications. According to the applicant/State, certain financial and other obligations have been fastened under the Arbitral Award upon non-applicant/EIH

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These financial obligations of non-applicant/EIH are rights of applicant/State. It is imperative for the non-applicant/EIH to discharge these obligations.

Non-applicant/EIH not only disputes several claims made by the applicant/State but also puts forth its own claim, hence dispute has arisen concerning financial rights and obligations of the respective parties under the Arbitral Award dated 23.07.2005.

This order decides the respective claims of the parties towards their disputed financial obligations/rights under the Arbitral Award.

3. **Heard** learned counsel on both sides & considered the case file. For convenience, the claims urged for the parties during hearing of the applications & deliberations thereupon are being discussed hereinafter.

4. **Consideration**

4(i) **Prayer No. i)** as made by applicant/State:-

> "Direct Respondent/EIH Ltd. to pay to the Applicant/petitioner/State due amount of ₹19,56,80,342/- forthwith towards ₹4.5 crores (which includes 3.5 crores penalty amount agreed in terms of Clause 10.1 (b) and ₹1 crore for user of the land) directed to be paid under the Award dated 23.07.2005 with statutory interest of 18% simple interest under Section 31(7)(b), calculated up to 29.02.2024."

4(i)(a) Non-applicant/EIH does not dispute its liability to pay delay penalty of ₹3.5 Crores under the Arbitral Award. It however submits that:- It is not required to pay interest on delay penalty amount till 29.02.2024 as a sum of ₹3.5 Crores with statutory interest @ 18% p.a. total

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amounting to ₹14,72,78,082/- was deposited by it in the Registry of this Court on 15.05.2023; This amount be reconciled/adjusted in favour of the applicant/State. No further interest @ 18% p.a. is required to be paid on the amounts deposited with the Registry of this Court. Reference in this regard was made to following portion of an order passed on 02.06.2023 in Ex. Pet No. 5 of 2023:-

> "… …. Since DH has already deposited the amount in the Registry of this Court as per their calculation, same is ordered to be invested in FDRs till further orders, so that opposite party may not subsequently claim interest, if any, at the rate of 18% in terms of provision contained under Section 31(7)(b) of the Arbitration Act. However, it is clarified that shortfall, if any, shall carry interest in accordance with law.
>
> Amount deposited by the DH in terms of order dated 16.5.2023 is ordered to be invested in FDRs till further orders."

Further, non-applicant/EIH does not dispute its liability to pay ₹1 Crore with statutory interest @ 18% p.a. for the use of land from termination of JVA w.e.f. 17.12.2003 till the date of Award i.e. 23.07.2005. According to it, an amount of ₹4,20,79,452/- under this head was deposited in the Registry of this Court on 15.05.2023.

The above has been accepted by the applicant/State.

4(i)(b) Apparently, there is no dispute between the parties on the financial obligation of non-applicant/EIH towards applicant/State under the first prayer. Both sides have agreed that EIH's liability to pay under this component is to the extent of ₹18,93,57,534/- (alongwith interest

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calculated up to 15.05.2023 i.e. when EIH deposited the amount in registry of this Court). Hence, the first prayer of the applicant/State is allowed. The applicant/State is held entitled to this amount. The Chartered Accountant to reconcile/adjust the above deposited amount in favour of the applicant/State.

4(ii) Prayer No. ii) as made by applicant/State**:-**

> "Direct Respondent/EIH Ltd. to pay to the Petitioner No. 2/SADA an amount of ₹21,74,226/- forthwith towards Compounding fee of ₹5,00,000/- directed to be paid under the Award with 18% statutory interest, calculated up to 29.02.2024."

During course of hearing, learned Senior Counsel for applicant/State submitted that the compounding charges are to be paid by the Joint Venture Company - MRL and not by non-applicant/EIH Therefore, the amount under this Head is required to be reconciled while settling the account. The amount thus is to be factored during reconciliation of accounts. This is also the stand of EIH.

The above submission has come from applicant/State, therefore, held accordingly. The compounding charges are to be paid by MRL and not by non-applicant/EIH. The amount is to be reconciled by the Chartered Accountant while settling the accounts.

4(iii) Prayer No. iii) as made by applicant/State**:-**

> "Direct Respondent/EIH Ltd. to pay to the Applicant/Petitioner State an amount of ₹77,38,65,936/- forthwith towards 'User Fee' on account of use of the property from the date of the Award till the date of vacation calculated as per the lease rent determined

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> in the arbitral award alongwith 18% statutory interest, calculated up to 29.02.2024."

Applicant/State claimed ₹77,38,65,936/- towards user fee on account of use of property from the date of Award till the date of vacation alongwith 18% statutory interest (calculated up to 29.02.2024). The calculations for claiming this amount (Annexure A-7) were statedly made as per the lease rent determined in the Arbitral Award.

As against this prayer, the pleaded stand of non-applicant/EIH as urged during hearing is that 'it acknowledges its liability to pay user fee to the State Government subject to the necessary implication that all revenues generated by the Hotel from the date of Award till the handover date are credited to EIH's account pursuant to reconciliation of such accounts by the Chartered Accountant'.

4(iii)(a) Claim of ₹77,38,65,936/- though had been emphatically asserted in the applications, however during hearing of the applications, learned Senior Counsel for the applicant/State invited attention to following para 25 of the rejoinder and submitted that 'in case in the opinion of the Court, the State is not entitled to this additional compensation of ₹77,38,65,936/- termed by it as user fee, the State shall not press this relief':-

> "25. It is respectfully submitted that that the Government nominee directors have consistently recorded their dissent on approval of accounts primarily with regard to heavy payments of expenses in the nature of technical know-how fee which EIH Ltd. was to provide free of cost as also heavy payments made to

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related parties of Respondent/EIH Ltd. in the garb of expenses and procurement. It is respectfully submitted that the Applicant State in its termination letter dated 06.03.2002 which stand revived pursuant to the Arbitral Award and the judgment dated 05.01.2024 passed by this Hon'ble Court, has specifically asserted its right to *write back and recover from EIH any payment on account of technical services in the books of accounts of Joint Venture Company without prejudice to the rights of the State to recover such other amounts which may be due and entitled.* It is relevant to state that the State has not received even a single penny out of the Joint Venture with Respondent/EIH Ltd. whereby EIH Ltd. exploited the State's property for over two decades by abusing its majority vote in the Joint Venture Company by making heavy payments to its related parties in the garb of expenses and procurement as also heavy payments of expenses in the nature of technical know-how fee which EIH Ltd. was to provide free of cost. That, therefore the State prayed for an additional compensation of ₹77,38,65,936/- (termed by it as user fee), for suffering revenue loss due to breach of Joint Venture Agreement by Respondent/EIH Ltd, and calculated at the rate of 'lease rent' given under the Award with interest, in absence of any other parameter available. That the Respondent/EIH Ltd. in order to wriggle out of the consequences of judgment dated 05.01.2024 passed by this Hon'ble Court in Execution is trying to mislead this Hon'ble Court by twisting the prayers of the Applicant State by projecting as if the State is actually and essentially seeking "lease rent" for the occupation and usage of the property by EIH Ltd. which is an absurd proposition and is contrary to the pleaded case of the State. As stated hereinabove, the pleaded primary case of the Applicant State in the present Execution Petition is that Board of Directors Resolution and the Government decision dated 07.02.2002 have been revived and have become executable against EIH Ltd. in terms of the Award and the judgment dated 05.01.2024 passed by this Hon'ble Court and

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> accordingly the property and the assets of the Joint Venture Company as well as the 100% shares of the JVC belong to the Applicant State as a consequence of termination of JVA on payment of the stipulated consideration. That this Executing Court vide its judgment dated 05.01.2024 has accepted the contentions of the State and the Hon'ble Supreme Court has concurred with the same. As a result of which the Applicant State has become the sole owner of the Joint Venture Company as a going concern alongwith all its assets and revenues. That if in the opinion of this Hon'ble Court in view of the foregoing, the State is not entitled to this additional compensation of ₹77,38,65,936/- termed by it as user fee, the State shall not press for this relief."

The above was a strange manner of canvassing prayer No. iii) viz. 'in case the Court comes to the conclusion that State is not entitled to the claim, in that event, State will give up the claim'.

It is for the applicant/State to lay out its different claims & urge them in accordance with law. Such claims may or may not be accepted/granted by the Court. It will be for the State to either accept the conclusion drawn by the Court or to challenge it in accordance with law. Nonetheless it is for the applicant/State to press its claims or to relinquish them, this cannot be left to the discretion of Court.

4(iii)(b). The 'user fee' of ₹77,38,65,936/- claimed in the application by the State was projected as kind of given up in the rejoinder. The rejoinder did not give clear picture as to the real intent of the applicant as to whether it wanted to press this relief or was it giving up this prayer unconditionally. Therefore, during hearing of the case, learned Senior

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Counsel for the applicant/State was requested to be specific as to whether this claim is being pressed or not. In response, learned Senior Counsel submitted that prayer iii) be treated as given up. According to learned Senior counsel for the applicant/State it is the Joint Venture Company – the MRL that remained in possession of the joint venture property & not EIH; This has been the stand of the State during proceedings of Arbitration Case as well as Arbitration Appeal. While repelling EIH's challenge to the Arbitral Award, the Courts have very specifically held MRL to be in possession of Joint Venture Property & not EIH or the State. Pursuant to the Arbitral Award attaining finality & also the orders passed by the Executing Court on 17.11.2023 & 05.01.2024, the State has become the sole owner of the Joint Venture Company as a going concern alongwith all its assets & revenues; Hence EIH is not to pay the user fee. Any claim for user fee will be against MRL and not EIH. Once 100% shareholding of MRL has vested in the State, the claim of user fee against MRL has become redundant.

