



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 427 OF 2024**

Mumbai Metropolitan Region Development
AuthorityPETITIONER

: VERSUS :

Mumbai Metro One Private LimitedRESPONDENT

**WITH
INTERIM APPLICATION NO. 3495 OF 2025**

National Asset Reconstruction
Company Limited ...APPLICANT/INTERVENOR

IN THE MATTER BETWEEN:

Mumbai Metropolitan Region Development
AuthorityPETITIONER

: VERSUS :

Mumbai Metro One Private LimitedRESPONDENT

Mr. J.P. Sen, Senior Advocate with Mr. Kunal Vaishnav, Ms. Prachi Garg, Ms. Prerna Verma & Ms. Sayalee Dolas i/b DSK Legal, for the Petitioner.

Mr. J.J. Bhatt, Senior Advocate with Ms. Anjali Chandurkar, Mr. Dhishan Kukreja, Mr. D.J. Kakalia, Ms. Bhavna Singh Jaipuria, Mr. Paresh Patkar, Mr. Ayaan Zariwalla & Ms. Bhakti Chandan i/b Mulla & Mulla & CBC, for Respondent.

Ms. Gathi Prakash with Ms. Nidhi Asher & Ms. Vidushi Trivedi i/b Cyril Amarchand Mangaldas, for Applicant in 1A/3495/2025.



CORAM : SANDEEP V. MARNE, J.
RESERVED ON: 30 January 2026.
PRONOUNCED ON: 24 February 2026.

Judgment :

THE CHALLENGE

1) By this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**), Petitioner has challenged majority Award delivered by the three-member Arbitral Tribunal on 29 August 2023. The majority Award has allowed claims of the Respondents in the sum of about Rs. 496.48 crores along with interest. The Award directs Petitioner to pay to the Respondent Rs. 35 crores towards deductions made in the tranches of Viability Gap Fund alongwith interest. The Award directs Petitioner to pay to the Respondent amount of Rs. 13,16,00,000/- towards compensation for additional cost incurred on account of payment of rent for the land at Wadala together with interest. Petitioner is further directed to pay compensation of Rs.30,48,00,000/- towards construction of steel bridge instead of concrete bridge at Andheri Station alongwith interest. The Petitioner is further directed to pay to the Respondent amount of Rs.411,70,21,968/- towards increase in the cost of the Project. The Arbitral Award also holds Respondent entitled to extension of time for completion of Project upto 7 June 2011. The award grants *pendent lite* interest, post award interest, as well as costs of arbitration in favour of the Respondent. All counterclaims of the Petitioner have been rejected in the majority Award.



2) A separate dissenting Award has been delivered by the learned co-arbitrator on 29 August 2023 rejecting all claims of the Respondent with a direction to the Respondent to pay sum of Rs. 1 crore towards costs of arbitration to the Petitioner. The counterclaims of the Respondent have been rejected in the dissenting Award.

3) The disputes and differences between the parties arose out of Concession Agreement (**CA**) dated 7 March 2007 executed for setting up of Mass Rapid Transit System (**MRTS**) alongwith Versova-Andheri-Ghatkopar Corridor (**VAG Corridor**) which was the first Metro Line in Mumbai (**Metro-1**). The disputes were referred to three member Arbitral Tribunal comprising of Justice Shivaraj V. Patil, former Judge, Supreme Court of India as the Presiding Arbitrator, Justice B.P. Jeevan Reddy, former Judge, Supreme Court of India and Justice Gyansudha Misra, former Judge, Supreme Court of India as co-arbitrators. The majority award is delivered by the Presiding Arbitrator, Justice Shivraj V. Patil and Co-Arbitrator- Justice Gyansudha Misra. The dissenting Award has been given by the learned Co-Arbitrator- Justice B.P. Jeevan Reddy. Petitioner seeks invalidation of the majority Award by the present Petition filed under Section 34 of the Arbitration Act.

FACTS

4) On 19 August 2004, Government of Maharashtra sanctioned implementation of rail based MRTS along Versova-Andheri-Ghatkopar Corridor (**Metro Project**), to be implemented on Build, Own, Operate and Transfer (**BOOT**) Model. Petitioner-Mumbai Metropolitan Region



Development Authority (**MMRDA**) is a statutory corporation established under the Mumbai Metropolitan Regional Development Authority Act, 1974 and it was appointed as the Project Implementation Agency for the Metro Project. Petitioner-MMRDA invited Requests for Proposal. On 21 August 2004, a consortium consisting of Reliance Infrastructure Ltd and Veolia Transport S.A. (**consortium**) submitted its bid on 10 January 2006 for the Metro Project including its technical proposal. As per the financial bid, the consortium indicated expenditure for implementation of the project at Rs.2356 crores, out of which MMRDA was to bear capital contribution of Rs.1351 crores which was indicated as VGF. After negotiations, the revised bid was submitted by consortium on 10 May 2006 by reducing the demand for MMRDA's VGF to Rs.650 crores. The revised offer was accepted by MMRDA. By Resolution dated 14 June 2006, Government of Maharashtra sanctioned implementation of the project at total cost of Rs.2356 crores. The Resolution contemplated setting up of Special Purpose Vehicle (**SPV**) for implementing the project in which the MMRDA was to be the shareholder to the extent of 26% equity on behalf of Government of Maharashtra. MMRDA issued Letter of Intent (**LOI**) to the consortium on 20 June 2006.

5) MMRDA and consortium of Reliance Infrastructure Ltd. and Veolia Transport S.A. incorporated Mumbai Metro One Private Limited (**MMOPL**) as the SPV for implementation of Metro-1 project. In the SPV of MMOPL, Reliance Infrastructure Ltd. held 69% equity share capital, Veolia Transport S.A. held 5% equity share capital and MMRDA held 26% of equity share capital.



6) On incorporation of MMOPL, Petitioner-MMRDA entered into Concession Agreement dated 7 March 2007 with MMOPL which contemplated concession period as 35 years from 7 March 2007 till 6 March 2042 including construction period not exceeding 5 years, unless otherwise extended. The scope of work and obligations of MMOPL included designing, constructing, operating, maintaining, owning and transferring the MRTS. The obligations of MMRDA included grant of access to MMOPL to the site including Right of Way (**ROW**), leasing land for Car Depot, providing electric sub-stations and access to stations and land temporarily for construction of elevated track way, station buildings and staircases as envisaged under the Concession Agreement. As per Schedule-A to the Concession Agreement, MMRDA was to provide access to site, free from encumbrances in six identified stretches of a total length of 11.332 Kms. along the VAG Corridor. MMRDA was also to provide 13 Hectares of land at Versova (D.N. Nagar) within six months for construction of Car Depot, which was to be used as Casting Yard during construction phase. Under the Concession Agreement, MMRDA was to provide VGF of Rs. 650 crores. Concession Agreement also contemplated appointment of Independent Engineer (**IE**) for overseeing the implementation of the Project. MMRDA accordingly appointed Louis Berger Group Inc alongwith RITES Ltd. as Independent Engineer.

7) According to the Petitioner, the land envisaged for setting up of Car Shed/Casting Yard at D.N. Nagar, Versova was embroiled in litigation. Before execution of Concession Agreement, MMOPL had proposed to MMRDA that a plot of land at Wadala admeasuring about



60,000 sq.mtrs be permitted to be used for setting up Casting Yard. After execution of Concession Agreement on 7 March 2007, MMRDA allotted land admeasuring 60,000 sq.mtrs at Wadala in terms of Allotment Letter dated 25 April 2007 @ Rs.4.85 per sq.mtr. per day upto December 2007 and thereafter @ Rs.5.35 per sq.mtr. per day from January 2008 to December 2008. MMOPL objected to the rates. Later, in a meeting with the Chief Minister, it was agreed that the rent in respect of the land at Wadala would be average of commercial and concessional rate. MMOPL took physical possession of land at Wadala on 18 January 2008 for construction of casting yard.

8) A segment of Metro works in Andheri was to cross the Western Railway line, on account of which MMOPL was required to obtain necessary approval from Western Railways and the Western Railway gave in-principle approval to MMOPL for construction of a segmental concrete bridge at Andheri on 30 October 2007.

9) Though the Concession Agreement was entered into on 7 March 2007, it appears that physical work of the Project commenced only on 8 February 2008. MMRDA and MMOPL entered into Supplemental Agreement, inter-alia for extension of time period to provide Right of Way to MMOPL by a period of 180 days and consequently concession period also got extended accordingly. The second and the third extensions were given under Supplemental Agreements dated 29 February 2008 and 27 August 2008 by 180 days each and accordingly obligation to provide unencumbered Right of Way was extended totally by 540 days upto 28 February 2009. In the



meantime, MMOPL commenced construction work and claims to have faced considerable impediments on account of MMRDA's failure to handover Right of Way in timely manner and in removing the encumbrances. Parties exchanged correspondence. MMOPL requested for extension of time for completing the construction. The Independent Engineer, after considering the factual situation recommended extension of time upto 30 June 2014. By letter dated 19 December 2014, MMRDA extended the Project completion date upto 28 August 2013. By another letter dated 21 February 2014, the project completion date was extended upto 31 March 2014. The Commissioner of Metro Rail Safety sanctioned opening of Metro line on 2 May 2014. The Independent Engineer issued provisional completion certificate on 6 May 2014. The Railway Board granted clearance for rail systems on 5 June 2014. The operation of Metro line commenced from 8 June 2014. The Independent Engineer recommended extension of construction period upto 17 May 2014 by his letter dated 26 November 2014. MMRDA thereafter granted extension upto 17 May 2014 by letter dated 11 December 2014.

