

(2012) 05 BOM CK 0007

In the Bombay High Court

Case No : Appeal No. 513 of 2011, Arbitration Petition No. 209 of 2008 and Notice of Motion No. 2582 of 2011 and Notice of Motion No. 2847 Of 2011 in Appeal No. 513 of 2011 with Appeal (Lodging) No. 550 of 2011 in Arbitration PETITION No. 212 of 2008 with Notice of

Carol Info Services Limited, Wockhardt Towers, Bandra Kurla APPELLANT
Complex, Bandra (East), Mumbai 400051

Vs

State of Maharashtra RESPONDENT

Date of Decision : 11-05-2012

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Arbitration and Conciliation Act, 1996 — Section 34
Specific Relief Act, 1963 — Section 14(1), 20, 20(2), 9

Citation : (2012) 05 BOM CK 0007

Hon'ble Judges : Mohit S. Shah, C.J.;N.M. Jamdar, J

Bench : Division Bench

Advocate : Iqbal Chagla and Mr. F. De'vitre with Farhan Dubash and Karl Tamboly instructed by M/s. Harish Joshi and Co, for the Appellant; A.A. Kumbhakoni with Mr. L.M. Acharya and Geeta Shastry, AGP, for the Respondent

Judgement

Mohit S. Shah, Chief Justice

1. Appeal No.513 of 2011 is directed against the judgment and order dated 16 June 2011 of a learned Single Judge of this Court dismissing Arbitration Petition No.209 of 2008 of the appellant herein u/s 34 of the Arbitration & Conciliation Act, 1996 ('the Act'). In the said petition, the appellant had challenged the award dated 23 February 2008 of learned Arbitrator Mr.Justice V.P.Tipnis (Retd.). The other appeals are directed against orders passed in interlocutory applications. The appellant is a company incorporated under the provisions of Companies Act, 1956. The respondent-State of Maharashtra owns a building known as "New Gokuldas Tejpal Hospital" (hereinafter referred to as "G.T. Hospital" or "Hospital Building"). The respondent State also owns land near the said hospital building at Lokmanya Tilak Marg, Mumbai. The State Government

got constructed the said "G.T.Hospital" building of ground floor plus 12 floors with total built-up area of 2,53,645 sq.ft. by a contractor called M/s.Puri Construction.

2. The State Government decided to establish a super specialty hospital in that building. On 20 May 1999, the State Government floated a tender for commissioning of the said new G.T. Hospital as a State-of-Art super specialty hospital by way of formation of a Joint Venture Company ('JVC') in collaboration with a private sector partner. Pursuant to the said tender process, offer of the appellant was accepted on 18 May 2000 and a written agreement between the appellant and the State Government was entered into on 10 May 2001. The agreement provided that value of the project would be Rs.64.85 crores. The appellant was to have 51% share capital amounting to Rs.33.07 crores and the respondent State was to have 49% share capital amounting to Rs.31.78 crores. JVC was to have nine Directors, five of whom were to be nominated by the appellant and the remaining four were to be nominated by the State Government. The Chairman of JVC was to be nominated by the appellant. As per the agreement, the State was to be the owner of the hospital building and the land under it. However, it was to be given on lease to JVC for a period of thirty years. The State was to receive annual rent for the building and the land at Rs.One crore from JVC with an increase of 8% after every five years.

3. On 8 August 2001, the Memorandum and Articles of Association of JVC-Wockhardt Maharashtra Hospital Limited were formulated. The appellant and the respondent-State agreed to subscribe 25,500 and 24,500 shares respectively. On 20 August 2001, a Certificate of Incorporation of the JVC was issued. The Board of Directors of JVC was constituted and the meeting of the Board of Directors took place on 8 September 2001. The respondent-State executed a lease agreement in favour of JVC on 14 March 2002, but it was not lodged for registration. On account of differences between the parties, the respondent-State sent letter dated 12 September 2003 to the appellant terminating the agreement. Thereafter as per arbitration clause in agreement between the parties, the disputes between the parties were referred to Sole Arbitrator Mr.Justice V.P.Tipnis, a former Judge of this Court, for adjudication.

4. The appellant filed statement of claims and the respondent-State filed written statement and additional written statement. On the basis of pleadings, the learned Arbitrator by consent of the parties, framed 15 issues which will be referred to hereinafter. The parties filed various documents. On behalf of the appellant-claimant only one witness was examined viz its Director Mr.Anil Vadudev Kamat. On behalf of the State also, only one witness was examined viz Mr.G.S.Gill, Principal Secretary to State Government. Learned Arbitrator thereafter heard the parties and made his award on 23 February 2008.

5. The gist of the award is that the learned Arbitrator held that the appellant-claimant failed to make subscription and contribution to the share capital of JVC. The learned Arbitrator rejected the appellant's claim for grant of specific

performance of agreement by holding that the appellant had committed breach of its obligation under Clause 6.2 of the agreement to contribute to the share capital of JVC. He also held that the appellant was not able to prove that it was ready and willing to fulfill its part of the agreement. The learned Arbitrator also held that the contract runs into minute details and involves performance of obligations which could not be supervised by the Court. Based on these findings the learned Arbitrator also dismissed the appellant's claim for damages. On the other issues, the learned Arbitrator held in favour of the appellant-claimant. It was held that the State Government could not have terminated the contract without unanimous consent of both the parties, as purportedly done by the State Government. The learned Arbitrator, however, held that the appellant is entitled to reimbursement of the amount spent by it and therefore passed a monetary decree in favour of the appellant and directed the respondent-State to pay the appellant-claimant an amount of Rs.15,33,041/- with interest at the rate of 18% p.a. from 12 September 2003 till the date of realization.

6. Aggrieved by the above award, the appellant filed Arbitration Petition No.209 of 2008 u/s 34 of the Act. After hearing learned counsel for the parties, the learned Single Judge held that the learned Arbitrator was justified in recording the finding that the appellant had committed breach of Clause 6.2 of the agreement and was not entitled to a decree for specific performance of agreement and is also not entitled to a decree for damages. The learned Single Judge further held that even otherwise, considering the limited jurisdiction conferred by Section 34 of the Act on the Court in setting aside the award, the award of the learned Arbitrator cannot be interfered with. The learned Single Judge also held that the award made by learned Arbitrator was the most balanced award which took into consideration every piece of evidence on record and considered every submission in detail and gave elaborate reasons for each of the findings. Therefore, the award is incapable of being interfered with. Accordingly, the learned Single Judge dismissed the Arbitration Petition u/s 34 of the Act. The present appeal is directed against this judgment and order dated 16 June 2011 of learned Single Judge.