As against above, learned Senior Counsel for the non-applicant/EIH urged that it was State's pleaded case in the application about EIH being in possession of joint venture property from the date of Award till date of vacation or in other words State had admitted EIH and not MRL to be in possession of the joint venture property. Once such statement of facts is made, State cannot be permitted to resile from it. Such surrender of prayer is a strategic retreat upon realizing the

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consequences of its admission. Learned Senior Counsel urged that having admitted EIH's possession over the property, the State is only entitled to fair rent of the property and cannot claim revenue generated by the property. In *Union of India & Ors. vs. Banwarilal & Sons (P) Ltd.* [2] Hon'ble Supreme Court had observed that in a class of cases where possession was initially authorized such as under a contract, even if such possession subsequently became unauthorized, it would entitle the property owner only to fair rent for the property and not any other remedy including mesne profits. The observations of the Apex Court apply to the facts of the case.

Though learned Senior Counsel for the non-applicant/EIH emphatically urged that EIH is ready to pay & should be held responsible to pay 'user fee' but when the applicant itself does not wish to press this specific prayer, has abandoned it, then there arises no question to adjudicate upon this prayer. Also, the Award does not give any relief of 'user fee' to any party in the Award. There are two scenarios provided by the Arbitral Award. Scenario number one envisaged transfer of State's entire shareholding in MRL to EIH & failing which comes number two scenario where EIH's entire shareholding in MRL goes to State. Number one scenario having not been opted by EIH, it is the second scenario, which is being sought to be enforced by the State. Claim No. iii) therefore is dismissed as not pressed. Parties' respective claims for revenue generated by the joint venture property have been deliberated in para 4(v)

[2] (2004) 5 SCC 304

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4(iv) Prayer No. iv) as made by applicant/State:-

> "Permit the Petitioner/State to deposit with this Hon'ble Court an amount of ₹13,00,00,010/- payable to Respondent/EIH Ltd. towards amount of consideration payable to EIH Ltd. on account of transfer of all 2,60,00,000 equity shares held by EIH Ltd. and its associates in MRL as on date, in favour of the Petitioner/State and accordingly Respondent/EIH Ltd. be directed to transfer all its 2,60,00,000 equity shares in the MRL in favour of the Petitioner/State as per the provisions of the Companies Act and other applicable laws."

Learned Senior Counsel for applicant/State submitted that State is liable to pay ₹13,00,00,010/- only as consideration amount on account of transfer of all 2,60,00,000 equity shares held by non-applicant/EIH and its associates in MRL-the JVC. This claim has been strongly refuted by learned Senior Counsel for non-applicant/EIH. According to EIH full market value of its shares as on date of handing over is required to be paid to it in lieu of their transfer and not just ₹13,00,00,010/- or 50% of face value of shares.

4(iv)(a) It has been contended for the applicant/State that pursuant to order dated 17.11.2023 passed in the execution petition, the State had filed OMP No. 612 of 2023 on 7.12.2023 exercising its option to resume the joint venture property and take its vacant possession in terms of Arbitral Award. It was also urged by the State therein that Government decision to terminate JVA dated 06.03.2002 & Board Resolution dated 07.03.2002 have revived automatically and are to be enforced in terms of Arbitral Award; Hence as per Government decision dated 06.03.2002

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terminating the JVA & Board Resolution dated 07.03.2002, entire property & assets of JVC as well as 100% shares of JVC belong to applicant/State on payment of stipulated consideration i.e. 50% of face value of the paid-up equity held by EIH and ₹10. That this aspect has already been noticed & affirmed in the order dated 05.01.2024 passed in the Execution Petitions. The orders dated 17.11.2023 & 05.01.2024 have attained finality, the SLPs instituted by EIH against these orders have been dismissed. Therefore, value of shares held by EIH has to be as determined as per the Government decision dated 06.03.2002 & Board of Directors resolution dated 07.03.2002, which in turn is based upon termination notice/order dated 06.03.2002 and applicable provisions of the JVA dated 30.10.1995 and similar provisions existing in other ancillary agreements. *Deepa Bhargava & anr. vs. Mahesh Bhargava & ors.*[3] and *Haryana Vidyut Prasaran Nigam Limited & anr. vs. Gulshan Lal & ors.*[4] were relied upon to contend that the Executing Court has no power to vary/modify the terms of the decree.

4(iv)(b) As against above:

(1) The non-applicant/EIH admitted that it holds shares in MRL with face value of ₹26 crores and that all its shares are liable to be transferred to the State under the Arbitral Award & orders passed in Execution Petitions. It however strongly opposed transfer/acquisition of its shares at valuation in

[3] (2009) 2 SCC 294
[4] (2009) 13 SCC 354

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terms of JVA/AOA/State Government decision & Board Resolution dated 07.03.2002. According to non-applicant/EIH, the State may acquire EIH's shares in MRL but on payment of fair market value consideration thereof.

(2) An aspect strongly highlighted for the non-applicant was that right to hold property is a right conferred by the Constitution. This right cannot be taken away without paying full market value of shares. Clause 11 of JVA providing for acquisition of shares at less than their market value is unconstitutional. Acquiring the shares at 50% of their face value will amount to confiscation or de facto acquisition without sanction of law, which is contrary to Article 300A of the Constitution that mandates 'no person shall be deprived of his property save & except by authority of law'. To repel State's reliance upon *Radhakrishna Agarwal vs.State of Bihar*[5] reference was made to *M.P. Power Management Company Limited, Jabalpur vs. Sky Power Southeast Solar India Private Limited & Ors.*[6] which held that *Radhakrishna Agarwal*[5] & other decisions enshrining the principle that in case of a non-statutory contract the rights are governed only by the terms of the contract, may not continue to hold good in light of what has

[5] (1977) 3 SCC 457
[6] (2023) 2 SCC 70

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been laid down in *ABL International Ltd. vs. Export Credit Guarantee Corpn. of India Ltd.*[7]. The mere fact that relief is sought under a contract which is not statutory, will not entitle the State to ward off scrutiny of its action/inaction under the contract, if the complaining party is able to establish that the action/inaction is *per se* arbitrary. Reliance was also placed upon *Lucknow Nagar Nigam & Ors. Vs. Kohli Brothers Colour Lab. Pvt. Ltd. & Ors.*[8] to contend that constitutional right to property under Article 300A of the Constitution is a potent safety net against arbitrary acquisitions, hasty decision-making and unfair redressal mechanisms. *Shrilekha Vidyarthi vs. State of U.P.*[9] was cited to highlight that there is difference in the contracts between private parties and contracts to which the State is a party. The State while exercising its powers & discharging its functions acts for public good & in public interest. State action impacts public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with the character the contracts made by the State. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all

[7] (2004) 3 SCC 553
[8] 2024 SCC OnLine SC 188
[9] (1991) 1 SCC 212

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the characteristics of the State at the threshold while making a contract requiring it to fulfill the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. Reliance was also placed upon *Dr. (Major) Meeta Sahai vs. State of Bihar & Ors.*[10]; *Bharat Petroleum Corporation Limited vs. Maddula Raatnavalli & Ors.* [11]; *M/s Icomm Tele Limited vs. Punjab State Water Supply and Sewerage Board & Anr.*[12]; and *Lombardi Engineering Limited vs. Uttarakhand Jal Vidyut Nigam Limited*[13] that Constitution must guide State action. When there are two plausible interpretation, the interpretation which promotes constitutional values must be preferred more so when State is acting within the contractual sphere.

(3) It was further contended for non-applicant/EIH that provisions of forfeiture /surrender of property including shares whether encapsulated in a contract or JVA or AOA, Allotment Agreement or Share Holders Agreement are

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[10] (2019) 20 SCC 17
[11] (2007) 6 SCC 81
[12] (2019) 4 SCC 401
[13] 2023 INSC 976

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subject to provisions of Section 73 & 74 of the Indian Contract Act. Consequences of breach of contract are governed by Section 74 of the Contract Act. Transfer of shares cannot be effected in a manner that violates Sections 73 & 74 of the Contract Act. Clause 11 of the JVA violates Sections 73 & 74 of the Contract Act. *Naresh Chandra Sanyal vs. Calcutta Stock Exchange Association Ltd.*[14] holds that while it is permissible in contract to compel transfer of shares in certain circumstances, the transfer sought to be compelled must be proportionate to the loss actually suffered and cannot be carried out contrary to principles of Sections 73 & 74 of the Contract Act. In the instant case the Arbitral Award has already determined ₹3.5 crores as damages to be paid to the State, there is therefore no cause for the State Government to seek further damages in form of forfeiture of EIH's shares in MRL at nominal consideration.

(4) It has been contended for the EIH that:- Transfer of its shares cannot be as per Clause 11 of the JVA. Invocation of Clause 11 necessitates not only breach of JVA but also termination of JVA in accordance with Clause 10 of the JVA, by the State Government; In the instant case, the Award expressly records a finding that 'order of

[14] (1971) 1 SCC 50: AIR 1971 SC 422

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termination' dated 06.03.2002 being a premature action, cannot be held to be legal; Similarly consequential action by way of resumption, Board Resolution and order dated 07.03.2002 have also been held to be illegal and not binding upon EIH; Such orders shall not affect right of EIH. Termination of JVA by the applicant/State having been declared as invalid by the Arbitrator, State cannot seek to apply Clause 11 of JVA for valuing transfer of shares as such recourse is available only on valid termination of JVA.