10) According to MMOPL, the delay in implementation of the Project resulted in increase in the cost of the Project from Rs.2356 crores to Rs.4026 crores. On 14 July 2014, MMOPL addressed letter to MMRDA claiming amount of Rs.1162 crores. This is how disputes and differences arose between the parties under Concession Agreement, which were referred to arbitration. The Arbitral Tribunal comprised of three former Judges of the Supreme Court, Justice Shivraj V. Patil, former Judge, Supreme Court of India as the Presiding Arbitrator and Justice B.P. Jeevan Reddy, former Judge, Supreme Court of India and Justice



Gyansudha Misra, former Judge, Supreme Court of India as Co-Arbitrators. In its Statement of Claim as amended, MMOPL raised six claims as under:

a. [Claim No.1]: Rs.62,26,63,973/- including interest at the rate of SBI PLR+ 2% (14.75% + 2%) per annum as per the Particulars of Claim (Annexure F-18) with further interest at the same rate on the principal amount from the date of SoC till payment or realization;

b. [Claim No.2): Rs. 143.94 Crores including interest at the rate of SBI PLR + 2% (14.75% + 2%) per annum as per the Particulars of Claim (Annexure G-45) with further interest at the same rate on the principal amount from the date of SoC till payment or realization.

c. In any event and without prejudice to prayer clause (b), if this Tribunal holds that the claimant is not entitled to the said amount of Rs.143.94 Crores, then, in that event, declaring that the respondent is entitled to charge only a sum of Rs.44,98,94,270/- and that the respondent is not entitled to charge any other sum, particulars whereof are given in Annexure G-33 and to award Rs.35,78,79,565/- as per Particulars of Claim (Annexure G-47) with interest thereon at the rate of SBI PLR 2% (14.75%+2%) per annum from the date of deductions thereof till payment or realization;

d. [Claim No.3]: Rs.91.08 Crores including interest at the rate of SBI PLR+ 2% (14.75%+ 2%) per annum as per the Particulars of Claim (Annexure H-40) with further interest at the same rate on the principal amount from the date of SoC till payment or realization:

e. Declaring that claimant is entitled to a sum of Rs.35.59 Crores O&M life cycle costs under the Agreement as per the statement annexed to SoC as Annexure H-41:

f. [Claim No.4]: Rs.14.38 Crores including interest at the rate of SBI PLR+ 2% (14.75% + 2%) per annum as per the Particulars of Claim (Annexure 1-32) with further interest at the same rate on the principal amount from the date of SoC till payment or realization;

g. [Claim No.5]: Rs.48.52 Crores including interest at the rate of SBI PLR + 2% (14.75% + 2%) per annum as per the Particulars of Claim (Annexure J-42) with further interest at the same rate on the principal amount from the date of SoC till payment or realization;

h [Claim No.6]: declaring that the claimant is entitled to extension of time for completion of the Project upto 7th June 2014 as against the time extended by the respondent upto 17th May 2014:



i. Rs.1372.47 Crores including interest at the rate of SBI PLR + 2% (14.75% + 2%) per annum as per the Particulars of Claim (Annexure K-121 hereto) with further interest at the same rate on the principal amount from the date of SoC till payment or realization;

j. Cost of arbitration proceedings:

k. For such further and other reliefs as the nature and circumstances of the case may require.

11) Petitioner-MMRDA filed Statement Of Defence and also preferred counterclaim on 6 October 2015. The counterclaims made by MMRDA were as under:

a. Rs.15,82,41,75,205.48 (being a sum of Rs.14,45,00,00,000/- plus an amount of Rs. 137,41,75,205.48 as interest at a rate of Rs. SBI PLR + 2% from the 10th March, 2015 (being the date of the demand notice) till 6th October, 2015), plus interest at the same rate till the date of actual realization, for the delay caused above 30 + 1 months from the date of handing over ROW in completing the milestones in terms of the particulars of claim annexed at "Annexure R-CC-7";

b. Without prejudice and in the alternate to prayer clause (a) above, for Rs.521,70,29,873.91 (being a sum of Rs.476,40,00,000/- plus an amount of Rs. 45,30,29,873.91 as interest at a rate of Rs. SBI PLR + 2% from the 10th March, 2015 (being the date of the demand notice) till 6th October, 2015), plus interest at the same rate till the date of actual realization, for the delay caused above 54 + 1 months from the date of handing over ROW in completing the milestones in terms of the particulars of claim annexed at "Annexure R-CC-7";

c. In addition to prayer clauses (a) or (b) above, for Rs.61,38,25,824.66 (being a sum of Rs.56,60,00,000/- plus an amount of Rs.5,38,25,824.66 as interest at a rate of Rs. SBI PLR + 2% from the 10th March, 2015 (being the date of the demand notice) till 6th October, 2015), plus interest at the same rate till the date of actual realization, for the delay of 283 days in achieving the SPCD in terms of the particulars of claim annexed at "Annexure R-CC-7";

d. All legal costs and expenses, plus interest @ 18% per annum thereon, from the date of the respondent made actual payment thereof, upto the date of actual re-imburement by the claimant; and

e. For any such orders as this Tribunal may deem fit.



12) Based on the pleadings, the Arbitral Tribunal framed issues. The first two preliminary issues related to jurisdiction and limitation in respect of Claim Nos.1, 2 and 6. The rest of the issues related to the six claims raised by MMOPL and counterclaims raised by MMRDA.

13) The Arbitral Tribunal has delivered two Awards. The majority Award is delivered on 29 August 2023 by the Presiding Arbitrator, Justice Shivraj Patil and Co-Arbitrator- Justice Gyansudha Misra granting some of the claims of MMOPL, while rejecting the rest, as well as rejecting all counterclaims of MMRDA. The dissenting Award is delivered by the Co-Arbitrator, Justice Jeevan Reddy who has rejected all the claims of MMOPL and has awarded costs of Rs.1 crore to MMRDA for raising fabricated case by MMOPL. The counterclaims of MMRDA are also not granted in the dissenting Award.

14) MMRDA and MMOPL filed application under Section 33(1) of the Arbitration Act for correction of the Award. By order dated 26 February 2024, the Arbitral Tribunal allowed the Application and has effected corrections in the majority Award.

OPERATIVE DIRECTIONS IN THE MAJORITY AWARD

15) The operative directions in the Majority Award are as under:-

- (a) The respondent shall pay to the claimant Rs.35,00,00,000/- (Rupees Thirty Five Crores only) towards deductions made by respondent from 16th, 19th and 20th tranches of Viability Gap Fund payable to the claimant, along with interest thereon from respective due dates as



shown in Enclosure-I to Annexure-1 to Synopsis on Claim 1 submitted by the claimant on 6/7/2020 at the then prevailing SBI PLR + 2%.

(b) The respondent shall pay to the claimant Rs.6,14,72,498/- (Rupees Six Crores Fourteen Lakhs Seventy Two Thousand Four Hundred Ninety eight only) towards interest on delay in payment of Viability Gap Fund tranches other than 16th, 19th and 20th tranches.

(c) The respondent shall pay to the claimant Rs.30,16,00,000/- (Rupees Thirty Crores Sixteen Lakhs only) as compensation towards additional cost incurred by the claimant on account of payment of rent for half of the land at Wadala together with cost of funds/interest @ 10% p.a. on the said amount from the respective dates of payments as set out in Table in para 10.148 till the date of SoC.

(d) The respondent shall pay to the claimant Rs.30,48,00,000/- (Rupees Thirty Crores Forty Eight Lakhs only) as compensation on account of having to construct steel bridge instead of concrete bridge for Andheri Station together with cost of funds / interest @ 10% p.a. upto the date of SoC.

(e) The respondent shall pay O&M life cycle cost to the claimant in accordance with Clause-5 of the Agreement dated 9/3/2011 between Western Railway and the respondent by factoring in the additional cost incurred in construction of Andheri Bridge (i.e. additional cost of Rs.30.48 Crores plus cost of funds/interest @ 10% p.a. from 1/4/2012 upto 31/3/2013 and from 1/4/2013 to 10/6/2015).

(f) The claimant shall be entitled to extension of time for completion of the Project upto 7/6/2011.

(g) The respondent shall pay to the claimant Rs.411,70,21,968/- (Rupees Four Hundred and Eleven Crores Seventy Lakhs Twenty One Thousand Nine Hundred Sixty Eight only) towards increase in cost.

ii) The relief granted at SI.No.(i)(a) above shall carry pendente lite interest @ extant SBI PLR + 2%. The other reliefs shall carry pendente lite interest @ 10% p.a.

iii) The sums awarded shall carry future interest @10% p.a.

iv) All other claims of the claimant are rejected.

v) The counter claims of the respondent are rejected.

vi) The respondent shall pay to the claimant Rs.1,00,00,000/- (Rupees One Crore only) towards cost.



vii) The seat of arbitration is Mumbai. However, for convenience, the award is passed and pronounced at Hyderabad with the consent of the parties.

OPERATIVE DIRECTIONS IN THE MINORITY AWARD

16) The operative directions in the Minority Award are as under:-

For all the reasons given above, I am of the opinion that the claims put-forward by the Claimant-MMOPL in this arbitration case are in clear contravention of the provisions of the contract (concession agreement), contrary to law besides being utterly unjust and unfair. Accordingly, the claims put forward by the Claimant (MMOPL) in this arbitration dispute (Metro-I) are hereby rejected and dismissed.

So far as the costs are concerned, since the Claimant has come forward in this arbitration with a patently fabricated case as discussed herein above, the Claimant (MMOPL) is held liable to pay a sum of Rs.1.00 crore (Rupees one crore only) by way of costs to the Respondent-MMRDA.

The Counter claims of the Respondent do not call for any orders in view of my findings in the main dispute. Read at pages 196-197 among others. The Counter Claims are accordingly disposed of with no order as to costs.

17) By the present Petition filed under Section 34 of the Arbitration Act, Petitioner-MMRDA has challenged the majority Award. By order dated 24th October 2024 this Court condoned the delay of 14 days in filing the Petition.

18) Petitioner applied for stay of the Award by filing Interim Application No. 3642 of 2024. By order dated 10th June 2025, this Court refused to grant unconditional stay to the Award and directed that if



MMRDA deposited the entire awarded amount along with interest up to 31 May 2025, execution of the award would remain stayed during pendency of the present Petition. Petitioner-MMRDA challenged the order dated 10 June 2025 before the Supreme Court. By order dated 14 July 2025, the Supreme Court stayed the direction for deposit of entire amount subject to deposit of 50% of the awarded amount.

19) National Asset Reconstruction Co. Ltd. (NARCL) has filed Interim Application No. 3495 of 2025 seeking intervention in the Petition contending that the lenders of the Respondent-MMOPL have assigned their loans to NARCL by Assignment Deed dated 23rd December 2024. The intervention is sought for ensuring that in the event of any amount being found due and payable to the Respondent under the award, NARCL should be permitted to withdraw the amount deposited in the Court.

SUBMISSIONS ON BEHALF OF PETITIONER

20) Mr. Sen the learned Senior Advocate appearing for the Petitioner-MMRDA submits that the majority award suffers from patent inconsistencies, findings recorded therein are patently perverse and that the award of Claim Nos. 1,2,3 and 6 of the majority Award are patently illegal. That MMOPL was not entitled to claim damages on account of alleged delay as per the provisions of the CA as Respondent is sufficiently compensated by increase in the concession period as per the provisions of the CA. That the majority Award overrides the stipulations of the CA by awarding damages to MMOPL. That under Article 4.1 and



4.4 of the CA, inability by MMRDA to provide ROW would result only in extension of concession period or termination thereof. That there is no remedy in the contract for seeking any damages or monetary compensation as a result of delay in provision of ROW. That in complete disregard to the contractual provisions, the Arbitral Tribunal has awarded damages to MMOPL. That MMOPL, being creature of contract, cannot override the provisions thereof. That the Arbitral Tribunal has rewritten the terms of contract in support of this contention, he relies upon judgment of the Apex Court in *PSA SICAL Terminals Pvt. Ltd. Versus. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others*¹. He also relies on judgment of the Delhi High Court in *Trans Engineers India Private Limited Versus. Otsuka Chemicals (India) Private Limited*² in support of the contention that misreading/misunderstanding of basic contractual framework vitiates the Award.