7. Mr.Chagla, learned Senior Advocate appearing for the appellant (claimant before the Arbitrator) has canvassed the following submissions :

a) Once the learned Arbitrator held that there was concluded, valid and subsisting share holders agreement dated 10 May 2001 between the parties, in that the same had come into operation and that the conditions precedent as set out in Clause 2.0 of the share holders agreement were fulfilled, and that the agreement was acted upon and further that agreement did not formally stand terminated as alleged by the State Government, the learned Arbitrator erred in not directing specific performance of share holders" agreement;

b) The obligation of the appellant-claimant and the respondent-State to contribute to the equity share capital was simultaneous. Therefore, the appellant could not have contributed 51% share in JVC unless the State Government also

contributed 49% of the equity share capital simultaneously;

c) In any view of the matter, even if the obligations were not simultaneous, at least they were reciprocal. The appellant had shown its readiness and willingness to contribute 51% equity share capital by going to the State Government with photostat copy of the cheque for a sum of Rs.33.07 crores. The appellant had made all necessary arrangements for payment of the said amount and if the State Government had also given its cheque for Rs.31.78 crores, the parties would have deposited both the cheques in the bank account of JVC;

d) The learned Arbitrator as well as the learned Single Judge ought to have held that the appellant had done all that was required to be done by the appellant under the share holders agreement dated 10 May 2001 and it was only on account of failure on the part of the State Government by not making its contribution of 49% of the equity share capital that the appellant did not give the cheque of Rs.33.07 crores to JVC, though the cheque was already drawn on 4 April 2002 and photostat copy of the same was already given to the State Government within 30 days from the date of execution of the lease deed on 14 March 2002;

e) Reliance is placed on several decisions in support of the contention that for showing its readiness and willingness the appellant was not required to make actual payment or to have the amount of Rs.33.07 crores in the bank account of the appellant. The appellant had placed adequate material on record in support of its case that the appellant had capacity to pay Rs.33.07 crores for 51% of the equity share capital of JVC.

f) The learned Arbitrator and the learned Single Judge also did not pass a decree for specific performance, in view of nature of the agreement in question, but once the appellant-claimant and the respondent-State Government would have contributed their respective shares of the equity share capital in the ratio of 51:49, nothing further was required to be done by the State Government and the hospital was to be run by the appellant through its Committee, as provided in clauses 10 to 13 of the agreement. There was, therefore, no question of the Arbitrator or the Court being required to supervise implementation of the contract in minute details.

8. On the other hand, Mr.Kumbhakoni, learned counsel for the respondent-State Government has opposed the appeal and supported the judgment of learned Single Judge. The learned counsel has further submitted that by now there are several super speciality hospitals available in the same locality in which the building in question is situate, such as Bombay Hospital, J.J. Group of Hospitals etc.. The appellant also owns and manages a super speciality hospital in the City of Mumbai. Moreover, it would not be in public interest to direct specific performance of an agreement under which even after entire building with built up area of 2,53,645 sq.ft. having been constructed by the State Government without contribution of a single rupee by the appellant (the building and land

both are worth hundreds of crores of rupees now and even at the relevant time they were valued at Rs.45.00) crores and even after contribution of 49% of the equity share capital in JVC from the State Government (Rs.31.78 crores), the only benefit that the public at large would get under the agreement in question would be a mere 10% beds for poor patients, that is, only 30 beds.

9. We have heard learned counsel for the parties at length and have given anxious consideration to the rival submissions.

10. The issues raised before and considered by learned Arbitrator may, for the sake of convenience, be divided into the following broad categories :

1.

Category-I : Issue nos.1, 2, 3 and 4 :

Issue No.1 : Whether there is no concluded, valid or subsisting Shareholders' Agreement dated 10 May 2001 between the parties or the same has not become operational and/or effective as alleged in paragraphs 1, 3 and 5 to 7 of the Written Statement?

Issue No.2 : If the answer to Issue no.1 is in the affirmative, whether there is no valid or subsisting arbitration agreement or the same has not come into operation as alleged in paragraphs 2 and 3 of the Written Statement?

Issue No.3 : Whether the arbitral tribunal has no jurisdiction to try, entertain or decide any claim arising out of the transaction in issue?

Issue No.4 : Whether the conditions precedent as set out in clauses 2.0 of the Shareholders' Agreement dated 10 May 2001 were not fulfilled and/or accomplished to the satisfaction of the parties on or before the effective date as set out in clause 28.2 thereof, as alleged in paragraphs 5 to 7 of the Written Statement?

Arbitrator's : In favour of the Appellant and against the State findingsGovernment.

2.

Category-II : Issue Nos.5 and 6 :

Issue No.5 : Whether the Claimant has failed to make subscription and contribution to the share capital of the Joint Venture Company within 30 days of the effective date, thereby committing breach thereof as alleged in paragraphs 8 and 29 of the Written Statement?

Issue No.6 : Whether the obligation of the claimant and the respondent to contribute to the equity capital was simultaneous and reciprocal and that one party could not have contributed without the other contributing, as alleged in paragraph 9 of the Statement of Claim?

Arbitrator's : In favour of the State Government and against findings the Appellant.

3.

Category-III : Issue Nos.7 to 10 :

Issue No.7 : Whether the Agreement was acted upon as alleged in paragraph 8 of the Statement of Claim?

Issue No.8 : Whether the proposal has become unviable or unworkable as contemplated under Clause 29.4 of the said Agreement as alleged in paragraph 9 of the Written Statement?

Issue No.9 : Whether the Agreement has to be treated as non-est or is not valid, subsisting and binding upon both the parties as alleged in paragraph 9 of the Written Statement?

Issue No.10 : Whether the agreement stood formally terminated as alleged in paragraph 28 of the Written Statement and whether the alleged termination is valid?

Arbitrator's : In favour of the Appellant-Claimant and findings against the State Government.

4.

Category-IV : Issue Nos.11 and 12:

Issue No.11 : Whether the claimant is entitled to a decree for specific performance as alleged in paragraph 24 of the statement of claim?

Issue No.12 : Whether the claimant is entitled to a sum of Rs.1550.03 lakhs and a further sum of Rs.141.28 lakhs per month as and by way of damages for delay as alleged in paragraph 25 of the Statement of Claim?