(5) The EIH also submits that though the Arbitral Award records a finding that JVA shall be deemed to have been terminated w.e.f. 17.12.2003 but this finding had been arrived at by the ld. Arbitrator in his capacity of 'amiable compositor' for deciding the dispute between the parties. This is more so in view of following term No. 6 of the order dated 17.12.2003 passed by the Court while referring the dispute to the ld. Arbitrator:-

> "(6) If the Arbitral Tribunal ultimately finds, after adjudication, on a totality of circumstances and on consideration of all relevant aspects that the partnership between the State Government and EIH Ltd. is not workable any more and that in the considered opinion of the Arbitral Tribunal, parting of the ways is, and would be the most ideal and conducive situation, in public interest as well as in the interest of the parties, the Arbitral Tribunal may, while passing the arbitral award also indicate the

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terms on which such parting of ways can best be achieved…".

It was for resolving the dispute between the parties the ld. Arbitrator had declared the JVA as having been terminated under Clause 10(i)(b) on a date subsequent to 06.03.2002. To avoid further litigation, ld. Arbitrator in following manner declared the JVA as terminated with effect from 17.12.2003 i.e. the date on which the High Court had referred the dispute to the Arbitrator:-

> "To resolve the controversy between the parties, I have come to the conclusion that in view of the findings returned on Issue No. 1 and this Issue, the JVA may be declared to have been terminated under Clause 10(i)(b) on the date subsequent to 06.03.2002, subject to the conditions and limitation prescribed by this award. To avoid further litigation between the parties and keeping in mind the broad powers conferred by the Hon'ble High Court and the parties on this Tribunal, the JVA is declared to have been terminated w.e.f. 17.12.2003, the date of the order of the High Court by which the disputes between the parties were referred to this Arbitral Tribunal and the Hotel made fully commercial operational. The Termination of JVA shall, however, be subject to other directions to be given while deciding other Issues, particularly Issue No. 14 and other conditions of the Award."

The termination had not been validly effected by the State Government under Clause 10 of the JVA but by the learned Sole Arbitrator as an equitable measure to do substantial justice between the parties. In view thereof, the

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consequences of termination as would have flown from a valid contractual termination of the JVA by the State do not apply including that of forfeiture of EIH's shares in MRL at the consideration set out in Clause 11 of the JVA. Further, the Award does not contemplate revival of Termination Notice dated 06.03.2002. It is only the Board Resolution of 07.03.2002 that gets fresh life in the second scenario under the Award and Board Resolution is silent on valuation of shares. Hence in light of law laid down in *Meenakshi Saxena & anr. vs. ECGC Ltd. & anr.*[15] and *Bhavan Vaja & ors. vs. Solanki Hanuji Khodaji & anr.*[16], the Executing Court has the authority to interpret the Award to reflect its true intent. The Award upholds only the requirement for mandatory transfer of shares and does not consider quantum of consideration.

4(iv)(c) Consideration

4(iv)(c) a. A Joint Venture Agreement was executed between the parties on 13.10.1995. Relevant to the context is Clause 10 of this JVA under the heading 'Termination', which reads as under:-

> "10. TERMINATION:
> 10.1 This Agreement may be terminated as follows:
>
> (i). The party of the FIRST PART may terminate this Agreement by giving the Notice of Termination in writing to the other party:

[15] (2018) 7 SCC 479
[16] AIR 1972 SC 1371

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(a) If the party of the SECOND PART defaults in the performance of any material undertaking under this Agreement and fails to correct such default to the reasonable satisfaction of the party of the FIRST PART within 15 days after written notice of such default is provided to the party of the SECOND PART;

(b) If the Joint Company, which is contemplated by the parties to be formed is not formed within a period of sixty days, or within such period as may be mutually extended in writing, but not exceeding ninty days reckoned from the date of signing of this Agreement; or where the Joint Company is formed the Joint Company does not commence the business i.e. to say to make the hotel fully commercially operational within four years from the date of handing over the possession of the said premises i.e. the Wild Flower Hall, Chharabra, as Five Star Deluxe Hotel Resort, due to any reasons. For determining the said period of four years, the period extended under this clause for the formation of the Joint Company, shall be excluded. Notwithstanding anything contained hereinbefore the party of the FIRST PART may permit the continuation of this Agreement for a further period of two years on payment of a penalty of Rs. 2 crores (Two crorers) per annum in the last month of the fifth year and as the case may be in the last month of the sixth year reckoned from the effective date as provided in Article 8.1 of this Agreement by the party of the SECOND PART to the party of the FIRST PART to the Joint Company and after the sixth year this Agreement shall stand automatically terminated.

(c) … … …

10.2 … … …"

Clause 11 of the JVA details the effects of termination. Being relevant, it is reproduced hereinafter:-

"11. EFFECTS OF TERMINATION:

11.1 If this Agreement is terminated pursuant to Article 10, the Party terminating this Agreement shall be entitled to require the party in breach to sell its own and its Associate Companies shareholding in the Joint Company, at the option of the terminating party:

(a) to the terminating Party or its Associate Companies on the terms and conditions set forth in Article 9 hereof;

(b) to the public at large by a public offer:

Provided however that in the event that the termination of this Agreement is due to the default of the party of the SECOND PART falling to perform its obligations as regards the provision of technical services in the manner and time frame prescribed, the party of the SECOND PART shall sell its shares to the party of the FIRST PART on payment of Rs. 10 at which the technical services are valued plus 50% of the

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> **face value of the paid up equity shares held by the party of the SECOND PART; and the party of the FIRST PART shall be entitled to acquire the same.**
>
> 11.2 Notwithstanding the foregoing, in any such event, the land, buildings and structures on the Wild Flower Hall Estate (mentioned in Schedule 'C'), together with buildings, structures or any other immovable assets which might have been raised by the Joint Company shall revert to the party of the FIRST PART on payment stipulated in proviso to clause of 11.1 of this Agreement."

As per Clause 11.1, in the event of termination of the Agreement on account of default of EIH, failing to perform its obligations as regards the provision of technical services in the manner and time frame prescribed, the EIH shall sell its shares to the State and the State shall be entitled to acquire the same on payment of ₹10/- at which the technical services are valued plus 50% of the face value of the paid up equity shares held by EIH. Similar provision existed in the Share Holding Agreement & other ancillary agreements executed by the parties.

4(iv)(c) b. On 06.03.2002, State of Himachal Pradesh terminated the JVA dated 30.10.1995 w.e.f. 30.10.2001 in terms of Clause 10.1(b) of the JVA. The communication dated 06.03.2002 also spelt out following consequences of termination of JVA concerning transfer of shares held by EIH in favour of State:-

> "… … In view of the above, the Joint Venture Agreement dated 30.10.1995 stands automatically terminated w.e.f. 30.10.2001 in terms of clause 10.1(b) of the Joint Venture Agreement. Consequently EIH stands disqualified from continuing as a member and/or shareholder of the Joint Venture Company and the shares held by EIH stand surrendered in favour of the State of Himachal Pradesh in terms of Article 3(3) of Allotment Agreement read with article 10 of Articles of Association of the Joint Venture Company and article 5 of the Shareholders Agreement.

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Therefore shares held by EIH stand transferred to the State of Himachal Pradesh at a consideration of Rs. 10/- at which technical services have been valued plus 50% of the face value of the equity shares held by EIH in terms of the said Agreements. Accordingly, a Cheque of Rs. 9 crore 10 bearing No. CA/38 778552 dated 6-3.2002 drawn on State Bank of Patiala The Mall, Shimla is being enclosed herewith as detailed below, subject to the right of the Govt. to write back & recover from EIH any payment on account of technical services in the books of accounts of Mashobra Resorts Ltd. This is without prejudice to the rights of the State Government to recover such other amounts which may be due and entitled.

	Amount (in Crores)		
	Total	GoHP	EIH
Share capital (Issued, subscribed, called & paid up)	33	7	26
Amount payable to EIH @50% of the face value of equity shares held by EIH consideration for technical services	Rs. 13 crores Rs. 10		
Total amount payable to EIH	**Rs. 13 crores and 10**		
Less:			
Penalty due on account of non commencement of full commercial operations within the meaning of clause 10 of Joint Venture agreement as per letter No. TSM-F(6)-1/95-7(1) Dated 6-3-2002 enclosed herewith	Rs. 4 crores		
Net Amount Payable to EIH	**Rs. 9 crores and 10**		

Further in accordance with terms of Clause 11.1 & 11.2 of the Joint Venture Agreement, the Land, Buildings and Structures on the Wild Flower Hall Estate together with buildings, structures or any assets etc, which might have been raised by the Joint Venture stand reverted to the State of Himachal Pradesh on 'as is where is basis'."

Under the State Government decision dated 06.03.2002 & the Board Resolution dated 07.03.2002, the JVA was terminated. The non-applicant/EIH was disqualified from continuing as a member/shareholder of the Joint Venture Company. The shares held by EIH stood surrendered in favour of State of Himachal Pradesh in terms of

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Article 3(3) of Allotment Agreement read with Article 10 of Articles of Association of the Joint Venture Company and Article 5 of the Shareholders Agreement. The termination order further stated that shares held by EIH stood transferred to State of Himachal Pradesh at consideration of ₹10/- at which technical services had been valued plus 50% of the face value of the equity shares held by EIH. The share transfer money was also computed in the termination order (extracted above) @ ₹13 Crores & 10 (₹13,00,00,010/-).