21) Mr. Sen further submits that the Arbitral Tribunal has erred in incorrectly imposing the liability for delay on MMRDA. That the finding is based on completely erroneous and misconceived assumption that MMRDA was obliged under the CA to provide MMOPL site/ROW free from encumbrances after diversion of utilities within 180 days of CA. That under the contractual stipulations of the CA, there is a distinction between providing 'access to the site' and in making the 'site free from encumbrances and after shifting the utilities'. That definition of the term 'encumbrances' in the CA specifically excluded utilities and roads. That therefore it was not the responsibility of MMRDA to remove

¹ 2021 SCC OnLine SC 508

² 2024 SCC OnLine Del 4964



utilities and any delay in removal of utilities cannot be construed to mean delay in handing over of ROW. Furthermore, it was the responsibility of the concessionaire to identify the utilities and therefore there was no question of diversion thereof within 180 days of execution of CA. That it is a matter of fact that as work progressed and reached particular stages, MMOPL intimated MMRDA of certain obstructions / encumbrances / utilities which was discovered/identified by MMOPL only at such stage. That the responsibility of MMRDA was only to provide 'access to the site' after which MMOPL was to identify the utilities. That the process of identification of utilities continued till 2012-13. The very assumption of the Arbitral Tribunal that MMRDA was to make available the site/ROW free from all encumbrances and after diversion of utilities within 180 days of execution of CA, is itself contrary to the contractual terms. That the interpretation is not a plausible interpretation of the CA. That the dissenting award has rightly taken conduct of parties into consideration for holding that MMOPL never insisted for clearance of encumbrances or removal of utilities within 180 days.

22) Mr. Sen would further submit that substantial portion of ROW was timely handed over by MMRDA to MMOPL as early as in December 2007 by which time almost 68% of ROW was handed over to MMOPL. He invites attention of the Court to letter dated 21 December 2007 by which MMOPL informed MMRDA that the stretches to be taken over was only 4.85 kms. He further relies upon letter dated 27 April 2009 of MMOPL in support of the contention that 9.90 kms. ROW was handed over to MMOPL for Metro work. That thus MMOPL itself admitted taking



over large stretch of 11.4 kms. by April-June 2009. He relies upon findings in dissenting award which appreciates the actions of MMRDA as objective and pragmatic delivering best possible performance at various stages.

23) Mr. Sen would then demonstrate contradictions in the findings of the Arbitral Tribunal relating to delay in provision of ROW. He would submit that the Arbitral Tribunal divided the distance of Metro line into six stretches by further sub-dividing each stretch into sub stretches and thereafter decided various contentions of the parties in respect of each of the sub-stretches. He would submit that after deciding the contentions of the parties, the majority Award fails to conclude as to whether there was any delay on the part of MMRDA in provision of ROW for individual sub-stretches. He invites attention of this Court to various paragraphs of majority Award, where it is concluded that MMRDA was not responsible for delay in those sub-stretches. He further contends that the Tribunal has recorded a finding that there were no pleadings in the statement of claim or affidavit of evidence in respect of allegations in relation to several sub-stretches. He would therefore submit that imposition of entire liability on MMRDA, as if the entire delay was attributable to it, is completely erroneous. That the Tribunal has failed to arrive at the finding as to who was responsible for the delay in individual sub-stretches. However, it has erroneously concluded that MMRDA has delayed handing over of portions of various stretches to MMOPL, which delayed completion and commissioning of the Project. That the Arbitral Tribunal has wrongly rejected counterclaims filed by MMRDA by holding MMRDA responsible for handing over of ROW.



24) Mr. Sen would further submit that since MMOPL's case was based on 'global loss', the Tribunal ought to have satisfied itself that there were no other factors contributing to the delay in holding MMRDA solely responsible for the delay. That there were concurrent causes of delay which was also the responsibility of MMOPL. That therefore award of compensation was clearly not called for especially when MMOPL was entitled for extension of time which is already granted. That MMRDA had relied on judgment in the case of *De Beers UK Limited Versus. Atos Origin IT Services UK Limited*³ which is totally ignored by the Arbitral Tribunal. He relies upon findings in the dissenting Award that once cause of certain delays by MMOPL/third parties is proved, the entire claim must necessarily be rejected.

25) Mr. Sen would further submit that the claim of MMOPL was time barred. That as per the initial Schedule-A2 of the CA, MMRDA was to make available site to MMOPL in two tranches and not at one go and therefore claim for damages filed after completion of project was completely time barred.

26) Mr. Sen would further submit that the Tribunal's computation and quantification of Claim No.6 is on an entirely erroneous basis. That it has relied upon cost estimates for quantifying the loss when infact actual numbers / details of cost incurred were available on account of completion of the Project. That the methodology of comparing initial cost estimate with final alleged cost incurred itself is erroneous as estimates by their very nature are never final. That the

³ 2010 EWHC 3276 (TCC)



figure of Rs.2356 crores was the bid amount and that there is nothing on record to indicate that it was an accurate estimation of project cost. That it is erroneous to assume that increase in the estimated project cost automatically resulted in losses to MMOPL. That the commercial risk of an increase in the total cost beyond Rs.2356 crores was to be borne by MMOPL.

27) Mr. Sen further submits that even if it is assumed that there is an increase in the total project cost, the same was never proved or established by MMOPL. That it only relied on board meetings for the purpose of establishing alleged increase in the project cost to Rs. 4,321 crores. That mere presence of MMRDA's nominee director in the Board or as a chairman of the audit committee, did not absolve MMOPL of the burden to prove actual incurring of total project cost. That no evidence was led in support of the claim that additional costs were confirmed in the Board Meetings. The minutes of the Board Meetings were never produced. That in any case, the claim amounts do not tally with each other as the minutes of the meeting dated 23 May 2012 indicated project cost of Rs.4321/- crores whereas the actual project cost indicated in financial statements is Rs.4032 crores.

28) Mr. Sen further submits that mere board minutes cannot be the basis to impose liability on MMRDA. That the Tribunal has erred in holding that since there was MMRDA's nominee/representative on the board of MMOPL, the amounts are accepted by MMRDA. That since details of actual costs incurred were available, the Tribunal ought not to have adopted a short cut method of accepting the figure of project costs



from mere board minutes. That in any case, approvals by the Board of MMOPL cannot bind MMRDA. He relies on minutes of the meeting dated 23 May 2012 to demonstrate that the resolution itself made it clear that the analysis with respect to the revision in the estimation of project cost was advised by nominee directors of MMRDA and that such analysis was to be undertaken. That therefore there is no admission on the part of MMRDA's Director on Board of MMOPL with regard to the project cost of Rs.4321 crores. That the dissenting Award rightly appreciates this position. He would submit that the Tribunal has misconstrued the presence of MMRDA's nominees on the Board of MMOPL, which was essentially for overseeing the project completion. MMRDA's nominee was not involved in day to day functioning nor was a financial expert. That therefore the Tribunal erroneously fastened the liability in respect of the revised project cost on MMRDA holding that its nominee on the board, who was part of audit committee, had right to verify the project cost. He takes me through the evidence of R.W.2 in support of his contention that the revised project cost was never agreed by MMRDA. He submits that MMOPL has failed to prove its claim for alleged additional cost incurred by them and having failed to produce the relevant material and particulars, has erroneously relied on board minutes to prove the claims for recovery of additional costs. That there is no independent evidence of having actually incurred the additional costs. That the dissenting Award rightly holds that mere presence of MMRDA's nominee on the board of MMOPL does not mean any admission on the part of MMRDA in relation to revised project cost.



29) Mr. Sen further submits that MMOPL did not provide any particulars of co-relation between board approvals for project cost of Rs.4321 crores or revised cost of Rs.4026 crores. Neither in the pleadings nor in the evidence, MMOPL provided any particulars or proof of loss/damages suffered. That there is no evidence to show any nexus or even a casual link between the alleged delays on the part of MMRDA and the losses allegedly suffered by MMOPL. In support of his contention that production of independent evidence is mandatory. Mr. Sen relies on judgments in Central Bureau of Investigation Versus. V.C. Shukla and others⁴, M/s Khushal Chand Jagdish Rai of Jalabad (w) Tehsil Fazilka District ferozepur through its sole proprietor Shilpa Rani w/o Raman Kumar Versus. Hakam Singh⁵ and Chandradhar Goswami & others Versus. Gauhati Bank Ltd.⁶

30) Mr. Sen would further submit that though the Tribunal in the majority award has recorded a finding that there was increase in the total project cost, it ultimately held that each head of the claim was required to be individually proved. That while examining various subheads under Claim No.6, the majority award rejects claims towards price verification, price adjustment, increase in costs of civil works and additional amount paid to PMC for lack of proof and supporting evidence. That though the Tribunal correctly applied the yardstick of production of concrete proof and rightly demanded underlying documents while adjudicating claims towards price variation, price adjustment, cost of civil works and additional payments to PMC, it has

⁴ (1998) 3 SCC 410

⁵ RSA No. 439 of 1986(O&M) decided on 14 January 2014

⁶ 1966 SCC OnLine SC 255



failed to apply the same yardstick in respect of the four other subheads of (i)increase in cost of system work, (ii)additional overheads and supervision of construction work, (iii)additional interests and financial expenses and (iv)opportunity costs on loss of profits. That these four claims also suffered from the same defect of absence of evidence of underlying documents but have still been granted by the Arbitral Tribunal. In support, he relies on the judgment of the Apex Court in *Batliboi Environmental Engineers Limited Versus. Hindustan Petroleum Corporation Limited and another*⁷

31) In respect of the award of claim in the sum of Rs.163.22 crores towards increase in the cost of system works, Mr. Sen would submit that the claim was premised on the basis that the sub-contractors engaged for the project were to be paid in foreign currencies and that due to delays caused by MMRDA, the systems contract work was to be performed at a much latter period resulting into losses due to fluctuation in value of foreign currency. That to recover the damages on this account, MMOPL was required in law to establish (i) when orders would have been placed by them and delivery taken in normal course, (ii) when they were actually placed and delivery taken, (iii) that this was on account of delay attributable to MMRDA and not for some other reason (iv) when payments were made to each of the vendors/sub-contractors and quantum of those payments and (v) foreign exchange rates on the relevant dates. That though all this information was available with MMOPL, no material was produced before the Arbitral Tribunal. Instead, it chose to rely on Annexure-9 to the Affidavit in

⁷ (2024) 2 SCC 375



evidence of C.W.2 who himself had not personal familiarity with the figures indicated therein. That Annexure-E filed alongwith the rejoinder written submissions introduced new material including alleged foreign exchange rates providing no opportunity to MMRDA to challenge the same. That in any case, neither Annexure-9 nor Annexure-E contained any material in support of the alleged loss suffered by MMOPL on account of foreign exchange fluctuation. That the Tribunal erroneously accepted the correctness of statements prepared by MMOPL in absence of any evidence. That MMOPL did not discharge any burden in bore, and the claims appears to be inconsistent with MMOPL's own Balance Sheet which indicated cumulative foreign currency loss of Rs.39.25 crores, which is totally inconsistent with the claim of loss of Rs.195.52 crores and with the awarded sum of Rs. 163.22 crores. That during the course of submissions, entry is sought to be explained by MMOPL that it pertains to only for the year ending 31 March 2014 which is plainly perverse as the entry in question is a cumulative figure of foreign currency loss upto 1 April 2013 (7,52,83,144 plus foreign currency loss for the year ending 31 March 2014 -Rs.31,72,62,664/-).