Arbitrator's : No, in favour of the State Government & against findings the Appellant-Claimant.

5.

Category-IV : Issue Nos.13 to 15:

Issue No.13 : Whether in the alternative to the above, the claimant is entitled to (i) a sum of Rs.15073 lakhs as and by way of damages; and (ii) a sum of Rs.32,87,853/- towards reimbursement of expenditure, as alleged in paragraph 26 of the Statement of Claim?

Issue No.14 : Whether the Claimant is entitled to interest on the monetary claims above and if so, for what period and at what rate?

Issue No.15 : What order as to costs.

Arbitrator's: Issue no.13: (i) No.

findings (ii) Rs.15,33,041/-

Issue no.14: Yes. At 18% from 12 September 2003

till payment.

Issue no.15: As per final award.

11. As far as issues under Category-I are concerned, neither there is any dispute about jurisdiction of the Arbitral Tribunal to try, entertain and decide the appellant's claim arising out of the transaction in issue nor is there any dispute about factum of the shareholders' agreement dated 10 May 2001 having been entered into between the appellant-claimant and the respondent-State Government.

Whether conditions precedent fulfilled :

12. As far as Issue no.4 is concerned, it is necessary to refer to Clauses 1 and 2 of the Shareholders' Agreement dated 10 May 2001 (hereinafter referred to as "the Agreement" for the sake of brevity) viz. :

1.0 Formation and Organisation of the JVC :

1. Subject to fulfillment of Conditions Precedent contained in this Agreement, the JVC will be incorporated on or before June 30, 2001 and Wockhardt and GOM agree to organise the JVC as a Joint Venture Company.

1.2. Wockhardt and GOM agree to participate as shareholders of and Joint Venture Partners in the JVC, and agree to exercise their respective voting rights at the meetings of the shareholders of the JVC.

2.0. Conditions Precedent :

This agreement shall be effective only upon the satisfactory fulfillment and accomplishment of the following conditions precedent on or before the Effective Date:

2.1 Wockhardt and GOM obtaining the permission from the Dept. of Company Affairs under the Companies Act, 1956.

2.2 GOM executing lease deed in favour of JVC of the said Hospital Complex referred to above.

2.3 Incorporation of the JVC.

13. On Issue No.4 the learned Arbitrator gave a finding that the JVC by name Wockhardt Maharashtra Hospital Ltd. was incorporated on 20 August 2001, as evident from the certificate of incorporation, and that necessary permission from Department of Company Affairs and certificate of commencement of business in the JVC was issued on 18 October 2001 as evident from the certificate of

commencement of business. One dispute raised by the State Government regarding fulfillment of the above conditions was that it was done after 30 June 2001 and, therefore, there was no compliance with all the conditions precedent. Learned Arbitrator overruled the above objection on the ground that incorporation of JVC itself took place on 20 August 2001 on account of participation and volition of the appellant-claimant as well as respondent-State Government. Therefore, there was no substance in that objection.

14. The respondent-State Government, however, seriously disputed compliance with Condition No.2.2 requiring the Government of Maharashtra to execute the Lease Deed in favour of JVC.. After referring to the Lease Deed dated 14 March 2002 at Exhibit-3 on his record, the learned Arbitrator gave the finding that admittedly a document on stamp paper of Rs.20/-titled as Lease Deed dated 14 March 2002 was executed between the Government of Maharashtra through Deputy Secretary to the Government and JVC by name Wockhardt Maharashtra Hospital Limited through its Director Mr. A.V. Kamat and it was a regular lease deed and not an agreement to lease. As regards objection raised by respondent-State Government that the document was not registered and properly stamped, the learned Arbitrator overruled the objection after making following observations :

..... Now, although the document is not registered and properly stamped, on the plain wordings of clause 2.2, the condition precedent was the Government of Maharashtra executing the Lease Deed in favour of the Joint Venture Company. When the properly worded written document titled as "Lease Deed" is signed by the appropriate authorities on behalf of the Governor of Maharashtra and the Joint Venture Company, condition no.2.2 of the Shareholders" Agreement must be held to have been satisfied. Stamping of the document appropriately and registration thereof could have been made after the execution. Effect and legal consequences of not stamping and not registering are not relevant for deciding whether the document was "executed". As a matter of fact, there is material on record to suggest that parties and especially the respondent-State by its conduct has accepted that all the conditions precedent mentioned in clause 2 are accomplished.....

The learned Arbitrator also referred to letter dated 17 April 2002 written by the appellant-claimant to the respondent-State Government stating that the parties including the respondent-State Government had proceed in furtherance of the Agreement to take further steps for implementation of various conditions made precedent and they were accordingly accomplished.

15. Though Mr.Kumbhakoni, learned counsel for the State Government sought to challenge the above findings regarding the effect of non-stamping and non-registration of the lease deed, it is not necessary to express any opinion thereon in view of our findings on the other issues.

Scope of Judicial intervention in Sec. 34 Petitions

16. Before proceeding further, we may set out the principles enunciated by the Supreme Court regarding scope of interference by the Court in regard to Arbitral Award u/s 34 of the Arbitration and Conciliation Act, 1996.

17. In *Kwality Manufacturing Corporation v/s. Central Warehousing Corporation* (2009)5-SCC-142, the Supreme Court examined the principles regarding scope of interference by Court in regard to arbitral award under Sections 30 and 33 of the Arbitration Act, 1940 and made following observations:

10. At the outset, it should be noted that the scope of interference by courts in regard to arbitral awards is limited. A court considering an application u/s 30 or 33 of the Act, does not sit in appeal over the findings and decision of the arbitrator. Nor can it reassess or reappraise evidence or examine the sufficiency or otherwise of the evidence. The award of the arbitrator is final and the only grounds on which it can be challenged are those mentioned in Sections 30 and 33 of the Act. Therefore, on the contentions urged, the only question that arose for consideration before the High Court was, whether there was any error apparent on the face of the award and whether the arbitrator misconducted himself or the proceedings.

The scope of interference came to be further curtailed by Section 34 of the Arbitration & Conciliation Act, 1996.

18. In *Mcdermott International Inc. v/s. Burn Standard Co.Ltd. And others* (2006)11-SCC-181, as regards the scope of jurisdiction of the Court to set aside an arbitral award, the Supreme Court examined the provisions of Section 30 of the Arbitration Act, 1940 and of Section 34 of the Arbitration & Conciliation Act, 1996 and observed that the 1996 Act makes a radical departure from 1940 Act.