4(iv)(c) c. Before the learned Arbitrator, it was an admitted position of the parties that non-applicant/EIH & its associated companies were owners of 2,59,99,995 (2,60,00,000 rounded off) equity shares of ₹10/- each. The applicant/State prayed before the ld. Arbitrator *inter alia* for declaration that:-

> "11 **The breach and violation of JVA provisions and Articles and other breaches and violations rendered EIH liable at the States option to transfer/sell its shares to the State under Article 32 of MRL on the valuation prescribed in the proviso to Clause 11.1 (b) of the JVA** and Clause 5.2 of the SHA are alternatively declared that in the event the compulsory sale from EIH to the State of its shares affected 6th /7th March, 2002 is held to be legally invalid even then the State is entitled to take action through its nominee Directors on the Board of MRL and thus become the sole shareholder of MRL and to have its nominee Directors as the only Directors on the Board of MRL or that EIH became and is liable to take all steps and cooperate in so transferring/selling its shares by accepting the payment tendered towards it and completing all necessary formalities with a direction to its representative to so do and act legally in its name

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and on its behalf or be deemed that the same is done in the eyes of law;" **(Page 16 of the Award)**

EIH had contended before the ld. Arbitrator that it was not bound by some of the provisions of the JVA; Clause 11 of the JVA dealing with effects of termination was contrary to the Companies Act and thus not enforceable against it; Provision for compulsory transfer of shares at rupees thirteen Crores & ten was also illegal; Clause 10 of the JVA providing for contingencies for termination of agreement was unlawful & not binding upon EIH.

One of the issues framed by the ld. Arbitrator was *"Whether and to what extent the Joint Venture Agreement is valid and binding on the parties and is capable of conferring rights on them?"* (Page 17 of the Award) Deliberating on this issue, ld. Arbitrator at page 76 of the Award *inter alia* noted the contention of the State that consequences of termination provided in JVA were neither illegal nor void. Ld. Arbitrator also noted Clause 10 of the JVA related to termination of the agreement under specified circumstances and Clause 11 that dealt with effect of termination, Clause 1.1 of the Articles of Association and held as under on the aforesaid issue:-

- ... … the present Articles of Association have been formulated in pursuance of the Joint Venture Agreement dated 30-10-1995 entered into by and between the State of Himachal Pradesh and EIH whereby they have come together to form and incorporate this company". In Para 32 it has been again reiterated that, "the

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shares of either EIH or the State shall be transferred to the other or to the public in the event that the Joint Venture Agreement executed by and between the State and EIH on 30th Oct. 1995 is terminated in accordance with the terms thereunder. In such an event the transfer of shares shall take place in the mode and mechanisms provided in the said agreement". This agreement was also signed at Shimla on 29th Nov. 1995 by the representatives of the State of H.P. and EIH. **(Page 84 of the Award)**

- … … Both the aforesaid parties have preferred their claims over the JVC-MRL. The liabilities and obligations sought to be enforced are by the aforesaid two parties against each other. No party wants the winding up of the company, which if prayed would have definitely affected the rights of the MRL. Vesting of shares of one contracting party in the other or conveyance of the landed property in favour of one of the contracting parties does not in any way effect the rights which have accrued to the incorporated company. **(Page 88 of the Award)**
- … … In view of what has been stated hereinabove, I am of the firm opinion that the JVA is valid and binding on the incorporated company i.e. MRL as effectively as it binds the original parties to the contract agreeing for the incorporation of the MRL.

  (Page 88 of the Award)
- … … Despite being one of the executants of the JVA, the EIH contends not to be bound by some of the provisions of the

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agreement including the Annexures thereto. It is submitted that Clause 11 of the JVA dealing with the effects of termination is contrary to the Companies Act and is thus not enforceable against the EIH. Similarly, Clause 32 of Schedule 'A' attached to the JVA dealing with compulsory transfer of shares is allegedly illegal. Clause 9 of the said Schedule relating to transfer of shares is stated to be illegal being against the provisions of law. Clause 10 of the JVA providing for the contingencies of termination jof the agreement is alleged to be against law and not binding on the Claimant No. 1. **(Page 89 of the Award)**

- … … In view of this position of law, it cannot be said that Condition No. 11 of the JVA or Para 10 (surrender of shares) of Schedule A to the JVA or any other terms of Memorandum and Articles of Association is contrary to Section 75 of the Companies Act and renders JVA itself illegal. **(Page 91 of the Award)**
- … … I am of the firm view that pre-incorporation agreements which are not contrary to any of the provisions of the Companies Act and other enactments are binding upon the parties and their successors-in-interest. **(Page 97 of the Award)**
- … … In this case specific provision regarding surrender of shares has been duly incorporated in the Articles of Association (Para 10, 10.1, 10.2 and 103 and Para 32). **(Page 98 of the Award)**

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- … … It is true that there cannot be an estoppel against a statute but in the absence of a statutory bar, the parties are bound by the terms of the agreement and no party is permitted to resile from its conditions particularly when the contract has been given effect to and the party has taken advantage under it. A party is estopped to urge that it was not bound by the terms of the contract when upon its assurances and actions, the other party has changed its position, which it would not have done, in the absence of such assurances and undertakings. **(Page 98 of the Award)**
- … … I have no doubt in my mind that the Joint Venture Agreement is valid and binding on the parties including the incorporated company. The parties executing the Joint Venture Agreement and the incorporated Company, the MRL are bound by the terms and conditions of the said agreement. They are also entitled to the rights and bound by the obligations arising in terms of the said agreement. Issue No. 1 is thus decided accordingly. **(Page 99 of the Award)**
- … … All the terms and conditions of the JVA are legal, valid and binding on the parties including the MRL. **(Page 164 of the Award)**

4(iv)(c) d Another issue before the ld. Arbitrator was *whether the State was legally entitled to cancel the JVA & take consequential action?* (Page 17 of the Award) Learned Arbitrator held as under (relevant extracts):-

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- The terms and conditions of the JVA being legal and binding on the executants and the JVC, the Claimant No. 2 had the right, were entitled to cancel the Joint Venture Agreement and take consequential actions but only in accordance with Clause 10 of the JVA. Clause 10.1(i) contemplated the termination after service of notice in writing to the other party under the circumstances specified in sub-clause (a) thereof. It has been conceded that no notice in terms of the aforesaid clause of the JVA was ever served upon the Claimant No.1. A perusal of Annexure 'N', Page 331 of Vol. II-B would indicate that except Para 1, Claimant No. 2 is shown to have exercised the powers under sub-clause (a) of Clause 10 of the JVA. Without service of notice to the EIH, the State Government could not have terminated the JVA on the grounds mentioned in Paras 2 to 5 in its notice of termination dated 6th of March, 2002. **(Page 111 of the Award)**
- The non-completion of the building and failure on the part of Claimant No. 1 in making the hotel 'fully commercially operational' on or before 3rd of May, 2000 conferred a right upon Claimant No. 2 to terminate the JVA and take consequential action. However, admittedly the State of H.P. opted not to take any action of termination of the JVA despite the failure of Claimant No. 1 to comply with the condition regarding completion of the Hotel and making it fully commercially operational within the time specified under the first part of Article 10 of the JVA.

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While exercising its powers under Article 10.1(b), the State of H.P. vide its notice dated 6th of March, 2002, has terminated the JVA with effect from 30th of October, 2001. The action has been taken on the ground that even within the extended period of two years, the Claimant No. 1 had not made the hotel fully commercially operational. **(Page 116 of the Award)**

- I have no doubt in my mind that if the period of six years has to be counted with effect from 30th of October, 1995, the action of the State was legal, valid and binding and no fault could be found in it. I am, however, of the opinion that though technically speaking, the State could have counted the period of six years in terms of Article 8.1 of the JVA, yet the intention of the parties is apparent that in case of failure of Claimant No. 1 to complete the construction within four years, the State had agreed to give it two years extension in the discretion of the Government and subject to payment of the penalty, as contemplated in the said Article of the agreement. **(Page 117 of the Award)**
- Taking the JVA and all accompanying documents together, I have come to the conclusion that the JVA could be terminated only on 3rd of May, 2002 if by that time Claimant No. 1 had not made the hotel fully commercially operational and also failed to pay the amount of penalty, as mutually agreed in terms of the agreement executed on 30th of October, 1995 and as held by this tribunal to be binding on the executants and the incorporated company. In view of this finding

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the order of termination dated 6th of March, 2003 cannot be held to be legal on the ground of being a premature action. Similarly, the consequential action by way of resumption, the Board Resolution and the orders dated 7th of March, 2002 are also held to be not legal and binding upon Claimant No. 1. It is further held that such orders shall not affect the rights of Claimant No. 1. **(Pages 117 & 118 of the Award)**

- It is, therefore, held that neither the construction of the Hotel was complete nor the hotel had been made fully commercially operational before 3rd of May, 2002. The Claimant No. 2 had therefore every right to terminate the JVA and take consequential actions thereafter. They are entitled to take all such actions as they had undertaken on 7th of March, 2002, which were challenged before the Company Law Board. **(Page 121 of the Award)**
- This Tribunal, therefore, finds that the Claimant No. 2 was legally entitled to cancel the Joint Venture Agreement and take consequential actions but that could be done only after 3rd of May, 2002. As already noticed the action of terminating the JVA having been taken on 6th of March, 2002 the same cannot be upheld and is liable to be set aside. Therefore, the Resolution of the Board and the directions issued on 7th of March, 2002 in consequence of illegal termination cannot be upheld. It is further held that the Claimant No. 2 has the right to terminate the JVA in terms of Article 10(i)(b) on any date after 3rd of May, 2002 and take appropriate

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consequential action as permitted under the agreements and the law. **(Page 122 of the Award)**

- It appears that the Claimant No. 2 itself was conscious of the premature action on 6th of March, 2002. Despite asserting that its action was valid, legal and according to law, it pleaded that, "if for any procedural deficiency or lacuna or for any other reason, action taken by the State is not upheld as valid, it is prayed that the State may be permitted to overcome the same or follow the procedure afresh as required or another procedure that may be advised as more suitable and available".

  To resolve the controversy between the parties I have come to the conclusion that in view of the findings returned on Issue No. 1 and this Issue, the JVA may be declared to have been terminated under Clause 10(i)(b) on a date subsequent to 06.03.2002 subject to the conditions and limitations prescribed by this award. To avoid further litigation between the parties and keeping in mind the broad powers conferred by the High Court and the parties on this Tribunal, the JVA is declared to have been terminated with effect from 17.12.2003, the date of the order of the High Court by which the disputes between the parties were referred to this Arbitral Tribunal and the Hotel made fully commercially operational. The termination of the JVA shall, however, be subject to the other directions to be given while deciding other Issues particularly Issue No. 14 and other conditions of the award.