32) So far as the claim awarded in the sum of Rs.100 crores towards additional overheads and supervision of construction works is concerned, Mr. Sen would submit that the Tribunal had actually dealt with three claims together viz.(i) additional payments made to PMC and IE (ii) additional overheads and supervision of construction works and (iii) additional interests during construction. He would submit that the Tribunal rejected the first sub claim on the ground of non-production of supporting material but erroneously awarded the sum of Rs.100 crores



for additional overheads and supervision of construction works without a scrap of supporting material. That for recovery of damages on account of additional overheads, MMOPL was required to establish expenses incurred by it on account of alleged overstay. Material such as purchase orders, work orders, delivery challans and bank statements for proving such alleged expenses was available with MMOPL, but the same was not produced by it. It only relied on Annexure-11 to the affidavit of evidence, which is merely a statement prepared by it without any supporting material. That C.W.2 in the course of his cross-examination admitted his unfamiliarity with those figures. Even otherwise, additional overhead expenses are indirect expenses which could not be claimed on account of Article-29.2 of the C.A. That this objection of MMRDA is not even considered in the impugned Award.

33) So far as the claim of Rs.125 crores towards additional interest and financial expenses awarded by the Tribunal is concerned, Mr. Sen would once again submit that the same were 'indirect expenses' incapable of being claimed on account of Article 29(2) of the CA. He would further submit that to press the claim, MMOPL was required in law to produce various evidence in support of alleged additional interest and financial expenses such as arrangements entered into with lenders, sanction letters, loan agreements, bank statements and ledger accounts maintained by them in respect of the lending facilities. However, no such material was produced by MMOPL which chose to rely on a mere statement prepared by it, being Annexure-12 to the Affidavit of evidence of C.W.2. That the statement explained nothing and is entirely devoid of



any documentary support. C.W.2 also considered his unfamiliarity with the basis on which the statement was prepared.

34) So far as the claim of Rs. 23.47 crores towards opportunity costs of loss of profits is concerned, Mr. Sen would submit that the same is again an 'indirect expense' incapable of being claimed in view of Article-29(2) of the CA. That the claim was premised on the basis that if project was to be completed in timely fashion, it would have been able to realize its revenue as per its projections and that it was deprived of opportunity costs on such loss of cash profits. That financial statements of MMOPL till 2019-20 were available with the Tribunal indicating figures generated through commercial operations which did not disclose any profit. The only evidence led by MMOPL in support of the claim was oral testimony of C.W.2, who did not have any personal knowledge. MMOPL also relied on Information Memorandum of IDBI which was never produced before the Tribunal. If there were no profits till 2013-14 as admitted by C.W.2, there was no question of any opportunity cost on loss of profit. That the Respondent has made a fable attempt to draw distinction between operational profit and cash profit to salvage the situation which attempt is misplaced as even the figures of cash profit cannot be derived from Balance Sheet actually available on record. He would therefore submit that award of claim is plainly perverse.

35) Mr. Sen then deals with award of Claim No.3 relating to change of scope of work in respect of the Bridge at Andheri which is awarded in the sum of Rs.30.48 crores. He submits that mere change in mode of construction did not constitute a 'change in scope' at all. That



Article-16 of the CA prescribed a detailed procedure for effecting change in the scope. That such procedure was admittedly not followed. That MMOPL did not lead any evidence to prove that there was any change in the scope of work. That MMRDA's witness (R.W.4) who was an expert witness, has explained that Andheri bridge could have been built at higher level which could have entailed additional costs of only Rs.1.12 crores and of Metro station of Rs.3.81 crores. That the Arbitral Tribunal has rewritten the agreement by holding that Article-16 was not mandatory. He further submits that no evidence was led by MMOPL in respect of the alleged costs incurred by it and the figures claimed by it in Table-1 of the rejoinder submissions were neither produced nor proved. He would also submit that the claim was barred by limitation as the alleged change in the scope occurred on 17 November 2008, whereas the invocation of arbitration was made on 9 May 2015.

36) In respect of Claim No.2 relating to Wadala Casting Yard in the sum of Rs.13.16 crores, Mr. Sen submits that the Arbitral Tribunal framed a specific issue as to whether MMOPL accepted the rate for Wadala land and whether it was estopped from claiming otherwise. The Tribunal decided the first part of the issue in favour of MMRDA and held the rate to be binding. However, it did not express any view on the issue of estoppel. That there is apparent inconsistency in the finding of the Arbitral Tribunal as it has erroneously held that MMOPL is entitled to difference between the rates stipulated in the License Agreement and the one agreed for D.N. Nagar land. That the findings are plainly inconsistent thereby affecting the ultimate view taken by the Tribunal. Once the Tribunal held that the arrangement struck in the meeting with



the Hon'ble Chief Minister was binding, it ought to have held that the provision under the contract regard imposition of rate @ Rs.1 per sq.mtr per annum stood superseded/novated and could no longer furnish basis for claiming damages. That the award exhibits lack of judicial approach on the Arbitral Tribunal and in support, he relies upon judgment of the Apex Court in *Associate Builders Versus. Delhi Development Authority*

8.

37) In respect of Claim No.1 relating to Viability Gap Funding awarded in the sum of Rs.35.78 crores, Mr. Sen would submit that a sum of Rs.35,78,79,565/- was withheld by MMRDA from total VGF of Rs.650 crores on account of MMOPL's failure to pay amounts due under the License Agreement for Wadala land. That the Tribunal has erred in not appreciating that the relationship between the parties was in the nature of licensor-licensee and the License Agreement did not contain any arbitration clause. That the claim was in the nature of recovery of rent and dispute in relation thereto could only have been adjudicated by a Rent Court under Section 41 of the Presidency Small Causes Courts Act, 1882 read with Sections 5 and 8A of Maharashtra Government Premises (Eviction) Act, 1955. That if award of Claim No.2 for Wadala Casting yard is set aside, Claim No.1 would also automatically go.

38) Mr. Sen would further submit that in the event of this Court holding that any part of the Award is not fit to be set aside under Section 34, it can apply the principles of severability of the arbitral award and in support, he relies upon judgment of the Apex Court in *Gayatri*

⁸ (2015) 3 SCC 49



*Balasamy Versus ISG Novasoft Technologies Ltd.*⁹ and of this Court in *Hindustan Petroleum Corporation Limited Versus G. R. Engineering Private Limited*¹⁰ and *Larsen & Turbo Limited Versus Hindustan Petroleum Corporation Ltd and Anr*¹¹.

39) Mr. Sen would further submit that dissenting opinion of minority award can be relied upon by a party seeking to set aside the award and in support he would rely upon judgment of the Apex Court in *Dakshin Haryana Bijli Vitran Nigam Limited Versus. Navigant Technologies Private Limited*¹². In support of the contention that the Arbitral Tribunal has not recorded reasons in the award particularly while awarding sub-claims under Claim No.6. he relies upon judgment of the Delhi High Court in *Delhi Development Authority Versus. Sunder Lal Khatri & Sons*¹³. On scope of this Court's power to interfere in the arbitral award, he relies on judgments in *Dyna Technologies Private Limited Versus. Crompton Greaves Limited*¹⁴ and *Ssangyong Engineering And Construction Versus. National Highways Authority Of India (NHAI)*¹⁵. In support of his contention that evidentiary standards cannot be relaxed in context of construction contracts involving astronomical amounts, he relies upon judgment of Delhi High court in *Satluj Jal Vidyut Nigam Ltd Versus. Jaiprakash Hyundai Consortium and Others*¹⁶. In support of his contention that mere reproduction of arguments of both sides and accepting as correct arguments of one side

⁹ 2025 7 SCC 1

¹⁰ COMMERCIAL ARBITRATION PETITION NO. 984 of 2018 decided on 18 June 2025

¹¹ APPEAL NO. 26 OF 2006 decided on 8 August 2025.

¹² (2021) 7 SCC 657

¹³ 2009 SCC OnLine Del 127

¹⁴ (2019) 20 SCC 1

¹⁵ (2019) 15 SCC 131

¹⁶ 2023 SCC OnLine Del 4039



do not amount to recording of reasons and that claim cannot be awarded in absence of oral evidence he relies on judgment of this Court in *Hindustan Petroleum Corporation Ltd. Versus. Om Constraction on behalf of Om Constraction Nice Projects Limited IV*¹⁷. In support of his contention that claim of loss of profit cannot be granted in absence of evidence he relies upon judgment of the Apex Court in *Unibros Versus. All India Radio*¹⁸. On above broad submissions, Mr. Sen would pray for setting aside the majority Award of the Arbitral Tribunal.

SUBMISSIONS ON BEHALF OF RESPONDENT

40) Mr. Bhatt, the learned Senior Advocate has appeared on behalf of the Respondent-MMOPL and has canvassed detailed submissions supporting the arbitral Award. He would submit that the majority Award contains detailed analysis of recording cogent reasons for awarding Claim Nos.1, 2, 3 and 6. That neither in the Petition nor during the course of oral submissions, Petitioner has been able to make out any of the enumerated grounds under Section 34 of the Arbitration Act for invalidation of any part of the Award.

41) Mr. Bhatt would submit that the grounds raised by MMRDA in the Petition are beyond the scope of Section 34 of the Arbitration Act. That the Petition is filed and argued as if it is an appeal over the Award. That this Court is being urged to reappraise the evidence. That even if there is any error in application of law or merely because an alternate

¹⁷ COMMERCIAL ARBITRATION PETITION (LODG.) NO. 28685 OF 2024 decided on 19 January 2026

¹⁸ 2023 SCC OnLine SC 1366



view is also possible, the same cannot be a ground to set aside the Award. That the Court cannot take independent assessment of merits of dispute. That even error committed in interpretation of clauses of contract is an error within jurisdiction.