52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to bring the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. (emphasis supplied)

19. In *Steel Authority of India Limited v/s. Gupta Brother Steel Tubes Limited* (2009)10-SCC-63, after reviewing the decisions on the subject, the Supreme Court enunciated the following principles:

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error

within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.

(emphasis supplied)

Readiness and willingness of Appellant to perform its obligations under the agreement

20. Now coming to the second category of issues i.e. issue nos.5 and 6, the parties had seriously contested these issues before the learned Arbitrator, before learned Single Judge and also before us in this appeal. Before referring to necessary facts and rival submissions on these issues, we may set out the relevant clauses of Agreement dated 10 May 2001, which read as under :

6.0 Authorised Capital and Subscription :

6.1 Upon organisation of the Company as the JVC, the parties agree that the authorised capital of the JVC shall be Rupees One hundred crores only, divided into Ten Crore equity shares of Rs.10/-each and that the initial issued share capital of the JVC shall be Rs.64.85 crores, divided into 6.485 crore equity shares of Rs.10/-each (hereinafter referred to as "the initial Capital") to be subscribed for and issued to the Parties as mentioned in Sub-Clauses 6.2 and 6.3.

6.2 Wockhardt agrees that within 30 days from the Effective Date (as defined in Sub-Clause 28.2), it will subscribe and pay for at par, equity shares corresponding to the amount of Indian Rs.33,07,35,000/-(Rs.Thirty Three crores seven lakhs thirty five thousand only).

6.3 GOM agrees that within 30 days from the Effective Date (as defined in Sub-Clause 28.2), it will subscribe and pay for at par, equity shares corresponding to the amount of Indian Rupees 31,77,65,000/-(Rupees Thirty one crores seventy

seven lakhs sixty five thousand only).

6.4 All equity shares of the JVC shall be of the same class and shall be alike in all respects and the holders thereof shall be entitled to without limitation, identical rights and privileges with respect to dividend, voting rights and the distribution of assets held by the JVC in the event of voluntary or involuntary liquidation, dissolution or winding up of the JVC.

6.5 Unless otherwise agreed in writing, Wockhardt and GOM agree to maintain the proportion of the total equity share capital of the JVC held by each of them as follows :-

Wockhardt : 51%

GOM : 49%

All further issues of shares or increases in share capital shall be done

6.6 The JVC may, from time to time, to meet its funding requirements, either increase its equity capital or borrow capital by way of loans, with or without security or by way of issue of preference shares, as may be determined by the Board.

(emphasis supplied)

21. On Issue Nos.5 and 6, the appellant-claimant's case was that since the appellant and the respondent-State Government were to contribute to the equity share capital of JVC in the ratio of 51:49, by necessary implication, the obligation of the appellant to contribute Rs.33.07 crores by way of 51% equity share capital was "simultaneous" with the obligation of respondent-State Government to contribute Rs.31.77 crores by way of 49% equity share capital. Mr.Chagla appearing for the appellant-claimant vehemently submitted that but for such simultaneous contributions, Clause-6.5 requiring the parties to maintain proportion of total equity share in the JVC in the ratio of 51:49 could not have been complied with.

22. On the other hand, Mr.Kumbhakoni appearing for respondent-State Government submitted that the appellant offered to enter into JVC to run a hospital on 14 June 1999 and the same was accepted by the State Government on 18 May 2000 and thereafter there were negotiations for a considerable period. During the course of negotiations the appellant-claimant had suggested that contribution of the share capital in the ratio of 51:49 be made "simultaneously" by the appellant and the respondent-State. However, in the final shareholders' agreement signed by the parties on 10 May 2001, the word "simultaneously" was consciously omitted. Even Clauses 6.2 and 6.3 in the final agreement gave each party thirty days time from the effective date to subscribe its contribution towards share capital.

23. Having heard learned counsel for the parties, we find that the learned Arbitrator as well as the learned Single Judge have rightly held that the

contribution of their respective share capital by the appellant-claimant and the respondent-State was not required to be made simultaneously, both on account of omission of the word "simultaneously" from the final agreement and also because the parties were given thirty days time from the effective date, to make their respective contributions to the share capital in the ratio of 51:49. Since the effective date was 14 March 2002 (when the lease deed was executed), it was obligation of the appellant-claimant to actually subscribe and pay towards equity share capital of Rs.33,07,35,000/ (Rs.33.0735 crores) within thirty days from 14 March 2002 which admittedly the appellant-claimant did not do.

24. Mr.Chagla, learned Senior Advocate, however, vehemently submitted that since the appellant-claimant had sent letter dated 4 April 2002 to State Government with a photostat copy of cheque for the amount of Rs.33,07,35,000/-and requested the State Government to contribute their contribution for share capital and on 14 April 2002 the appellant-claimant's witness Mr.Kamat had gone to Mantralaya i.e. Secretariat of the respondent-State Government with a photostat copy of the cheque dated 4 April 2002 for the aforesaid sum of Rs.33,07,35,000/-, and requested the State Government to contribute its own share of the share capital showing readiness to give the original cheque for the said amount upon the State Government also giving its own cheque for Rs.31,77,65,000/-(Rupees 31.7765 crores) towards its 49 percent share capital, the appellant did show its readiness and willingness to perform its part of contract i.e. to perform its obligation under Clause-6.2 of the agreement. Strong reliance has been placed on the following decisions :

(i) The Bank of India Limited and others Vs. Jamsetji A.H.Chinoy and M/s.Chinoy & Co. AIR-1950-Privy Council-90;

(ii) Smt.Indira Kaur and others Vs. Sheo Lal Kapoor (1988)2-SCC-488.

25. Mr.Chagla also vehemently submitted that when the State Government also admittedly did not pay its share of the equity share capital within thirty days from the effective date, it was not open to the State Government to raise any contention that the appellant had committed breach of its obligation by not contributing to the share capital within the stipulated time limit.

26. We find from the award that learned Arbitrator as well as the learned Single Judge considered both issues of willingness and readiness:

Whether the appellant-complainant was ready and willing to contribute to equity share capital of JVC by paying Rs.33,07,35,000/- on par equity shares to the extent of 51%.