  (Pages 122 & 123 of the Award)

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In conjunction with above, ld. Arbitrator further held as under on issue No. 14 (Page 17 of the Award) which was: *"Whether the Partnership between the parties is not workable and if so, how the same can be terminated or dissolved and what relief can be granted to the parties? O.P.Parties"*:-

> "I have indicated hereinabove some of the circumstances highlighted by the parties to accuse each other of being guilty to violate the terms of the JVA, other agreements, Memorandum and Articles of Association and provisions of the Companies Act only for the limited purpose to satisfy myself that actually and factually the faith amongst the parties have broken and despite direction for taking some confidence building measures, there is no possibility of revival of the original position, faith and continuation of the JVA for carrying on the business of the Hotel 'WildFlower Hall'. There is no way left, except to terminate and dissolve the JVA between the parties.
>
> As to what relief can be granted to the parties and what future arrangement can be made, has to be worked out on the basis of the record, the intentions of the parties, and keeping in mind the purpose and object of the Joint Venture Agreement. It has also to be kept in view that after the WildFlower Hotel has come into existence and made fully commercially operational, no useful purpose would be served by its closure or demolition. The alleged liabilities of the MRL incurred by the EIH in the form of loans etc. can also be not lost sight of." **(Page 153 of the Award)**
>
> … …
>
> "In this view of the matter, I have come to this conclusion that after termination of the JVA, the Claimant No. 1 (EIH) be permitted to continue the MRL with all its rights and liabilities, the land being retained by it on the lease hold basis. I am further of the view that

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the State of Himachal Pradesh, Claimant No. 2 should facilitate transfer of all its shares to Claimant No. 1 on payment of a consolidated sum of Rs. 12 Crores which includes the cost of land being Rs. 7.5 Crores, the penalty amount agreed in terms of Clause 10.1(b) of the JVA reduced to Rs. 3.5 Crores and a sum of Rs. 1 Crore as consolidated amount for the user of the land from termination of the JVA with effect from 17.12.2003 till the date of this award. The lease shall be initially for a period of 40 years from the date of this award, renewable thereafter with the consent of the parties upon conditions mutually agreed for such periods and rent as may be agreed from time to time. In case of disagreement regarding the fixation of rent, the party in possession and running the business of the Hotel and the State of H.P. shall refer the matter to the Court as defined in Section 2(e) of the Arbitration and Conciliation Act, 1996. Upon reference, the Court after hearing the parties shall determine the rate of rent for the period agreed to be extended. Such determination shall be finalized by the Court within a period of one month. The lease rent for the first five years shall be Rs. 1.25 Crores annually; for sixth to tenth year Rs. 1.50 Crores annually; for eleventh to fifteenth year Rs. 1.75 Crores annually; for sixteenth to twentieth year Rs. 2 Crores annually; for twenty-first to twenty-fifth year Rs. 2.30 Crores annually; for twenty-sixth to thirtieth year Rs. 2.75 Crores annually; for thirty-first to thirty-fifth year Rs. 3.40 Crores annually; for thirty-sixth to fortieth year Rs. 4 Crores annually. The lease rent has been determined keeping in mind the offer of Claimant No. 1 made to the State of Himachal Pradesh at the initial stage, which is on much lower side than the rate of lease offered by M/s Holiday Inn Hotel Pvt. Ltd.

From the date of the award and transfer of shares to Claimant No. 1, the Claimant No. 2 shall have no right and liability in the MRL, except to the extent of the right of a lessor in the land. Further, Claimant No. 1 shall be entitled to all the rights and subject to liabilities with respect to the MRL and the State shall

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provide all facilities for properly running the Hotel by Claimant No. 1 in accordance with law. **In case Claimant No. 1 does not perform its part of duties under this award within a period of 3 months from the date of the award, the Resolution of the Board of Directors and the Government decision taken on 07-03-2002 shall stand revived at the option of Claimant No. 2 and be executed by it as if a fresh decision and action has been taken consequent upon the determination of the JVA. In such an eventuality the rights and liabilities of the parties shall be determined on the basis of inspection of the accounts of the MRL in light of the JVA and other agreements and this award by a reputed concern of Chartered Accountants to be nominated by the High Court. Pending determination and the settlement of accounts, the Claimant No. 2 shall be entitled to take possession and run the "WildFlower Hall Hotel".**" **(Pages 155 & 156 of the Award)**

4(iv)(c) e. It remains a fact that the JVA provided that if default/breach is due to EIH's not performing its obligations with regard to technical services or making the hotel fully commercially operational within the stipulated timeframe then the JVA shall stand automatically terminated and State shall acquire shares of JVC held by EIH on payment of ₹10/- as agreed consideration for technical services plus 50% of the face value of equity shares held by EIH. Separate Shareholders Agreement, Articles of Association, Allotment Agreement were executed by the parties containing identical clauses.

It also remains a fact that State terminated the JVA on 06.03.2002 alleging breach of terms of JVA by EIH. Subsequent to Government's decision to terminate JVA on 06.03.2002, the Board

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Resolution was passed on 07.03.2002 to resume the property, to take over the JVC & for forfeiting EIH's shares in MRL in favour of State. The EIH challenged these decisions before the Court. All disputes were referred to the learned sole Arbitrator. EIH also questioned before the learned Arbitrator validity of some of the provisions of the JVA.

Learned Arbitrator passed the Award on 23.07.2005. The Award held the provisions of JVA including compulsory acquisition of EIH's shares upon breach of JVA to be legal & binding on all parties including EIH & MRL. Learned Arbitrator observed that under notice dated 06.03.2002, the State had terminated the JVA w.e.f. 30.10.2001 but held that JVA could be terminated only after 03.05.2002. In view of this finding the order of termination dated 06.03.2002 was held to be illegal on ground of being a premature action. For the same reason, consequential actions by way of resumption, Board Resolution dated 07.03.2002 were also held as illegal. The Arbitrator however also held that State had the right to terminate the JVA in terms of Article 10(i)(b) on any date after 03.05.2002 and take appropriate consequential action as permitted under the agreements & the law. For resolving the controversy & the dispute and keeping in view the terms of reference, ld. Arbitrator declared the JVA to have been terminated under Clause 10(i)(b) on a date subsequent to 06.03.2002 i.e. with effect from 17.12.2003 – the date when the dispute was referred to the ld. Arbitrator. In relation to above, following directions

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in the Award under Issue No. 16 specifically dealing with the aforesaid subject become relevant:-

> "(1) that all the terms and conditions of the JVA are legal, valid and binding on the parties to these proceedings including the MRL;
>
> (2) that the Claimant No. 2 was legally entitled to cancel the Joint Venture Agreement and take consequential actions but only after 03.05.2002;
>
> (3) that action of the Claimant No. 2 of terminating the JVA on 04.03.2002 and conveying its decision to Claimant No. 1 on 06.03.2002 vide Annexure 'N' page 331, Vol.II-B is not sustainable and is liable to be set aside;
>
> (4) that the JVA is declared to have been terminated with effect from 17.12.2003. The termination of the JVA shall be subject to the directions given while deciding Issue No. 14 that the Claimant No. 1 shall continue to hold and possess the property of the MRL upon executing a lease deed in favour of Claimant No. 2 on the terms and conditions as specified while deciding Issue No. 14;" **(Pages 164 & 165 of the Award)**

The modalities of lease rent payable by EIH as worked out in the Award have already been extracted at page 36-37 of this judgment. In this scenario, it was the State which had to transfer all its shares to EIH. The above option as given by the learned Arbitrator to EIH was to remain valid for a period of three months from the date of Award (or the date the Award became final).

For resolving the dispute, ld. Arbitrator further directed:-

> "(5) that upon the execution of the lease deed in its favor, the Claimant No. 2 shall transfer all its shares in favour of Claimant No. 1 or its nominee/nominees. The Claimant No. 2 shall also

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facilitate the transfer of shares under the provisions of the Companies Act;

(6) **that in case the lease deed is not executed as per award, the Resolution and orders passed by Claimant No. 2 on 07.03.2002 shall be deemed to have been revived and passed afresh in the discretion of Claimant No. 2 to be executable against Claimant No. 1 without any further delay**;

… … …

(9) that in case the Claimant No. 1 decides not to obey the conditions of this award, the Claimant No. 2 shall be entitled to take immediate possession and management of the Hotel. The disputed accounts of the MRL shall be settled by the reputed Chartered Accountants to be appointed by the High Court. Non-settlement of accounts would not disentitle the Claimant No. 2 to take possession and management of the Hotel;"

(Pages 165 & 166 of the Award)

It is a fact that the EIH did not choose the option provided by the ld. Arbitrator i.e. to continue the JVC with all its rights & liabilities, to retain the land on lease hold basis subject to the condition that it will execute the lease deed within three months from the date of Award. The Award clearly mandated that in case the lease deed was not executed by EIH as per Award, the termination Order dated 06.03.2002 & Board Resolution dated 07.03.2002 would be deemed to have been revived and passed afresh on the discretion of the State to be executable against EIH. Admittedly, the Award has attained finality. Objections filed against it under Section 34 of the Act were dismissed on 25.02.2016 & Appeal under Section 37 was also dismissed on 13.10.2022. While dismissing the Arbitration Appeal preferred by EIH, it was *inter alia* held that:-

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> "65. Arbitration is an adjudicatory process whereunder Arbitrator is not called to give merely an opinion, rather he renders a decision on a given issue termed as Award which is enforceable as a decree."
>
> … …
>
> "77. Alternatively, the learned Sole Arbitrator also formulated an alternate award (at page 220) wherein it has been provided that in the event EIH fails to abide by the leasehold arrangement prescribed in the award (at page 219), the Board Resolution dated 07.03.2002 would revive and the consequences of termination as prescribed in Clause 11 of the JVA would follow. Therefore, at the very least, the alternative award cannot be said to be in the teeth of the JVA. If EIH chooses to treat the Arbitrator's leasehold arrangement as merely a suggestion and disregards the same, then the alternative award would be applicable. In such a case also, EIH cannot raise a grievance that the award is in derogation of the contractual terms."