42) Mr. Bhatt would further submit that the contention of MMRDA that MMOPL is only entitled to extension of time and not damages itself exhibits clear admission that the delay is attributable to MMRDA. That MMRDA does not dispute the grant of extension of time. That under the Contract, grant of extension of time was warranted only if there was delay on the part of MMRDA. That therefore it was not even necessary to establish responsibility of MMRDA in cause of delay on account of admitted extension of time granted by it. That the Tribunal has devoted over 600 pages in the Award for minutely examining each and every encumbrance and hindrance and has thereafter arrived at the conclusion that there was no delay on the part of MMOPL in execution of the Project and that the delay was attributable to MMRDA. He would submit that Article-13.4 of CA stipulated that the IE was to determine the cause of delay and recommend extension of time for construction only if the delay was on the part of MMRDA in granting ROW. That there is no dispute to the position that the IE recommended grant of extension from time to time and MMRDA granted such extension by accepting recommendations of the IE. That thus responsibility of MMRDA in respect of the delay is clearly established. However, the Arbitral Tribunal has conducted independent factual inquiry into the aspect of delay and has held MMRDA responsible for delay in making available ROW.



43) Mr. Bhatt would further submit that the contention of MMRDA that MMOPL could have constructed Metro line piecemeal as and when Right of Way was made available is misplaced and has been rightly rejected by the Arbitral Tribunal. That construction of the Metro line was to be sequential and continuous and that the same could not be constructed piecemeal. He relies on judgments in Sutlej Construction Limited Versus. Union Territory Of Chandigarh¹⁹ and Swastik Construction & Anr. Versus. Mukesh alias Mohanlal Mulji Dhanesha & Ors²⁰.

44) Mr. Bhatt further submits that mere increase in the concession period does not mean that MMOPL was not entitled to damages. The Arbitral Tribunal has recorded detailed reasons for rejecting this contention and has held that there is no clause in the contract barring claimant from claiming monetary losses. In support, he relies upon judgment of Gujarat High Court in Vinod Chandra Hiralal Gandhi Versus. Vivekanand Mills Limited Ahmedabad²¹.

45) Mr. Bhatt would further submit that the findings recorded by the Arbitral Tribunal relating to increase in the project cost are well supported by the documentary and oral evidence. That the Arbitral Tribunal has considered *inter alia* minutes of meeting of MMOPL's audit committee, minutes of various board meetings, audited financial statements and minutes of special resolution amending the Articles of Association of MMOPL for recording findings on increase in the project

¹⁹ (2018) 1 SCC 718

²⁰ COMMERCIAL ARBITRATION PETITION NO. 247 OF 2024 decided on 19 November 2025

²¹ 1965 SCC Online Guj 50



cost. That Petitioner-MMRDA was 26% shareholder in MMOPL and agreed to alter the Articles of Association to raise debt finance from the lenders to meet revised project cost. Thus, all decisions relating to revised project cost were taken with due concurrences with MMRDA. That the award rightly holds that there was increase in the total project cost from Rs.2356 crores to Rs.4026 crores resulting in differential project cost of Rs.1670 crores. Mr. Bhatt would further submit that the Arbitral Tribunal has not awarded the whole differential value of the project cost in favour of MMOPL but has considered each of the claims on merits and has awarded only part of them. That the Tribunal has correctly found that there was increase in the cost of systems works primarily on account of increase in the conversion rate of foreign exchange. That contracts with foreign suppliers were entered into in foreign currency and if Right of Way was given in a timely manner, the import of goods and systems, particularly rolling stock, would have taken place prior to original proposed completion date of 31 July 2010. That due to delay on the part of MMRDA to give ROW in a timely manner, the import of the goods had to be postponed, which resulted in conversion of foreign currency into Indian Rupees at a higher value. That the Tribunal has considered the entire evidence and has arrived at the conclusion that MMOPL is entitled for compensation for the said increase. However, while granting such increase, the Tribunal has chosen the least possible figures that the exchange rates claimed are based on official RBI records published from time to time. That while arriving at its findings, the Arbitral Tribunal has evaluated and considered evidence in the form of (i) contracts and amounts payable to foreign vendors as approved by the Board of MMOPL (ii) Annexure-9 of



C.W.2 affidavit of evidence, (iii) C.W.3 cross-examination on computation of foreign exchange variation and (iv) data produced from RBI's official website. That the Tribunal also considered alternative methodologies for calculating foreign exchange variations furnished by MMOPL at length and has thereafter accepted MMOPL's version. That the Tribunal has proceeded on accepted and permissible principle of rough and ready measure. In support, he relies upon judgment of this Court on *New India Assurance Co. Ltd. Versus. Shirdi Industries Limited*²².

46) Mr. Bhatt would further submit that the finding of fact recorded by the Arbitral Tribunal after appreciation of evidence relating to losses suffered on account of foreign exchange fluctuations do not warrant interference in exercise of power under Section 34 of the Arbitration Act. That the Tribunal has rightly relied upon approval of Board of Directors of MMOPL which included representatives from MMRDA. That since the amounts payable to foreign vendors is approved by the Board, it is objectionable on the part of MMRDA to now question correctness of the said figures. That if there was no delay on the part of MMRDA in delivering the site/Right of Way, MMOPL would have achieved COD by 31 July 2010 and would have paid consideration for imported items required for the project at a much cheaper rate of foreign exchange. That the Tribunal has merely considered the difference in the average rate of foreign exchange in the year 2009-10 and the rate applicable as on the date of actual purchase. That therefore award of

²² Arbitration Petition NO.375 OF 2024 decided on 9 December 2025.



reasonable figure of Rs.163.22 crores by the Arbitral Tribunal does not warrant any interference.

47) Mr. Bhatt further submits that the Petitioner is attempting to mislead this Court by relying on Balance Sheet ending on 31 March 2014 in support of his contention that foreign exchange loss was only of Rs.39 odd crores. He submits that the duly approved Balance Sheet every year shows expenditure in foreign currency and CIF value of imported goods. That the CIF value of imported goods for the balance sheet for Financial Year 2013-14 is shown at Rs.3,36,60,75,390/- which is the expenditure in foreign currency. That the sum of Rs.39.25 crores indicated as foreign exchange loss in Balance Sheet ending 31 March 2014 is merely cumulative figure of loss in foreign exchange being the difference between the amount booked in the Books of Accounts (being only a book entry) where a bill is raised by a foreign supplier and the amount that was later paid in the year and if not paid, the foreign exchange rate as on 31 March of financial period. That this is in accordance with statutory account standards. That therefore the said figure of Rs.39.25 crores has nothing to do with the difference between the amount that would have been paid in the Rupee terms had the contract been completed on 31 July 2010 and the date on which the contract was actually completed and the amount towards foreign exchange actually paid considering the date of completion of contract.

48) Mr. Bhatt then justifies award of claim towards (i) additional overheads of Rs.100 crores submitting that given the nature of project requiring employment of manpower and machinery for its execution, it



cannot be disputed that MMOPL was required to incur additional costs during the prolonged period of execution. He submits that after considering the evidence on record, the Tribunal awarded a conservative sum of Rs.100 crores towards additional overhead costs as against a much higher amount which was reflected against this head in the financial statement for the year 31 March 2011 and 31 March 2014. That the figure is extremely conservative considering the original claim of Rs.255.06 crores.

49) Mr. Bhatt also justifies the award of claim of Rs.125 crores towards additional interest costs and financing charges contending that the MMOPL had to incur additional interest and financial expenditure on account of extension of execution period. That the Tribunal has considered evidence on record in the form of MMOPL's witness, evidence affidavit and Balance Sheet. That the figure of Rs.125 crores is again extremely conservative as compared to the actual cost incurred by MMOPL of Rs.369.51 crores. He takes me through the Balance Sheet of MMOPL being exhibit, C-73 as on 31 March 2011 at Exh.C-76 as on 31 March 2014 to demonstrate that specific figures of bank and finance charges were reflected herein and that the said figures are approved by the audit committee chaired by MMRDA's representative. He relies on judgment of this Court in Lotus Logistics and Developers Pvt. Ltd. Versus. Evertop Apartments Co-operative Housing Society Limited²³.

50) Mr. Bhatt also supports the award of claim towards opportunity cost submitting that the delay in achieving the completion

²³ CARBP (L) NO.34791 OF 2024 decided on 13 January 2026



date deprived MMOPL of avenues and that therefore it is entitled to opportunity costs on loss of profits. That the Arbitral Tribunal has awarded extremely conservative sum of Rs.23.47 crores at the rate of 10% as against the rate of 18% demanded by MMOPL. That while awarding the said claim, the Tribunal evaluated evidence in the form of MMOPL's business plan, statements setting out opportunity cost, Information Memorandum prepared by IDBI, loss of revenues from Financial Year 2011-15 and written and oral evidence of the parties. He relies upon judgment of this Court in *Regus South Mumbai Business Centre Private Limited Versus. Marie Gold Realtors Private Limited*²⁴ in support of his contention that even a business plan can be relied upon by the Arbitral Tribunal for awarding claim. In support of his contention that Arbitral Tribunal can make guesstimate of damages in a case involving delay by a party, he relies upon judgments of the Apex Court in the case of *A.T. Brij Paul Singh and others Versus. State of Gujarat*²⁵ and *Mohd. Salamatullah and Others Verus. Govt. Of AP*²⁶.

51) Mr. Bhatt justifies award of Claim No.3 regarding Andheri bridge submitting that the CA envisaged construction of PSC bridge across railway lines at Andheri but was required to construct steel bridge on account of failure on the part of MMRDA in giving ROW in respect of construction of PSC bridge. That the Arbitral Tribunal has constructed clauses of the contract for arriving at the conclusion that there was change in the scope and after considering the evidence on record, awarded sum of Rs.30.48 crores towards the difference. That the

²⁴ CARBP NO. 439 OF 2024 decided on 25 November 2025.

²⁵ 1984 (4) SCC 59

²⁶ 1977 (3) SCC 590



consideration and reasoning of the Tribunal is cogent and conclusion is correct conclusion. That the Tribunal has rightly awarded additional costs of Rs.30.48 crores after evaluating the entire evidence on record. That the awarded sum represents difference in the actual cost of steel bridge and the estimated cost of PSC bridge. That Petitioner's IE has also determined the actual cost incurred by MMOPL in construction of steel bridge. That therefore award of this claim does not warrant any interference in exercise of powers under Section 34 of the Arbitration Act.