27. On the question of willingness, we are of the view that the learned Arbitrator rightly held that nothing prevented the appellant-claimant from depositing the sum of Rs.33,07,35,000/-in the bank account of JVC as the said deposit did not require any consent of the respondent-State Government. The learned Arbitrator also rightly held that in a suit for specific performance where the plaintiff alleges

breach on part of the defendant, the plaintiff has to show his readiness and willingness at all times to perform his part of the contract, irrespective of the unwillingness of the defendant to perform his part of the contract. Only in such a case, a decree for specific performance can be passed. The above finding of learned Arbitrator is fortified by decision of the Supreme Court in *Narinder Kumar Malik Vs. Surinder Kumar Malik* (2009)5-SCC-142 and in *Man Kaur Vs. Hartar Singh Sangha*. (2006)11-SCC-181

28. In *Narinder Kumar Malik v/s. Surinder Kumar Malik* (2009)8-SCC-743, the Apex Court considered the question of readiness and willingness of the buyer-Plaintiff to honour his commitment under the MoU. Following observations support the case of the Respondent-State Government that the mere act of the Appellant-Claimant in sending a photocopy of the cheque did not amount to its honouring the commitment under the Shareholders" Agreement:

24. The respondent sent the photocopies of three pay orders two of which were for a sum of Rs. 1 crore each and the third one for a sum of Rs.1.25 crore. It was neither here nor there as the originals were never tendered to the appellant and only photocopies were sent to make a semblance that the respondent has been ready and willing to perform his part of the contract. When MoU had already been arrived at between the parties then mere show of readiness and willingness would not discharge the obligation resting on one of the parties unless it is shown to be real and genuine. From the conduct, behaviour and attitude of the respondent it is clearly made out that he had not been ready and willing to perform his part of the contract as mentioned in the MoU. (emphasis supplied)

29. In *Man Kaur (dead) by Lrs v/s. Hartar Singh Sangha* (2010)10-SCC-512, the Supreme Court in terms held that even assuming that the defendant had committed breach, if the plaintiff fails to prove that he was always ready and willing to perform the essential terms of the contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the plaintiff that readiness and willingness on the part of the plaintiff is something which need not be proved, if the plaintiff is able to establish that the defendant committed breach, is not correct.

30. Mr.Chagla for the appellant-claimant, however, heavily relied on the Supreme Court decision in *Smt.Indira Kaur & Ors. Vs. Sheo Lal Kapoor* (1988)2-SCC-488. Learned counsel particularly relied on the following observations:

The real test as to whether or not the plaintiff was ready and willing to perform his part of the contract was for the defendant to call his bluff, in case it was a bluff, by remaining present at the Sub-Registrar"s office on the appointed day that is to say on August 16, 1977 as he was bound to do if he on his part was ready and willing to execute the sale deed. In fact the lower Courts ought to have considered whether the defendant himself was willing and ready to perform his part of the contract by executing the sale deed in favour of the plaintiff in

discharge of the obligation undertaken under the agreement of sale executed in 1967 in favour of the plaintiff.

(emphasis supplied)

31. In the case before the Supreme Court, the plaintiff executed a document purporting to be ostensible sale of the suit property for consideration of Rs.7,000/-in favour of the defendant and on the same date a contemporaneous document was executed by the defendant in favour of the plaintiff agreeing to sell the suit property for sum of Rs.7,000/-within 10 years of the date for execution of the aforesaid document. Possession of the suit property remained with the plaintiff and he was to pay Rs.80/-per month as rent exclusive of monthly charges and other taxes to be paid by the plaintiff. The Supreme Court, therefore, held that the real intention of the parties was to create mortgage, because the original plaintiff's son was ill and he required liquid resources to incur for necessary charges for his ailing son. A sum of Rs.7000/-which was raised was expended to cure the ailment of the son who unfortunately died. Nearly 10 years passed, the plaintiff personally contacted defendant and made number of requests to the defendant for fulfilling his obligation for executing sale deed. The plaintiff also sent Advocate's notice calling upon the defendant to execute sale deed as stipulated in the suit agreement but the defendant did not reply to or comply with the notice. On the crucial date when 10 years dead line was to expire, the plaintiff remained present at sub-registrar's office throughout the day but the defendant did not care to attend the said office. In the plaintiff's suit for specific performance of the suit agreement, the defendant in his written statement nowhere asserted that he had gone to sub-registrar's office on the relevant date and his main defence was to evict the plaintiff from the premises on the ground that the plaintiff was not ready and willing to perform his obligation.

32. It was in the context of the aforesaid facts that the Supreme Court observed that if, according to the defendant, the plaintiff was not ready and willing to perform his part of the contract, it was for the defendant to call his bluff by remaining present in the sub-registrar's office on the appointed date as he was bound to do on his part to show his readiness and willingness to execute the sale deed. The observations relied upon by the learned Counsel for appellant, therefore, cannot be read in isolation and out of the context. In fact, applying the said observations in the present case, it can be said that the appellant-claimant could have called the respondent's bluff by depositing the amount of Rs.33.07 crores in the bank account of the JVC which was already incorporated.

33. Mr.Chagla, learned Senior Advocate also relied on the following observations in the Supreme Court decision in P. D'Souza Vs. Shondrilo Naidu (2004)6-SCC-649:

21. It is not a case where the plaintiff had not made the requisite averments in the plaint. The readiness and willingness on the part of the plaintiff to perform

his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale.

34. Though the above observations may apparently seem to support the appellant's argument, the observations need to be read in the context of the factual background of that case. The suit property was mortgaged by the defendant in favour of the Life Insurance Corporation of India and the plaintiff's case was that despite the assurance given by the defendant to the plaintiff, (that all original documents, title deeds and encumbrance certificate would be produced by the plaintiff in May,1981), the same had not been done by the defendants within the stipulated period. In fact, the plaintiff had made payments between November,1976 and December,1977. The plaintiff not only sent a draft sale deed in order to enable the defendant to claim requisite clearance under 230-A of the Income Tax Act, but also advanced the amount to enable the defendant to defray the expenses for obtaining the Income Tax Clearance Certificate. The plaintiff by a letter called upon the defendant to execute deed of sale, wherein she conveyed her readiness and willingness to perform her part of the contract, but in response thereto the defendant purported to cancel the agreement and sought to forfeit the amount of part consideration paid by the plaintiff.