Further the Executing Court further passed order in the Execution Petitions on 17.11.2023 holding that EIH had defaulted in facilitating execution of lease deed within three months from the date the Arbitral Award became final and directed the parties to show consequent compliances in terms of Award as under:-

> "28. The second part of the award i.e. the payment of consolidated amount of Rs. 12 Crores by claimant No. 1 to claimant No. 2 and the obligation of claimant No. 2 to transfer shares in favour of the claimant No. 1, it is clearly mentioned in Clause-V of the award, more particularly, findings on issue No. 16 that the claimant No. 2 has been obligated to transfer all its shares in favour of claimant No. 1 or its nominee/nominees upon execution of the lease deed. As held above, the formality of execution of lease deed is *sine qua non* for claimant No. 2 to

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perform its obligation transferring the shares in favour of claimant No. 1, whereas such formality cannot be considered to inure to the benefit of claimant No. 1 with respect to its liability to pay lease money w.e.f. the date of award. While reading the findings of learned Arbitrator on issues No. 14 and 16 harmoniously, their remains no doubt that the State of Himachal Pradesh has been further obligated to transfer its shares to claimant No. 1 on payment of consolidated sum of Rs. 12 Crores, which again means that the payment of Rs. 12 Crores is *sine qua non* for claimant No. 2 to transfer its shares in favour of the claimant No.1. This part of the award has also not been implemented by claimant No. 1 within the stipulated period of three months, thereafter, the amount of Rs. 12 Crores payable by claimant No. 1 to claimant No. 2 will also entail the liability of interest under Section 31(7)(b) of the Arbitration and Conciliation Act, 1966.

… … …

35. Since, the award grants right to the State to resume and take possession of the property immediately on non-compliance of the obligation by claimant No. 1 within the stipulated period and such option has been reserved in favour of claimant No. 2, it is for claimant No. 2 to decide on its option and in case it so desires, it is free to resume and take possession of the property immediately. In case the State Government does not choose to avail such option, the claimant No. 1 is to take steps with respect to cancellation of conveyance deed dated 06.02.1997 and up-dation of revenue records of rights and thereafter to immediately take steps for execution of lease deed.

36. In light of what has been held above, the prayers made by claimant No. 1 in the execution petitions are pre-mature. Claimant No. 1 is also to deposit the sum of Rs. 12 Crores with interest @ 18% simple per annum from the date of passing of the award. Similarly, it is liable to pay lease rent to claimant No. 2 w.e.f. the date of award with proportionate interest @ 18 % per annum thereon. On execution of the lease deed and payment of amount

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due, claimant No. 2 shall transfer its shares in favour of claimant No. 1 and shall also facilitate such transfer under the Companies Act.

37. The objections of the parties are decided accordingly. All objections of claimant No. 1 except objection as to claim of compound interest, are rejected.

38. In the first instance, the parties to show their respective compliances as under:-

(i) Claimant No.2 to reveal its option whether State of H.P. intends to resume the property by taking its possession in terms of the Award.

(ii) Claimant No.1 to provide a time schedule for execution of cancellation deed for cancellation of conveyance deed dated 6.2.1997 and for further execution of lease deed in terms of the Award.

(iii) Claimant No.1 and Claimant No.2 will provide their respective calculations in respect of the sum(s) payable under the Award by Claimant No.1 to Claimant No.2 alongwith simple interest @ 18% per annum thereon."

In sequel to above, State moved OMP No. 612 of 2023 on 07.12.2023 in these Execution Petitions communicating its option for resuming the property and prayed for issuance of warrants of possession. An order was passed in this application on 05.01.2024 holding that EIH had failed to comply with terms of Award within 03 months from the date it attained finality i.e. 13.10.2022, consequently, the Board of Directors resolution and Government decision dated 07.03.2002 have automatically revived and are to be executed against EIH. Two months time was given to EIH to handover physical possession of the property to the State:-

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"19. The award dated 23.07.2005 had bound the non-applicants to comply with the terms of the award within a period of 3 months from the date of its passing. In case, the non-applicants complied with the terms stipulated in the award within the aforesaid period of 3 months, the EIH Limited was made entitled to hold and possess the property of the MRL upon executing a lease deed in favour of the claimant No. 2 i.e. the State of H.P on the terms and conditions as specified while deciding issue No. 14 Learned Arbitrator had made a clear reference that in case the claimant did not perform its part of the duties under this award within a period of 3 months from the date of award the consequences as noticed by the learned Arbitrator would follow, which included :-

i) The automatic revival of resolution of Board of Directors and government decision dated 07.03.2002.

ii) The rights and liability of the parties to be determined on the basis of inspection of the accounts of the MRL in light of the JVS and other agreements and the award by a reputed concern of Chartered Accountants to be nominated by this Court.

iii) The right of claimant No. 2 i.e. the State of Himachal Pradesh to take decision and resume the 'Wild Flower Hall Hotel', pending determination and settlement of accounts.

20. Clause-6 of the findings recorded by learned Arbitrator while deciding issue No. 16 also clearly provided that in case the lease deed was not executed as per award, the resolution and orders passed by State of Himachal Pradesh on 07.03.2002 would be deemed to have revived and passed afresh in the discretion of Claimant No. 2 i.e. the State of H.P. to be executable against Claimant No. 1 i..e non applicants, without any further delay.

… …

25. It will not be out of place to notice that the award was passed as far back as on 13.10.2022 (SIC 23.07.2005). The finality to the award was deferred till lapse of period of about 17 years. The delay, indisputably, had occurred on account of rights

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exercised by non-applicants by taking recourse of Section 34 and 37 of the Arbitration and Conciliation, Act, 1996. As per award, non-applicants were required to take action within the stipulated period and not to show their willingness only. Learned Arbitrator had passed the award with an intent to close all the disputes between the parties at the earliest, which incidentally could not happen on account of aforesaid reasons.

26. Learned Arbitrator, in the award had fixed a period of 3 months for non-applicants to perform their part of obligation under the award, whereas no such period was prescribed for State of Himachal Pradesh. In this background, non-applicants could not justifiably interpret or see the terms of award in any other way but by way of execution of lease deed.

27. In light of above discussion, it is held that non-applicants have failed to comply with the terms of award within the period of 3 months from the date it attained finality i.e. 13.10.2022. Consequently, the Board of Directors resolution and Government decision dated 07.02.2002 have automatically revived. The State of Himachal Pradesh has become entitled to take possession and management of the 'Wild Flower Hall Hotel' alongwith entire property that was subject matter of the JVA.

28. The non-applicants/execution petitioners in Ext. Pet. No. 05 of 2023, are directed to vacate the entire property that was subject matter of JVA and handover vacant and peaceful possession thereof to the State of Himachal Pradesh within a period of two months from the date of passing of this order.

29. Parties are further called upon to give their preferences for appointment of reputed chartered Accountants for settlement of disputed accounts of the MRL in terms of the award dated 23.07.2005, passed by learned Arbitrator.**"**

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The above orders were not interfered with by the Hon'ble Apex Court save & except the date of handing over of possession of premises was extended up to 31.03.2025.

The propositions put forth for EIH about provisions of JVA being unconstitutional, contrary to provisions of Indian Contract Act, do not at all apply to the facts governing the case. Learned Arbitrator has held the JVA to be binding upon all the parties. The law cited for the EIH does not get attracted to the present case.

EIH's stance that Award is silent on the value of its shares to be acquired by the State, is also not correct. There remains no doubt that ld. Arbitrator in his capacity as Arbitrator had not just declared the State's order dated 06.03.2002 & Board Resolution dated 07.03.2002 terminating the JVA as illegal being premature having been issued prior to 06.05.2002 but had also declared that same were to be treated to have been issued on 17.12.2003. Despite this finding, still an option was given to EIH by the learned Arbitrator to overcome this declaration, by exercising lease holds right over the JV property within three months from the date of Award/date when the Award attained finality (refer order dated 05.01.2024). Had this option been resorted to by EIH, the State was to facilitate the transfer of its shares in MRL to EIH in lieu of cumulative payment of ₹12 Crores by EIH i.e. ₹7.5 Crores (value of State's shares on the basis of cost of land contributed by the State in the Joint Venture) + ₹3.5 Crores (delay penalty) + 1 Crore (usage charges from 17.12.2003 till

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23.07.2005). But this option was not exercised by EIH. The consequence thereof, has also been provided in the Award, that being revival of Government decision & Board Resolution dated 06.03.2002/07.03.2002 by treating them as having been passed afresh at the discretion of the State. The Board Resolution passed on 07.03.2002 confirms the State decision to terminate the JVA on 06.03.2002 as also the consequences thereof stipulated therein. Undeniably, State had exercised its discretion afresh on 07.12.2023. Fresh exercise of discretion by the State on 07.12.2023 revived the Board Resolution dated 07.03.2002 and consequently Government decision dated 06.03.2002 as also the mode & mechanism for transfer of shares held by EIH in favour of the State including consideration thereof i.e. 50% of their face value plus ₹10/- as stipulated in the aforesaid decision/order/resolution which in turn was based upon provisions of the JVA & other ancillary agreements. In view of settled facts that have travelled long time, it is beyond the domain of the Executing Court to now examine the validity of JVA or to modify the Arbitral Award which has become final or to take a view different from the view taken on 17.12.2023 & & 5.12.2024 which has become conclusive. The Award has settled the issue of quantum of consideration for transfer of EIH's share in MRL to the State government. There is no ambiguity in the Award on this score.