52) In respect of award of Claim Nos.1 and 2, Mr. Bhatt submits that it was MMRDA's obligation to provide 13 hectares of land at D.N. Nagar for car depot which was to be used for the purpose of casting yard during the construction period. That MMRDA delayed handing over the said land and provided the same in a piecemeal manner on 4 August 2008, 10 May 2010, November 2010 and September 2011. That full land was not delivered. That MMOPL was therefore constrained to take up another land on license which happened to be of MMRDA. That under the CA, the land for Casting Yard was to be provided at nominal rate of Rs.1 per sq.ft.per annum whereas it was forced to take land at Wadala at a much higher cost. That the Tribunal has rightly awarded differential amount arising out of rent payable in respect of land at Wadala. That the entire cost of rent is not awarded and what is awarded is only rent in respect of half of land at Wadala. That MMRDA had erroneously deducted the amount of rent from VGF. That once Claim No.2 in respect of Wadala land is upheld, Claim No.1 would automatically be upheld.



53) Mr. Bhatt relies on judgments of this Court in Kotak Securities Limited Versus Gajanan Ramdas Rajguru²⁷, Hindustan Petroleum Corporation Ltd. Versus. Aegis Logistics Pvt. Ltd.²⁸, Dimple Enterprises Versus. Wework India Management Pvt. Ltd²⁹, Central Depository Services (India) Limited Versus. Daksha Narendra Bhavsar and Another³⁰, MahaOnline Limited Versus. Aksentt Tech Services Limited³¹ and of Delhi High Court in MBL Infrastructures Limited Versus. Delhi Metro Rail Corporation³². He would therefore submit that in absence of any valid ground of challenge to the impugned majority Award, the Petition is liable to be dismissed. On above broad submissions, Mr. Bhatt would pray for dismissal of the Petition.

REASONS AND ANALYSIS

54) The disputes and differences between the parties have arisen out of performance of CA dated 7 March 2007 executed for the purpose of construction of Metro Line 1- Varsova-Andheri-Ghatkopar Corridor, which is the first Metro Line in Mumbai. The CA provides for concession period of 35 years from the date of execution thereof. The Metro Project was to be completed and operations were to be started within a period of five years. It appears that the Respondent gave a schedule to Petitioner indicating the (COD) as 29 July 2009. However, the commercial operations for Metro Line -1 started with effect from 8 June 2014 and there was delay in achieving the COD. The case involves

²⁷ CARBP NO. 788 OF 2024 decided on 3 December 2025

²⁸ ARBITRATION PETITION NO. 579 OF 2024 decided on 19 December 2025.

²⁹ CARBP No.154 OF 2022 decided on 25 July 2025.

³⁰ CARBP No. 311 OF 2024. Decided on 1 December 2025

³¹ CARBP (L)No.33165 OF 2024 decided on 5 December 2025

³² 2023 SCC OnLine Del 8044



peculiar feature of the Project implementing agency-MMRDA taking part in implementation of the Project with the consortium, which was awarded the tender. Accordingly, Respondent No.1-MMOPL was incorporated as a Special Purpose Vehicle for implementation of Metro Project comprising of MMRDA and consortium of Reliance Energy (Reliance Infrastructure Limited) and Veolia Transport SA. The share capital of MMOPL is owned by the three entities in proportion of 69% by Reliance, 5% by Veolia and 26% of MMRDA.

55) After incorporation of MMOPL, Concession Agreement 7 March 2007 was executed by MMRDA, under which MMOPL agreed to construct and operate the Metro Project as a Concessioner on Build-Own-Operate-Transfer basis. The CA contemplated the concession period of 35 years from 7 March 2007 upto 6 March 2042 including construction period not exceeding five years. During the concession period, Respondent-MMOPL can operate the Metro Line and recover the cost incurred for its construction. The CA also provided for grant of extension in respect of the concession period. As observed above, implementation of the project got delayed and operations of Metro Line-1 started from 8 June 2014. There is no dispute to the position that on account of delay in execution of project and the delay in commencement of commercial operations, the concession period has been correspondingly extended by MMRDA. MMOPL claims that the Total Project Cost went up due to delay. MMOPL is not satisfied by mere extension of concession period and believes that extension of concession period would not be sufficient for compensating it in respect of additional cost incurred in execution of the project.



56) The original cost of the project was Rs.2356 crores, out of which Rs.650 crores were to be contributed by MMRDA as VGF towards capital contribution. It is the case of MMOPL that by the time execution of the project was complete the Total Project Costs escalated to Rs.4321 crores. However, ultimately the actual expenditure incurred for the project was claimed by MMOPL at Rs.4026 crores.

57) The Respondent-MMOPL accordingly demanded sum of Rs.1162/- crores from MMRDA on 14 July 2014. After the reference to Arbitral Tribunal was made, the MMOPL filed Statement of Claim raising total six claims as enumerated hereinabove. The three-member Arbitral Tribunal has delivered a split verdict. The majority Award has partly granted claim Nos.1, 2, 3 and 6 while rejecting the rest of the claims. The minority Award rejects all the claim of the Respondent.

58) The summary of claims granted in the majority Award are as under:

Claims	Amount claimed	Amount granted
Claim No.1	62,26,63,973 +interest	Rs.35,00,00,000 + 6,14,72,498
Claim No.2	143,94,00,000/-	13,16,00,000/-
Claim No.3	87,03,96,777/-	30,48,00,000/-
Claim No.6	1,372.47 crores	411,70,21,968/-

59) The Respondent-MMOPL has not challenged the Award and therefore the limited remit of enquiry in the present Petition is about



correctness of award of Claim Nos.1 to 3 and 6 in the majority Award. Since the claims arise essentially out of allegation of delay on the part of the MMRDA in not making available site/ROW, Arbitral Tribunal has made detailed discussion on that aspect and has held MMRDA responsible for delay in handing over ROW. The Arbitral Tribunal has also recorded findings of increase in the total project cost. The Arbitral Tribunal has thereafter discussed each head of claim and has recorded its reasons for granting them. Since the Respondent-MMOPL has not challenged rejection of Claim Nos.4 and 5 and part rejection of Claims Nos.1 to 3 and 6, it is not necessary to deal with reasons recorded by the Arbitral Tribunal for not awarding the said claims in favour of MMOPL.

60) Thus, broadly the remit of enquiry in the Petition revolves around the three issues of (i) allegation of delay on the part of MMRDA in making available ROW/site for execution of project; (ii) entitlement of MMOPL for monetary compensation over and above extension of concession period; (iii) MMOPL's claim of increase in the project cost to Rs. 4026 crores (iv) liability of MMRDA to pay increased cost to MMOPL and (v) quantification of Claim Nos.1 to 3 and 6. In the majority award, MMRDA is held responsible for delay in execution of work due to failure on its part in making available the ROW. It is held that since the COD for the Project got extended, MMOPL is entitled to monetary compensation for incurring of additional expenditure over and above extension of concession period. The majority award has upheld MMOPL's claim of increase in the project cost of Rs. 4026 crores and has adjudicated the claims raised by it under various heads. While some of the claims are rejected, the majority award has quantified the Claim Nos. 1 to 3 and 6



and has awarded the same in MMOPL's favour. Petitioner-MMRDA has challenged both entitlement of MMOPL in respect of Claim nos. 1 to 3 and 6 as well as their quantification.

61) I accordingly proceed to examine whether findings recorded by the Arbitral Tribunal on the above aspects would pass the muster of scrutiny by Section 34 Court.

SCOPE OF POWERS UNDER SECTION 34 OF ARBITRATION ACT

62) Before proceeding further, it would be apposite to broadly outline the scope of jurisdiction of this Court while examining the findings of the Arbitral Tribunal on the above issues. By now, the scope of enquiry by Section 34 Court while deciding the objections to arbitral award is well settled. The broad scope of powers of Section 34 Court has been repeatedly outlined by the Supreme Court in various judgments. Reference in this regard can be made to the judgments in **Ssangyong Engineering & Construction Co. Ltd.** (supra) **Associate Builders** (supra), **Dyna Technologies Pvt. Ltd.** (supra), **Indian Oil Corporation Ltd through its Senior Manager V/s. Shree Ganesh Petroleum Rajgurunagar**³³, **OPG Power Generation (P) Ltd. Vs. Enexio Power Cooling Solutions India Pvt Ltd**³⁴ and **PSA Sical Terminals Pvt. Ltd.** (supra). In the light of the well settled principles, it is not necessary to reproduce the passages of those judgments. Suffice it to summarize the principles governing the scope of inquiry under Section 34 of the Arbitration Act. The arbitral proceedings are not *per-se* comparable to

³³ (2022) 4 SCC 463

³⁴ (2025) 2 SCC 417



judicial proceedings before the Court. The intention of the legislature is to recognise party autonomy. Party autonomy is the cornerstone of arbitration, allowing parties to voluntarily choose how to resolve disputes outside of traditional courts, including selecting arbitrators, governing law, seat, language, and procedures. Since parties to dispute choose the forum for dispute resolution through private arbitration, they must show deference to the decision of the arbitrator chosen by them. However, party autonomy is not absolute, as it is circumscribed by the principles of public policy, mandatory laws, and procedural fairness.

63) The approach of the Court should be to respect the finality of the arbitral award and not to interfere with the same in a casual or cavalier manner unless the award is so perverse that the perversity goes to the root of the matter. The Courts are therefore required to show significant latitude towards arbitral awards. The Court exercising power under Section 34 of the Arbitration Act cannot undertake independent assessment of the merits of the dispute. The Court does not sit in appeal over the award and therefore cannot reappreciate the evidence. Appreciation of quality and quantity of evidence is outside the scope of inquiry under Section 34 of the Arbitration Act. Merely because another view is also possible based on material available on record, the same cannot be a ground for setting aside the arbitral award. Mere erroneous application of law or erroneous interpretation of contractual clauses cannot be a ground for interference in the award. Interpretation of the contractual clauses is in the exclusive domain of the Arbitral Tribunal and therefore even if an error is committed in interpretation of contract, the same is still an error within the jurisdiction. Inadequacy or



insufficiency of reasons in the award is again not a ground for invalidating the arbitral award. In a given case, where the underlying reasons for making the award can be extracted from meaningful reading of the entire award together with documents on record, the Court can in fact explain such underlying reasons rather than setting aside the award for insufficiency of reasons.

64) At the same time, if the findings recorded in the award are based on absolutely no evidence, the award not only suffers from the vice of perversity, but such perversity would go to the root of the matter rendering the award invalid. There is fine distinction between the concepts of 'no evidence' and 'insufficient evidence' and while the former eventuality renders the award perverse, the latter does not. The award can be invalidated for patent illegality appearing on the face of the award, but such patent illegality must be such an illegality, which goes to the root of the matter and not mere erroneous application of law. If the Arbitral Tribunal, based on material before it, has recorded a finding or has reached a conclusion, which no fair or reasonable minded person would ever record or reach, the same would constitute patent illegality in the award, making it susceptible to invalidation under Section 34 of the Arbitration Act. While interpretation of contractual terms is in exclusive domain of the Arbitral Tribunal, it does not mean that the Tribunal can rewrite the terms of contract or foist an altogether new commercial bargain on the parties. The Arbitral Tribunal is mandated under Section 28 of the Arbitration Act to decide the disputes between the parties in accordance with terms of the contract and not by introducing a new contractual arrangement. Therefore, if the award is



rendered in departure of the contractual terms, the same can be invalidated by Section 34 Court. Being a creature of contract, the arbitrator must stay within the bounds of contractual terms. The Tribunal cannot exceed the contractual mandate and award claims by invoking the principles of equity or 'in the interest of justice' when the claim is not awardable as per contractual terms. Unless equitable jurisdiction is conferred on the Tribunal by agreement between the parties, the Tribunal cannot decide the matter as *amiable compositeur*. Inconsistent and contradictory findings exhibiting internal conflict in the award reflect patent illegality. Eschewing vital evidence on record constitutes a valid ground of challenge to the Arbitral Tribunal. Similarly, consideration of irrelevant material for awarding a claim also exhibits perversity in the award.