It was in the context of the above facts that the Supreme Court made the observations relied upon by the learned Counsel for appellant. The observations would apply to a case where, without requisite steps being taken by the defendant first, the plaintiff could not have performed his part of the contract. As already discussed above, in the present case, the appellant could have deposited the amount of Rs.33.07 crores as its contribution towards 51% of the share capital without the State Government first depositing any amount. As already discussed, the obligations were not to be performed simultaneously.

35. Coming to the question of readiness of the appellant to perform its obligation under Clause-6.2, the learned Arbitrator considered whether the appellant-claimant had capacity to pay Rs.33.07 crores within the stipulated time limit of 30 days from the effective date i.e. from 14 March 2002. The witness of the appellant had produced letter dated 25 March 2002 showing that Wockhardt had agreed to provide the claimant a short term loan of Rs.20 crores for a period of six months. Similarly, the witness produced two letters from State Bank of India both dated 24 August 2006, one addressed to the appellant showing the position of the appellant's cash credit/working capital fund based facility account with SBI as on 20 March 2002 which showed that total funds available for drawals were Rs.20.20 crores and the second letter from State Bank of India addressed to Wockhardt Limited showing the position of cash credit/working capital funds based facility account with SBI as on 28 March 2002 and the total funds available for drawal were Rs.21.71 crores. These two letters were not exhibited for lack of proof but were only marked for identification as Exhibits X-1 and X-2 respectively.

Mr. Chagla for appellant-claimant submitted that as held by the Privy Council in Bank of India Limited Vs. Jamsetji A.H.Chinoy and another AIR-1950-Privy Council-90, it is not necessary in a suit for specific performance for the plaintiff-purchaser to produce the money or to vouch a concluded scheme for financing the transaction. Learned Senior Advocate particularly relied on the following observations of the Privy Council in paragraph 21 of the above decision viz. :

[21]..... It is true that plaintiff 1 stated that he was buying for himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But in order to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact and in the present case the appellant Court had ample material on which to found the view it reached. Their Lordships would only add in this connection that they fully concur with Chagla, A.C.J. when he says :

In my opinion, on the evidence already on record it was sufficient for the Court to come to the conclusion that plaintiff 1 was ready and willing to perform his part of the contract. It was not necessary for him to work out actual figures and satisfy the Court what specific amount a bank would have advanced on the mortgage of his property and the pledge of these shares. I do not think that any jury-if the matter was left to the jury in England-would have come to the conclusion that a man, in the position in which the plaintiff was, was not ready and willing to pay the purchase price of the shares which he had bought from defendants 1 and 2.

(emphasis supplied)

37. Mr.Chagla also relied on the following observations in the decision of the Supreme Court in Claude-Lila Parulekar (Smt) Vs. Sakal Papers (P) Ltd. And others (2005)11-SCC-73 :

There was in fact no refusal to perform the contract, but a questioning of the mode of performance. It may be that they were mistaken in their challenge to the auditors' certificate, but that is a long way from saying that they were unwilling to pay. As was said in Sweet & Maxwell Ltd. V. Universal News Services Ltd. : "their view might have been a wrong one, but that does not justify it being treated as a repudiation of the contract.

If A and B, parties to a contract, form different views as to the construction and effect of their contract, and A demands performance by B of some act which B denies he is obliged to perform upon the true interpretation of the contract, then, if B says "I am ready and willing to perform the contract according to its true tenor, but I contend that what you, A, require of me is not obligatory upon me "according to the true construction of the contract", and if in so saying he is acting in good faith, he does not manifest the intention to refuse to perform the contract. On the contrary, he affirms his readiness to perform the contract, but

merely puts in issue the true effect of the contract.(Sweet & Maxwell Ltd. Case, QB p.737, All ER pp.44 I-45 B.)

There would have been no point in the appellant challenging the valuation of the shares by the auditors if they were not interested in completing the transaction. There would have been also no point in their offering to deposit Rs.20 lakhs as proof of their continued interest in purchasing the shares.

38. What Mr.Chagla contended was that merely because interpretation placed by the appellant on Clauses-6.2 and 6.3 of the agreement was different from the interpretation placed thereon by the State Government or even by the learned Arbitrator, it cannot be said that the appellant was not ready and willing to perform its part of obligation as provided in Clause-6.2 of the agreement. So also merely because the appellant did not have the amount of Rs.33.07 crores in its bank account to draw the cheque on 4 May 2002, the appellant had made arrangements for funds as indicated in the letters of State Bank of India and Wockhardt Limited at Exhibits-X-1 and X-2 referred to hereinabove.

39. The learned Arbitrator has given a reasoned award and it is not permissible to this Court to examine the correctness of the findings of the learned Arbitrator, as if this Court were sitting in appeal over the findings of learned Arbitrator. We find that the view taken by the learned Arbitrator is a possible, plausible and reasonable view. The view canvassed on behalf of the appellant-claimant is merely another possible view. However, that cannot be a ground for interfering with the award given by the learned Arbitrator. Assuming that there was an error on the part of learned Arbitrator relating to interpretation of the contract, the said error is within the scope of jurisdiction of learned Arbitrator and, therefore also, that error is not amenable to correction by the Court, as such error is not an error on the face of the award. These are the settled legal principles as enunciated by the Supreme Court in case of Steel Authority of India Limited (2009)10-SCC-63. Similarly, the law laid down by the Supreme Court in case of McDermott International Inc. (2006)11-SCC-181 wherein the Court has held that intervention of the Court is envisaged in few circumstances, like in case of fraud or bias by the arbitrators, violation of natural justice. The Court cannot correct the errors of the Arbitrators. Since the contentions urged on behalf of the appellant-claimant do not bring the present case under any of the above explained circumstances, and having regard to the discussion in paragraphs 28 to 35 hereinabove, we are of the view that finding of learned Arbitrator that the appellant-claimant was not ready and willing to perform its obligation as provided in Clause-6.2 of the agreement, does not call for any interference.

Contract running into minor details-

Supervision by Court required?

40. We may now consider the question whether the finding that the contract runs into minute details and involves performance of obligations, which could not be supervised by the Court, calls for interference. In paragraph 38 of the Award, the

Arbitrator has given following findings:

I find merit in the submission of Mr.Kumbhakoni that the present contract runs into such minute and numerous details and some terms of the contract are also dependent on the volition of the parties and, therefore, it will be difficult to enforce the specific performance of its material terms. It is not possible to accept the submission of Mr.Parikh that it is essentially a contract to lease the building and, therefore, contract of transfer of immovable property. Leasing the building to the Joint Venture Company is only one of the terms of the contract. The substance is running a super-speciality hospital through the Joint Venture Company and, as such, it also involves performance of a continuous duty which the Court cannot supervise. For these reasons also, a decree for specific performance cannot be granted.