4(iv)(d) Result of above discussion is that share transfer has to be in accordance with Government decision dated 06.03.2002 & Board

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Resolution dated 07.03.2002 which in turn are based upon Articles 10 & 11 of JVA. Prayer of the State is, therefore, accepted. It is held that shares held by EIH in JVC are to be transferred to State as per Government decision dated 06.03.2002 & Board Resolution dated 07.03.2002. Accounts to be reconciled by the Chartered Accountant.

4(v) Prayer Nos. v) & vi) as made by applicant/State read as under:-

> "v) direct that all sums deposited by the EIH/MRL with the Registrar General of this Hon'ble Court from the bank accounts of MRL be reverted/returned to MRL forthwith;
>
> vi) direct Respondent/EIH Ltd./MRL to restore in the MRL designated bank accounts 30% of the tariff receipts with respect to 57 rooms of the hotel in terms of the order dated 17.12.2003 passed by this Hon'ble Court;"

4(v)(a) According to the applicant/State, it having become sole owner of the JVC-MRL in terms of Arbitral Award, all assets & revenues belonging to the JVC-MRL as on the date of taking over i.e. 07.12.2023 would automatically belong to the State. The State has accordingly claimed ₹138.82 Crores deposited by MRL as 30% of the tariff generated & deposited in account of JVC in terms of reference order passed by the Court on 17.12.2003.

4(v)(b). Non-applicant/EIH's stand on State's claim of revenue is that:- (i) State has already claimed 'user fee' from EIH under prayer No. iii). The EIH is ready & willing to pay such user fee; (ii) It is EIH that had been in possession, user and operation of the property. A necessary corollary of using & possessing the Hotel/Joint Venture Property during

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the period & paying user fee to the State will be that only EIH is entitled to the revenue as it is the EIH that has been running & managing the hotel; (iii) Tariff receipts are revenues generated from the property by EIH through its possession & operation of the property. Consequently all revenues generated by the hotel from the date of Award till handover, accrue to EIH & are required to be credited to EIH's accounts; (iv) In case cut-off date for purpose of reconciliation of disputed accounts of MRL is taken as 07.12.2023, EIH having remained in de-facto possession & management of the hotel from the date of Award 23.07.2005 till 07.12.2023, is entitled to the revenue earned from use of hotel during the period subject to payment of 'user fee'; (v) Alternatively & without prejudice to above, in case MRL is held to be in possession of property during *pendente lite* period, the aforesaid revenue be ordered to be split up between shareholders in terms of their respective shareholding in MRL.

For the foregoing, EIH submitted that ₹139 Crores (₹138.82 Crores) deposited by MRL as 30% of the revenue receipt in A/C No. 277050003541 in Punjab National Bank under reference order of Court dated 17.12.2003 are liable to be refunded to EIH.

Consideration

4(v)(c) The cut-off date for settling the disputed account of MRL-JVC

a. Arbitral Award was passed on 23.07.2005. Section 34 petition preferred against it was dismissed on 25.02.2016. Appeal filed

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under Section 37 of the Act was dismissed on 13.10.2022. Arbitral Award was not challenged any further and became final. In the order dated 17.11.2023, passed in the execution petitions, the Court directed the State as under to reveal its option as to whether it intended to resume the property by taking its possession in terms of the Award:-

> "22. Noticeably, in the award, learned Arbitrator has fixed a period of three months for claimant No. 1 to perform its part of the obligation under the award, whereas no such period has been prescribed for claimant No. 2. This observation is being made only in the context of dissipating the doubts, if any, entertained by the parties regarding the sequence in which the parties were under direction to perform their respective obligations.
>
> … … …
>
> 25. It is also clear term of the award that on failure of claimant No. 1 to perform its part of the obligation under award within stipulated period, the State shall have the right at its option to resume the property in question pending fulfilment of all other obligations under the award. It being so, it would always be in the interest of claimant No. 1 to get the necessary formality completed in order to continue with its lease hold rights unless the said claimant thinks otherwise.
>
> … … …
>
> 35. Since, the award grants right to the State to resume and take possession of the property immediately on non-compliance of the obligation by claimant No. 1 within the stipulated period and such option has been reserved in favour of claimant No. 2, it is for claimant No. 2 to decide on its option and in case it so desires, it is free to resume and take possession of the property immediately. In case the State Government does not choose to avail such option, the claimant No. 1 is to take steps with respect to cancellation of conveyance deed dated 06.02.1997 and up-

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> dation of revenue records of rights and thereafter to immediately take steps for execution of lease deed.
>
> … … …
>
> 38. In the first instance, the parties to show their respective compliances as under:-
>
> (i) Claimant No.2 to reveal its option whether State of H.P. intends to resume the property by taking its possession in terms of the Award." … …

Pursuant to the above direction, the State moved OMP No. 612 of 2023 on 07.12.2023 for resuming the property in terms of the Award.

b. Vide order dated 05.01.2024 passed in the execution petitions the Court held that: EIH had failed to exercise option for getting leasehold rights over the Joint Venture Property in terms of Award within three months from the date it attained finality i.e. 13.10.2022; Consequently Board of Directors resolution & Government decision dated 07.03.2002 have revived automatically; State is entitled to resume the property as per Award. (Order extracted at page 45 of this judgment)

c. Since the option for resuming the property was exercised by the State on 07.12.2023 by moving OMP No. 612 of 2023, therefore, it is this date which will be crucial & material for settling the accounts. EIH's contention that cut-off date for settling of accounts would be 31.03.2025 is without any merit. This plea has been forwarded by EIH as the Hon'ble Apex Court while dismissing Special Leave Petitions on 20.02.2024 against orders dated 17.11.2023 & 05.01.2024 had allowed EIH to retain

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possession of the premises till 31.03.2025. However, the fact remains that EIH was merely granted some time by the Hon'ble Supreme Court for vacating and handing over the possession of joint venture property to the State. The orders dated 17.11.2023 & 05.01.2024 passed by the Executing Court were not interfered with by the Hon'ble Apex Court. Under the circumstances, cut-off date for settling the disputed accounts of MRL has to be taken as 07.12.2023 i.e. when State exercised option to resume the property.

4(v)(d) Revenue for the period in question.

While referring the dispute to the ld. Arbitrator under order dated 17.12.2003, following directions were also issued:-

> "Until the passing of the arbitral award by the learned arbitral Tribunal, we direct that it shall be open to the petitioners to open/start and use all the remaining 57 rooms of the hotel. This permission, however, is provisional and tentative in the manner that it shall abide by the arbitral award and be subject to the decision/result of the Arbitration proceedings and the ultimate result of the litigation and all the consequences that would ultimately follow. We also direct that the petitioners shall, from now onwards until the culmination of the arbitration proceedings communicate to respondent No. 1 on quarterly basis, a statement including the statement of accounts, with respect to the occupancy of rooms in the hotel and the details of the tariff charged. We also direct that the petitioners shall ensure that with respect to the aforesaid 57 rooms, a minimum of 30% of the tariff receipts, received by the petitioners, is always kept in deposit in a Nationalised Bank."

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Besides referring the dispute to the learned Arbitrator on 17.12.2003, the Court had permitted the use of 57 rooms with direction to EIH/MRL to deposit 30% revenue generated from such use to be kept in a Nationalized Bank pending adjudication of arbitration proceedings. EIH was also to communicate to State on quarterly basis a statement of accounts relating to occupancy of rooms & tariff charged.

It is an admitted position that in compliance to above directions, MRL has over the period deposited an amount of ₹138.82 Crores in Punjab National Bank towards 30% receipts from tariff. State claims this revenue. Right from its inception, the JVC-MRL has been managed by the Board of Directors as a Joint Venture Company. There was a dispute between joint venture parties which was resolved under the Arbitral Award announced on 23.07.2005 that remained under challenge till 13.10.2022. EIH's assertion of it being in possession of joint venture property all along more specifically during *pendente lite* period, will not take away the rights of MRL over the tariffs/revenue generated by the use of joint venture property and consequently of the State on its becoming sole owner thereof. It was JVC-MRL and not EIH that was in possession of the property. State had admittedly not received any revenue from the use of joint venture property. State's claiming an improper and wrong relief of 'user fee' from EIH in the application and justly abandoning the same in the rejoinder & during hearing of the application will not give any leverage to EIH to contend that State is bound by its plea to accept 'user fee' so

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that EIH gets to retain the revenue generated by the use of joint venture property. In the given facts, State had the right to surrender its plea of 'user fee' as it was neither the EIH nor the State but MRL-the Joint Venture Company that was in possession of the joint venture property. In fact, while dismissing the Arbitration appeal filed by EIH, the Court had held that the hotel was being run by MRL – a separate legal entity. That being the factual & legal position, question of paying 'user fee' by EIH to MRL/State to enable EIH to retain the revenues earned by use of joint venture property does not arise. The amount that has come from MRL is not to be returned to EIH. EIH being a shareholder cannot claim the revenue of MRL – a separate legal entity (Reference: *Bacha Guzdar vs. Commissioner of Income Tax, Bombay*[17]. The revenue belonging to MRL is to remain with MRL and is not divisible between shareholders in proportion to their shareholding. *Banwari Lal*[2] has no application to the facts of the case as claimed by EIH. The revenue of approx. ₹ 139 Crores lying in Punjab National Bank is essentially revenue of MRL. It has to go into the account of MRL. It is an asset of MRL. It has to revert to State on State's taking over the JVC-MRL as it is the State which has become sole owner of 100% shareholding of MRL as a going concern with all its assets & revenues. EIH's claim of management fee for the period 07.12.2023 is also not tenable as it was MRL Board that was managing the joint venture property.