65) Having dealt with the broad scope of powers of this Court to interfere in the arbitral award under Section 34 of the Arbitration Act, now I proceed to examine findings recorded by the Arbitral Tribunal on various issues.

MOST CLAIMS RELATE TO DELAY IN EXECUTION OF PROJECT

66) There is no factual dispute to the position that execution of the Metro Project has been delayed. The Commercial Operation Date could not be achieved by the desired date. Though the COD was supposed to be achieved within maximum period of 5 years in the CA, it appears that the MMOPL had given a schedule under which the COD was to be achieved by 29 July 2009. However, the physical work of the Project



commenced only on 8 February 2008. The COD was extended by the parties by mutual agreement from time to time and finally the commercial operations commenced on 8 June 2014.

67) Most of the claims of the Respondent-MMOPL are related to the aspect of delay. According to MMOPL the total project cost went up from the estimate of Rs. 2356 crores to Rs. 4321 crores (which was later claimed at Rs. 4032 crores). As observed above, the consortium had bid at a particular value and the MMRDA was supposed to provide the Viability Gap Funding of Rs. 650 crores. The project cost went up as the MMOPL was required to incur additional cost for procuring equipment and for system contracts, towards interest, overheads etc. According to MMOPL since there was enormous rise in the project cost, it is entitled to recover the same from MMRDA. As observed earlier, MMOPL is expected to recover the expenditure incurred in execution of the Project by operating the Metro Line during the concession period of 35 years. CA provided for grant of extension of concession period if MMRDA is found responsible for delay and accordingly extension of concession period has actually been granted to MMOPL. According to MMRDA, MMOPL can recover the additional cost by operating the Metro Line during extended concession period. On the other hand, it is the case of MMOPL that it cannot recover the entire additional cost only through extension of concession period and is entitled to recover the additional cost from MMRDA.

68) The Arbitral Tribunal was thus tasked upon to decide the responsibility for delay. The majority award holds Petitioner-MMRDA



responsible for delay in execution of project. According to MMRDA, even MMOPL is responsible for delay and that since there are concurrent delays, the Tribunal has erroneously put the entire responsibility for delay at the doors of MMRDA. Thus inquiry into the responsibility for delay was the main issue before the Arbitral Tribunal and answering that issue decides MMOPL's entitlement in respect of most of the Claims

MMRDA'S OBLIGATION TO PROVIDE ENCUMBRANCE-FREE ROW

69) The Arbitral Tribunal has held in the majority award that it was the responsibility of MMRDA to provide the site/ROW free from all encumbrances after diversion of utilities 'within 180 days of the CA'. According to the MMRDA, the finding is perverse and based on implausible and irrational interpretation of the CA. The MMRDA accuses the Arbitral Tribunal of having traveled beyond the express contractual stipulations under the CA. It would therefore be necessary to consider the relevant contractual stipulations. Under Article 13.4 of the CA, parties contractually agreed as under:

13.4. Site to be free from Encumbrances

The Site shall be made available to the Concessionaire pursuant hereto by MMRDA free from all encumbrances, after diversion of all utilities and free from all occupations and without the Concessionaire being required to make any payment to MMRDA on account of any costs, expenses and charges for the use of such Site for the duration of the Concession Period save and except as otherwise expressly provided in this Agreement. MMRDA shall procure for the Concessionaire access to the Site, free of Encumbrances, not later than 180 (one hundred eighty) Days from the date of this Agreement and in accordance with the land schedule (the "Land Delivery Schedule") set forth at Annexure of Schedule A.



Provided, however, that if MMRDA does not enable such access to any part or parts of the Site for any reason other than a Force Majeure Event or breach of this Agreement by the Concessionaire, MMRDA shall extend the Scheduled Project Completion Date and the Concession Period by such period as determined by the Independent Engineer to compensate the Concessionaire

70) The Arbitral Tribunal has interpreted the above contractual clause to mean that the contractual obligation for MMRDA in Article 13.4 of CA to provide the site/ROW within 180 days included removal of all encumbrances including utilities. Relevant findings of the Arbitral Tribunal in this regard are to be found in paragraphs 12.48 of the majority Award, which read thus:-

12.48 Hence, it is held that it was the obligation of the respondent under the CA to provide to the claimant Site / ROW **free from all encumbrances including utilities** (except those which were not required to be shifted), within 180 days of the CA

(emphasis added)

71) According to the Petitioner, the term 'encumbrance' defined in the CA specifically excluded 'utilities and roads referred to in Article 13.2'. The definition of the term 'encumbrance' in the CA is as under:-

"**Encumbrances**" means any encumbrances such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations and shall include without limitation any designation of loss payees or beneficiaries (other than such designation of the Senior Lenders pursuant to the Financing Documents) or any similar arrangement under any insurance policy pertaining to the MRTS Project, physical encumbrances and encroachments on the Site where applicable herein **excluding existing utilities and roads referred to in Article 13.2.**

(emphasis added)



72) The Arbitral Tribunal has considered contractual Article 13.4 of the CA as well as the definition of the term 'encumbrance' therein and has recorded following findings:

12.40. Respondent contended that Article 13.4 provided 180 days for the respondent to procure for claimant access to the Site free from Encumbrances' and in accordance with Schedule A, Annexure-II; that the utilities referred to in Article 13 being utilities likely to be affected during the construction of the 'Metro were excluded from definition of Encumbrance; that respondent did not have obligation to remove / divert such utilities within 180 days of the CA; that there was no time limit prescribed within which the respondent was to make available the Site to the claimant free from Encumbrances, after diversion of all utilities free from all occupations.

12.41. In order to appreciate the respondent's contention, the definition of term 'Encumbrances' under CA needs to be analyzed. 'Encumbrances' was defined to mean inter alia any encumbrances such as physical encumbrances and encroachments on the Site excluding 'existing utilities and roads referred to in Article 13.2'. The expression "Physical Encumbrances and encroachments, on the Site" used in the definition of "Encumbrance" was wide enough to include all Utilities, of course other than utilities referred to in Article 13.2, which has been expressly excluded. The expression 'Utilities', as defined under the CA meant the existing utilities on, along or under the Site that have been "identified" by the claimant; and "if required for the Project", relocated by respondent to a safe location, the location being such that the continued presence of such utilities did not affect the execution of the Project.

12.42. Now what were the 'existing utilities referred to in Article 13.2'? It is seen that Article 13.2 granted to the claimant the right and license to enter upon the Site for inter-alia constructing, , operating and maintaining the Project subject however, to' any existing utilities on, under or above the Site being kept in continuous satisfactory use. For avoidance of doubt, Article 13.2 made it clear that the said condition was only meant to apply to those utilities that were likely to be affected for the execution of works during the construction period. Then what were the utilities that were likely to be affected for the execution of works?

12.46. Considering that (i) article 13.4 required that the respondent shall procure for the Claimant access to the Site, free of 'Encumbrances', not later than 180 days (ii) and the term



"Encumbrances" as defined under the CA included all utilities other than utilities contemplated under Article 13.2, which could not be shifted and had to be maintained as it is, the respondent's contention that it was not obliged to remove the utilities within 180 days, cannot be accepted. The respondent's contention that utilities had to be removed / relocated only as and when during the progress of the construction a stage arose where such utilities obstructed further construction activity, is contrary to the express terms of the CA which required the respondent to provide to the claimant the Site free from Encumbrances including all utilities except those specified under Article 13.2. It is noticed that during the execution the respondent did not put forth such interpretation of the terms of CA. Per contra the Parties accepting that obligation of the respondent to provide the Site free from encumbrances included shifting of utilities, had proceeded accordingly and first and second Supplemental Agreements were executed.

12.47. The respondent's contention is also contrary to Article 4.1 which made the obligation of claimant subject to satisfaction in full of the conditions precedent on or before the Financial Close including that the claimant was granted ROW / Way Leave for the alignment of MRTS free from all Encumbrances. The claimant's obligation to undertake construction being subject to said conditions precedent, it is not possible to accept the respondent's contention that the shifting / removal of utilities was to be undertaken during the course of execution. The contentions also overlook that Article 9.1 (viii) cast a positive obligation on the respondent to shift the utilities, if required not even though the provision gave an option to the respondent to shift the utilities itself or through the concerned agency or through the claimant by reimbursing the cost, existence of such option did not relieve the respondent to ensure shifting of utilities. Postponing the stage of shifting / removing the utilities to the stage at which construction reaches a point requiring such shifting / removal is not only contrary to the express language of Article 13.4 and 4.1, but would also have made time bound achievement of specified milestones like Financial Close and Scheduled Project Completion Date, difficult to achieve and lead to results incongruous to the objective of the CA which was time bound completion of the Project. It is not possible to read the CA in a manner suggested by the respondent so as to hold that the identification / shifting of the utilities was within claimant's obligation.

73) Thus, the Arbitral Tribunal has holistically considered various clauses of the contract for construing that identification and shifting of utilities was within the domain of MMRDA and has



accordingly concluded that it was the obligation of MMRDA to provide site/ROW free from all encumbrances including utilities (except those which were not required to be shifted) within 180 days of execution of CA. For reaching the conclusion, the Tribunal has considered the factors of (i) Article 13.4 prescribed period of 180 days for removal of encumbrances (ii) definition of the term 'encumbrance' which includes all utilities, except the ones contemplated in Article 13.2 which were supposed to be preserved and maintained, (iii) obligation of MMOPL being made subject to grant of ROW free from all encumbrances under Article 4.1 (iv) positive obligation for MMRDA under Article 9.1 (viii) to shift utilities; (v) interpretation by MMRDA during execution of contract about shifting of utilities as and when work progressed (vi) execution of first and second supplemental agreements extending the period due to non-shifting of utilities. I do not find interpretation of contractual terms by Arbitral Tribunal to be so irrational that no fair-minded person would ever arrive at the same. As observed above, interpretation of contractual clauses is in the exclusive domain of the Arbitral Tribunal. Even if any error is committed by the Tribunal in interpreting the contractual clause, it is an error within the jurisdiction of Tribunal not warranting any interference in exercise of powers under Section 34 of the Arbitration Act. Thus, the findings of the Arbitral Tribunal on MMRDA's responsibility to provide encumbrance free ROW within 180 days for execution of project recorded by the Arbitral Tribunal passes the muster of Section 34 of the Arbitration Act.