41. Mr. Chagla, the learned Counsel for the appellant-claimant submitted that the Shareholders' Agreement dated 10 May 2001 merely requires the State Government to contribute its contribution towards 49% share capital i.e. Rs.31.78 crores and nothing further is required to be done by the State Government, and that it is the appellant-claimant which, after making contribution of 51% share capital, is to run the hospital through its Committee as provided in clauses 10 to 13 of the agreement and hence there was no question of the Arbitrator or the Court supervising implementation of the terms in the contract in minute details.

10.0 Board of Directors:

10.1 The JVC shall be managed by the Board of Directors who shall exercise all such functions as set out under the Companies Act 1956. The Board however shall be concerned only in setting the board policies framework of the hospital, while the operations and administration of the hospital shall be managed by the Chief Executive Officer who shall be duly appointed for the purpose. It is however agreed between the Parties that it would be the responsibility of Wockhardt to manage the said Hospital professionally, commercially and profitably keeping the social objective of the Government as set out in Clause 23.

10.2. The Board of Directors of JVC shall comprise of Directors majority of who shall be nominees of Wockhardt. The Board of directors shall have 9 members with 5 nominees of Wockhardt and 4 of GOM.

11.0. Powers of the Board

The parties acknowledge that the management of the JVC is the prerogative of the Board and, as such, all decisions relating to the management of the JVC would be decided by a simple majority of the Board except as otherwise provided for in the Companies Act, 1956.

12.0 Management of the JVC

12.1 The JVC shall have its own professional management.

12.1.1 The Board shall appoint the Chief Executive Officer (CEO) and the CEO shall function subject to the supervision, direction and control of the Board and on such terms and conditions as are approved by the Board. The CEO shall be an Ex-Officio member of the Board without any voting rights. The CEO shall be in charge and responsible to the JVC for the day-to-day operation of the JVC and shall be responsible for ensuring full and due compliance with all the statutory laws rules and regulations required to be complied with by the JVC.

12.1.2 It is agreed and understood between the Parties hereto that Wockhardt shall be responsible for the selection and recruitment of the CEO and for managing and running the Hospital on professional basis and profitable manner.

13.0. Chairman

Wockhardt shall nominate the Chairman of Board of Directors who shall have the casting vote.

42. Mr.Kumbhakoni, learned Counsel for the respondent State of Maharashtra has reiterated following submissions which were also made before the learned single Judge:

9. The nature of the agreement is/was such that it is impossible to be directed/ decreed to be specifically performed inasmuch as decree for specific performance would involve directing the parties to perform the following acts, deeds and things viz.

(i) First and foremost to enter into the Lease Deed, pay stamp duty and registration charges. The immediate question which would arise as to which party would arrange for funds to the tune of lakhs of rupees towards stamp duty and registration.

(ii) There is a clear obstacle for entering into the Lease Deed because without handing over possession of the land and building and demising the same unto the joint venture, the Lease would not be complete in the eyes of law.

(iii) The building presently is in a complete non-usable condition. Nothing can start, unless the building is refurbished. The refurbishment cost, itself was the matter of considerable debate and disagreement between the parties. Initially when the shareholders agreement was entered into the refurbishment cost was clearly defined to mean at Rs.13.22 crores with a reasonable increase thereon. However, after a period of one year or so, the Petitioners themselves raised the said figure tentatively to Rs.34 crores approximately. In other words, the final estimate of refurbishment cost was yet to be finalized.

Today, if specific performance is to be granted, there ought to be directions in this regard to refurbish the building which would involve certainly double the tentative cost and could be anywhere between Rs.75-100 crore. The question would then be whether the parties would bear such a huge cost. The issues then would be how much be considered as an appropriate cost of refurbishment, who

will be the agency to refurbish etc.

(iv) Apart from the same, there are other deeds and acts to be performed by either of the parties to make the joint venture effective. It is undisputed that though expertise was to be brought in by the Petitioner, the Hospital was to be run by the body constituted by JVC comprising of both the parties. These acts, would involve, continuous monitoring by some body of experts and a mechanism to resolve day-to-day differences, disputes and impracticalities incapable of being solved.

(v) What type of equipments should brought in to start and run the hospital? Who will procure them? What should be the specifications of each of them? (it is not mandatory that these equipments should necessarily be the best and costliest). In the market various types/make instruments are available which have both plus and minus aspects. Some have higher initial cost but lower running cost. Some are exactly the reverse i.e. lower initial costs and higher operating costs.

(vi) Thus innumerable decisions will have to be jointly taken by both the parties not just for effective running of the hospital but for its establishment/starting itself, which cannot be continuously monitored by the court.

It is therefore, submitted that the nature of the agreement is such that its performance will require continuous supervision by the court. Therefore, such an agreement is not specifically enforceable in view of section 14(1)(d) of the Specific Relief Act, 1963.

43. How to refurbish a building in a non-usable condition, what kind of equipments and which particular equipments and gadgets should be procured and several such decisions would have to be taken before handing over possession of the super-speciality hospital to the appellant for management. Hence, we are of the view that the learned Arbitrator as well as the learned single Judge were justified in taking the view that the nature of the agreement is such that its performance would require continuous supervision by the Court.

44. It is not necessary for us to further discuss this issue, because as per the settled legal position indicated above, while hearing the petition u/s 34 of the Arbitration and Conciliation Act for setting aside the arbitral award, the scope of interference is very limited. The Court is not supposed to reappraise the evidence, and Court cannot set aside an award even if another view on interpretation of the contract is possible. Since we have agreed with the view taken by the learned Arbitrator as well as the learned Single Judge, nothing further need be said.

45. In view of the above, we do not find any merit in any of the contentions urged on behalf of the appellant-claimant. It would, therefore, not have been strictly necessary to deal with the last alternate submission of Mr.Kumbhakoni for not interfering with the impugned arbitral award, but since both the learned

counsel have addressed us at length, we will refer to the rival submissions and deal with the same.