[17] (1954) 2 SCC 563

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4(v)(e) Refund of advance of ₹ 136 Crores to EIH.

a. The above is a claim set up by EIH. According to EIH: It had provided monetary advance to MRL from Financial Year (FY) 2000 – 01 up to FY 2011 – 12 totalling ₹136,19,25,457/- as on 31.03.2012 towards allotment of equity shares in MRL to EIH; These advances were categorized as 'Advance against Equity' in MRL's books of accounts but MRL did not issue equity shares in favour of EIH; The amount has not been repaid by MRL. It is an outstanding liability in MRL's financial records as on 31.03.2024. This amount therefore constitutes a loan and is a liability of MRL to EIH. The amount is required to be paid to EIH with applicable interest. As per reply, an amount of ₹136,19,25,457/- plus ₹422,52,97,319/- as interest @ 18% p.a. or in other words total of ₹558,72,22,776/- has been claimed by EIH. Reliance in support of prayer was placed upon *Reserve Bank of India vs. Bank of Credit and Commerce International (Overseas) Ltd. & ors.*[18]*; Bhajan Singh Samra vs. Wimpy International Ltd.*[19]*; Chowringee Sales Bureau (P) Ltd. vs. C.I.T. West Bengal*[20]*.*

b. According to the State:

- Government nominee directors in MRL have consistently recorded their dissent on advance made by EIH against share capital.

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[18] (1993) 78 Company cases 230
[19] 2011 (185) DLT 428
[20] (1973) 1 SCC 46

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- There was no Board approval or agreement to support the advance. EIH voluntarily deposited the amount abusing its majority shareholding in MRL with intention to defraud State by reducing its shareholding in MRL in order to usurp State's invaluable property.
- The amount claimed as advance against share capital is exaggerated & unverified. This disputed amount is required to be verified by Chartered Accountant.
- 'Advance against Equity' was brought in by EIH dishonestly to dilute shareholding of applicant/State for throwing it out of Joint Venture making mockery of the Joint Venture.
- There has never been any interest provision/contingent provision in this regard.
- In the Audited Balance Sheet of MRL for FY 2022 – 23, amount of ₹136.9 Crores has been disclosed under the head 'Equity'. Also as per Note 17 of the Balance Sheet *"… … amounts received in previous years from EIH Limited, the holding company, amounting to INR 1,361.91 million continue to be recorded as "Advance towards equity" as the Company intends to issue shares against the said advances without allotment till the date of actual transfer of the shares"*.

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- The Audited Balance Sheet of FY 2022-23 does not reflect the amount of ₹136.9 Crores as 'liability'. But EIH attempted to change nomenclature of this amount to 'liability' in the Balance Sheet of FY 2023-2024 after the dismissal of its Special Leave Petitions.
- Schedule III of the Companies Act makes it mandatory for companies to disclose their liabilities including contingent ones as per prescribed disclosure requirements. Rule 16 of the Companies (Acceptance of Deposit) Rules, 2014 makes it mandatory for all Companies to file details of deposits accepted and particulars of receipt of money or loan by a Company not considered as deposits in prescribed Form DPT-3. The JV Company-MRL has never disclosed the said amount as loan. The amount of ₹136.9 Crores was voluntarily given and shown as advance over the years to reduce State's share holding in JVC in violation of JVA. Neither the amount is in form of any loan or liability nor there was any agreement or condition of interest or intention to charge interest on this amount. Interest cannot be claimed on this amount.
- EIH had been attempting to hold a board meeting of JVC with intention of approval of financial statements for quarter ending 31.03.2024 by dishonestly changing classification of

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'advance against equity' of ₹136 crores into 'liability' and showing contingent liability of ₹422 crores as interest on same.

c. Consideration

EIH claims refund of ₹136.9 Crores with 18% interest on the same quantified to ₹422 Crores. In the Balance Sheet of MRL as on 31.03.2023, ₹1361.93 million has been shown as 'Advance towards equity'. It is neither reflected as 'loan' nor as share application money. No loan agreement has been shown to have been executed between EIH & MRL. In 'Notes to Financial Statements', this amount is again reflected as 'Advance towards equity'. It is further recorded therein that *"As per the Arbitral Award, upon execution of the lease deed in respect of land and upon payment of the stipulated consideration, the Government of Himachal Pradesh is to facilitate transfer of all its shares to EIH Limited. Pending transfer of shares held by the Government of Himachal Pradesh in favour of EIH Limited pursuant to the settlement under the Arbitral Award, amounts received in previous years from EIH Limited, the holding company, amounting to INR 1,361.93 million (31st March 2022 – NIR 1,361.93 million) continue to be recorded as "Advance towards equity" as the Company intends to issue shares against the said advances without allotment till the date of actual transfer of the shares.[Refer note 3(ii)]"*.

In Audited Balance Sheet of MRL FY 2022-23 (Page 817 of paper book), subscribed paid-up capital of MRL is shown as ₹ 33 Crores

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(25999995 shares held by EIH & 7000000 by State). Neither any further shares have been shown to be issued nor any amount has been classified as Share Application Money.

The amount was not reflected as liability or loan. The submission made for the State carry weight that under the provisions of Companies Act, more particularly Schedule-III thereof, it is mandatory for the Companies to disclose all liabilities including contingent ones as per prescribed 'disclosure requirements'. Also under Rule 16 of the Companies (Acceptance of Deposit) Rules 2014, there is mandatory requirement for all Companies to file detail of deposits accepted & particulars of receipt of money or loan by a company not considered as deposit. EIH – a Company cannot be allowed to make submissions contrary to its own admission in the Audited Balance Sheet [Reference *Usha Rectifier Corporation (India) vs. Commissioner of Central Excise, New Delhi*[21]]. The JVC – MRL has never disclosed ₹136.9 Crores as loan in its accounts. No Board meeting/approval or any agreement has been shown to support this 'advance'. Admittedly no shares were issued against the said amount. It cannot be assumed that MRL accepted the money as share application money towards allotment of shares. The amount cannot be construed as a loan or liability. Since interest stipulation was not documented, *Bhajan Singh Samra* [16] had not allowed any interest. In *Reserve Bank of India*[15], Hon'ble Apex Court had allowed interest in case of *'Geeta Polymers Ltd.'* as the Board had authorized

[21] (2011) 11 SCC 571

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the Company to receive application for subscription after the company was authorized to issue equity shares. The prospectus issued by the Company provided for payment of interest on e the excess application money. However in *Reserve Bank of India*[15] claim of interest made by *'Varun Shipping Company'* was denied for want to any such stipulation In the instant case, there is no document to support claim of interest made by EIH. The amount voluntarily paid by EIH qualifies as equity as reflected in the Balance Sheet. Accordingly 50% of this amount is payable to EIH as per Clause 11 of the JVA. In the circumstances, there is no question of State refunding this amount with interest @18% as claimed by EIH. The Chartered Accountant will verify the quantum of above advanced amount.

Learned Senior Counsel for the applicant/State submitted that remaining prayers made in the application have been rendered infructuous as possession of joint venture property has been taken over by the State.

5. **The conclusions** drawn above are summed up as under:-

a) **Prayer No. i)**: The delay penalty and user of land charges from the date of termination of Joint Venture Agreement w.e.f. 17.12.2003 till the date of Arbitral Award i.e. 23.07.2005, with statutory interest @ 18% simple interest are payable by East India Hotels Limited (EIH). This liability has been discharged by EIH by depositing the amount in the Registry of this Court. The applicant/State is held entitled to this

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amount. The amount is to be reconciled by the Chartered Accountant.

b) **Prayer No. ii)**: The compounding charges are payable by the Joint Venture Company (JVC) – the Mashobra Resort Limited (MRL) and not EIH. The amount is to be reconciled by the Chartered Accountant.

c) **Prayer No. iii)**:Applicant/State of Himachal Pradesh has given up its claim of 'user fee on account of use of joint venture property from the date of Award till the date of its vacation & handing over'.

d) **Prayer No. iv)**:Entire shareholding of EIH in MRL is to be transferred to the applicant/State as per Government decision & Board Resolution dated 07.03.2002 i.e. @ ₹13,00,00,010/- to be paid by State to EIH. Accounts to be reconciled by Chartered Accountant.

e) **Prayer Nos. v) & vi)**:

i. The cut-off date for settling the disputed account of MRL is 07.12.2023.

ii. The amount deposited in the Punjab National Bank towards 30% receipts from tariff, will revert to MRL and consequently to the State, which has become sole owner of MRL as a going concern.

iii. The amount paid by EIH to MRL shall qualify as equity as reflected in its Audited Balance Sheet. 50% of this amount is payable to EIH. The Chartered Accountant to verify the quantum of the

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amount advanced by EIH to MRL and to reconcile the accounts.

Parties have not agreed upon name of Chartered Accountant. Hence, RSM International is appointed as Chartered Accountant to inspect and reconcile the accounts of MRL in light of observations made, conclusions drawn and directions issued in this judgment. The applicant/State to inform the said Company about this order. Both sides shall render meaningful cooperation to above Company in furtherance of above objective. The company through its authorized officer shall also be at liberty to inspect the record of the case vis-à-vis the amount deposited by the parties under different heads in the Registry of this Court, for the purpose of reconciliation of accounts. Fee of the Company shall be payable in equal shares by EIH & the State. Compliance Report by the aforesaid Chartered Accountant Company be placed before the Court on 14.07.2025.

List on 14.07.2025.

Jyotsna Rewal Dua,
Judge

June 02, 2025 **(PK)**

High Court of H.P.

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