Specific Performance-Discretionary Relief

46. The last submission of Mr.Kumbhakoni is that in any view of the matter, this Court should not pass a discretionary order directing the State Government to perform as per agreement dated 10 May 2001. By now there are several super speciality hospitals available in the same locality in which the building in question is situate, such as Bombay Hospital, J.J. Group of Hospitals etc.. The appellant also owns and manages a super speciality hospital in the City of Mumbai. Moreover, it would not be in public interest to direct specific performance of an agreement under which even after entire building with built up area of 2,53,645 sq.ft. having been constructed by the State Government without contribution of a single rupee by the appellant (wherein building and land both are presently worth hundreds of crores of rupees and were valued at Rs.45.00 crores at the relevant time) and even after contribution of 49% of the equity share capital in JVC from the State Government, the only benefit that the public at large would get under the agreement in question would be a mere 10% beds for poor patients.

47. Mr. Kumbhakoni also relied on the following decisions in support of the submission that power to grant specific performance is a discretionary power. It can be denied when the defendant will be put to undue hardship by granting decree of specific performance. In A.C. Arulappan v/s. Ahalya Naik(smt.) (2001)6-SCC-600, the Supreme Court observed as under:

7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific, then also the court would desist from granting a decree to the plaintiff.

9. In Parakunnan Veetill Josph"s Son mathew v. Nedumbara Kuruvila"s Son (1987)Supp-SCC-340, this Court cautioned and observed as under: (SCC p. 345, para 14)

14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to courts as to decreeing specific performance. The court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the

litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff.

11. In *Gobind Ram v. Gian Chand* 22 (2007)7-SCC-548, it was observed in para 7 of the judgment that grant of a decree for specific performance of contract is not automatic and is one of the discretions of the court and the court has to consider whether it would be fair, just and equitable. The court is guided by the principles of justice, equity and good conscience.

(emphasis supplied)

48. In response to the above submissions made on behalf of the State, Mr. Iqbal Chagla, learned counsel for the appellant submitted that the State Government wanted to resile from the agreement as was indicated in the oral evidence of Mr. G.S. Gill, Principal Secretary, Department of Transport and Excise, Government of Maharashtra (para 16) which reads as under:

16. I say that the Standing committee of the Maharashtra Legislature attached to the Public Health & Medical Education Department in its report submitted to the Maharashtra Legislative Assembly had criticized this project and called for reconsideration. I say that since the shareholders agreement dated 10.5.2001 was not made effective, the Government re-considered the pros and cons of going ahead with the said project. Accordingly, the meetings of all the Government Directors was called by me to arrive at a decision on the project. Upon deliberation, the Respondent found these and other weaker points in the project viz.

(i) The land and the building was valued at Rs.45 crores. Despite this, the Government was required to pay Rs.31 crores by way of equity contribution towards joint venture company. In return, the Government was to get only Rs.1 crore per annum with an agreed increase of only 8% and that too at the interval of every five long years;

(ii) Despite contribution of land & building (Rs.45 crores) and equity contribution (Rs.31 crores) totaling Rs.76 crores, majority shareholding was to be of Wockhardt which was to contribute only Rs.32 crores approximately. The Chairman of J.V.C. Was also the nominee of Wockhardt. Moreover, Managing Director and Chief Executive Officer was also to be determined by the Claimants;

(iii) Even with 49% equity and additional contribution of land and building, Government was to get only 10% of the beds. Cost of the operation even in a super-speciality hospital at the relevant time was not more than Rs.1000/-per day per bed. Considering that there will be 30 beds available to the Government (in the form of 10%) the benefit in financial terms was only Rs.30,000/-per day which works out to Rs.1.09 crore per annum. This was not commensurate with the investments made by the Government.

(iv) Most importantly, Wockhardt had already indicated that refurbishment cost

was to go up to Rs.32 crores (preliminary estimate) and the extra burden was to be borne by the Respondent to the extent of 49%. The Respondent was to get the entire cost of refurbishment from the World Bank and this amount was identified and agreed upon by the World Bank. Therefore anything in excess of this identified and predetermined amount would have been required to be paid by the Respondent from its own funds, which was not possible. In any event this excess amount has remained unascertained till this date, as aforesaid. From the conduct of the Claimant therefore, it was evident that costs of the Project will further go up and the Government will be called upon to contribute 49% of these costs.

A note to this effect has been prepared under my signature. I say that since the project did not take off as contemplated under the Shareholders Agreement dated 10.5.2001, the Respondent eventually thought it fit to terminate the said agreement. The Claimants are therefore not entitled to any specific performance of the said Shareholders Agreement and/or for damages of any amount as claimed or otherwise. The claims of the Claimants are denied and disputed by the Respondent and the same may be rejected.

49. Having heard the learned counsel for the parties, we are of the view that even if the appellant had made out a case in law for grant of specific performance of the agreement dated 10 May 2001, the State Government has made out a strong case for not granting the appellant the discretionary relief of specific performance of the said agreement. It would be inequitable to grant specific performance of an agreement under which the State Government, after having provided for land and building with built-up area of 2,53,645 sq.ft., then valued at Rs.45.00 crores was required to pay further Rs.31 crores by way of 49% equity contribution towards the joint venture company and in return the Government was to get only Rs.1 crore per annum by way of annual rental and only 10% of the beds, that is about 30 beds, for poor patients, while the remaining 90% beds would be under the appellant which was to contribute only Rs.33.07 crores as 51% share capital.

Alternate prayer for Damages

50. Though Mr.Chagla, learned counsel for the appellant sought to argue on the alternate prayer for damages on the ground that the learned Arbitrator had held the termination of the contract to be illegal. But in view of absence of any material on record in support of the said prayer, the learned counsel did not press the same at the hearing.

51. Having considered the rival submissions, the agreement dated 10 May 2001 of which the appellant seeks specific performance, the award of learned Arbitrator & the material placed before the learned Arbitrator and the impugned judgment of learned Single Judge declining to interfere with the said award, and applying the principles enunciated by the Supreme Court and referred to in paragraphs 19 and 20 of this judgment, we do not find any merit in any of the

contentions urged on behalf of the appellant-claimant. Appeal No.513 of 2011 is dismissed. Consequently, Appeal (Lodging) No.550 of 2011 directed against the order of learned Single Judge disposing of the Arbitration Petition u/s 9 of the Act is dismissed. So also, Appeal No.574 of 2011 directed against the order of learned Single Judge in Notice of Motion No.3561 of 2010 taken out by the High Court is also dismissed. Notice of Motion Nos.149 of 2012, 2582 of 2011, 2748 of 2011 and 2749 of 2011 also accordingly stand disposed of as such.