74) Petitioner-MMRDA has also sought to rely on conduct of parties for criticizing Arbitral Tribunal's findings on contractual



obligation to provide encumbrance free ROW within 180 days of execution of CA. However, the Tribunal has taken note of conduct of parties in executing the first and second supplemental agreements due to delay in removal of encumbrances. If the encumbrances were to be removed only as the work progressed and only when MMOPL identified the same and brought to MMRDA's notice, there was no need for executing the two supplemental agreements. Also, construction of contractual clauses made by the Arbitral Tribunal cannot be termed as irrational merely by taking into consideration conduct of parties. Just because MMOPL commenced construction work without waiting for removal of all encumbrances and utilities and gave intimation of some of the encumbrances during performance of the contract, it does not mean that MMOPL had contractual obligation to identify the encumbrances and intimate the same after which only MMRDA was to remove the same. In my view therefore, conduct of the parties is not the only relevant factor for determining the exact contractual obligations agreed under the CA. The dissenting award appears to have laid unnecessary emphasis on encountering of encumbrances of mosque, hospital and a building which were apparently removed as and when the construction at the site /location/spot actually commenced.

75) I therefore do not find that any valid ground is made out for interfering in the findings recorded by the Arbitral Tribunal about contractual obligations of MMRDA to provide encumbrance free ROW to MMOPL within 180 days of execution of the CA.



DELAY IN PROVIDING ROW RESULTING IN DELAY IN EXECUTION OF PROJECT

76) The majority award adopts two-pronged approach while deciding the issue of delay in execution of the Project and the responsibility for delay. The Tribunal *first* adopted reverse methodology by holding that extension of concession period was grantable only if delay was not attributable to MMOPL and that since extension has been granted, MMOPL cannot be held responsible for delay in execution of the Project. It conducted inquiry whether extension for concession period was granted, what was the reason for grant of extension and whether grant of extension would mean that the delay was not attributable to MMOPL. *Second*, the Tribunal has conducted actual and factual enquiry into the delay and has held that MMRDA is responsible for delay in execution of the Project. The majority award is prolific, and significant part thereof is devoted in recording findings on second enquiry into delay.

Inferring MMRDA's responsibility for delay based on extension of Concession Period

77) The Arbitral Tribunal examined the role of the IE during execution of the contract in the light of MMOPL's contention that grant of extension of construction period automatically meant that MMOPL was not responsible for delay. The Arbitral Tribunal considered contractual terms of CA as well as IE Agreement and has concluded that under paragraph 18 of Schedule 'S' to the CA, it was the duty and



responsibility of the IE to recommend extension of COD and concession period. The Tribunal held in paragraph 12.64 of the Award as under:-

12.64. Having regard to the submissions of both the Parties, it is noticed that the Parties are in agreement that IE being a technical expert, its findings / conclusions have to be given due weightage. Under Article 13.4 of the CA, in the event of respondent's failure to enable claimant's access to Site or any part thereof other than for a Force Majeure event or breach of CA by the claimant, the respondent was obliged to extend the Scheduled Project Completion Date and Concession Period by such period as determined by IE. Article 14.2 and 14.4 of the CA obliged IE to inspect the construction works, once a month during the construction period and submit an inspection report to the authorities; the said report was required to include defects and deficiencies, if any, with reference to the Scope of Project, Specifications and Standards. As per Article 20.2 of the CA IE was required to discharge duties and functions substantially in accordance with terms of reference set forth in Schedule-S (sic S2). Vide paragraphs 10, 18 and 22 of Schedule-S the duties and responsibilities of IE included:

"10. To monitor the progress and quality of the works through periodic inspections and submit report to the Concessionaire and MMRDA.

18. In the event of delays not attributed to the Concessionaire, but likely to affect COD recommend suitable extension of COD and Concession Period.

22. Any other duty not specifically listed about but necessary for successful project implementation or as may be construed from the concession agreement."

78) The Tribunal thereafter considered terms and conditions of IE Agreement and held that under clause 2.13.0 extension of COD and concession period could be recommended by the IE only if delays are not attributable to the Concessionaire. Upon conjoint reading of the CA and IE Agreement, the Tribunal concluded in paragraph 12.68 as under:-



12.68. Neither under the CA nor the IE Agreement, IE could recommend extension of time based on delays attributable to the

claimant. Even though for the purpose of recommending extension of time IE could evaluate the causes for delay and determine whether the delay was due to the fault of the claimant, however, recommendation of extension of time was required to be made by IE, solely based on delays not attributable to the claimant.

79) The Arbitral Tribunal thereafter went into the recommendations of the IE and the reasons why he recommended extension of COD and ultimately concluded in paragraph 12.74 of the Award as under:

12.74. IE had recommended extension of period of construction works upto 30/6/2014. IE made recommendation based on mandate flowing from the CA and the IE Agreement that the extension be determined based on the delays to the extent same are attributable to respondent. The said recommendation having been made by IE, a technical expert appointed in terms of CA between the Parties needs to be given due weightage. The respondent having unconditionally extended the Schedule Completion date by 540 days i.e., upto 28/8/2013 by letter 19/12/2013, atleast upto the said period the respondent could not contend that there were delays attributable to the claimant.

80) Thus, the Arbitral Tribunal has concluded that IE, being a technical expert appointed in terms of CA, could recommend extension of COD and concession period only if delay was not attributable to MMOPL and that since MMRDA unconditionally extended COD by 540 days, it cannot be contended that delay for that period could be attributable to MMOPL. This is the first method employed by the arbitral tribunal in the majority award for deciding that the delay was not attributable to MMOPL.



Conduct of factual inquiry into responsibility for delay

81) As aforesaid, the Arbitral Tribunal did not stop at inferring absence of responsibility for delay on the part of MMOPL only based on extension of concession period, but went on to conduct factual enquiry into the delay. Annexure-A to the CA divided the entire alignment into six stretches and also specified the dates by which the MMRDA was required to handover ROW/site for all the six stretches. Accordingly, the Arbitral Tribunal conducted factual inquiry whether MMRDA delayed handing over portions of various stretches and whether the same caused delay in execution of the Project. Before doing that, the Arbitral Tribunal repelled the contention of the Petitioner-MMRDA that the construction work could be conducted in a piecemeal manner and concluded that the work was supposed to be carried out sequentially. The findings of the Tribunal in this regard are to be found in paragraph 12.12 of the Award, which read thus:

12.12. The contents of the Programme Chart including the description of activity, the start and finish dates confirm that the claimant had proposed to carry out the work sequentially and not in piecemeal manner. After issuance of notice to proceed, the actual work broadly comprised work of Viaduct, works at Stations and works at Depot. After the said works the activities of delivery of Rolling Stock, integration and trial were to follow. The items in the Chart disclose that the activities were to be undertaken / completed within a particular period for the entire line and each subsequent activity, with its own time frame, was dependent on prior activity. Considering that the activities had to be carried out within specified time frames, the claimant was required to mobilize resources / manpower / plant & machinery etc., accordingly. The claimant was not expected to have separate or different resources such as manpower, machinery and material etc., for each of the activity that too for open ended period. In fact, the claimant appointed ,sub-contractors to undertake specified works during specified periods. Hence, it cannot be accepted that the



construction work had to be done section-wise / stretch-wise. Only at the end of the construction of the entire Project, it was to be commissioned and a certificate of completion (provisional or final) was to be given. The execution of construction work being an integrated activity to be undertaken sequentially as per Schedule to achieve Completion, it was not possible to assess if claimant suffered damages on account of respondent's delays in handing over various ROWs and / or other breaches and if so to quantify the same.

82) The Arbitral Tribunal divided each of the six stretches into numerous sub-stretches and went on to consider the aspect of delay in respect of each of the sub-stretches. The Tribunal's factual enquiry in the majority Award runs from page Nos. 283 to 909. It must be observed here that apart from the fact that the Arbitral Tribunal has recorded findings of fact with regard to allegation of delay in respect of each of the sub-stretches by appreciating the evidence on record, Mr. Sen has fairly not sought to challenge those findings nor am I taken through those findings by him. Instead, what Mr. Sen has done, and in my view rightly so, is to raise a plea that since MMRDA is not held responsible in respect of delay for some of the sub-stretches, imposition of entire liability on MMRDA for delay is completely erroneous. This formulation by Mr. Sen is captured in paragraph 18.20 and 18.21 of MMRDA's written submissions and it would be apposite to extract the same for facility of reference:

18.20. With respect to various contentions, the Tribunal has observed that MMRDA was not responsible for the same. See: Paras 12.157 @p. 359 of the Compilation of the Award / Vol. II, 12.158, 12.159, 12.160, 12.172, 12.188 12.190, 12.207, 12.218, 12.238, 12.267, 12.276, 12.279, 12.280, 12.285, 12.288, 12.300, 12.328, 12.332, 12.336 of the Award. Further, with respect to various contentions, the Tribunal has held that the Claimant/MMOPL has not pleaded the same in its Statement of Claim or affidavit of Evidence and has held that the Delay cannot be attributed to MMRDA. See Paras 12.132 @ p. 325 of the Compilation of the Award / Vol. II, 12.155, 12.156, 12.158, 12.159, 12.160, 12.172, 12.224, 12.245, 12.256 to 12.261, 12.268 to 12.271, 12.274 to 12.276,



12.279 to 12.282, 12.283, 12.291, 12.296, 12.299, 12.300, 12.301, 12.306, 12.309, 12.310, 12.311, 12.312, 12.319, 12.344, 12.345, 12.363, 12.395 and 12.396 of the Award.

18.21. Thus, the imposition of entire liability on MMRDA as if the entire delay is attributable to it. is completely erroneous. The Tribunal has failed to arrive at a finding as to who was responsible for the delay in the individual sub-stretches. However, after conclusion of the discussions on ROW, the Tribunal has simply held that MMRDA had delayed handing over of portions of various stretches to MMOPL which had delayed the completion and commissioning of the Project (para 12.404. pg. 909 of the Compilation of the Award/Vol. IV)

83) Mr. Bhatt has fairly not contested the position that in respect of some of the sub-stretches, MMOPL has not been successful in demonstrating delay on the part of MMRDA either on account of absence of pleadings or absence of evidence. However, he submits that detailed discussion by the Arbitral Tribunal in paragraphs 12.110 to 12.403 at pages 283 to 908 of the Award contains analysis of each and every encumbrance and hindrance. He submits that after analysing all the encumbrances and hindrances and after considering the stipulations of CA, correspondence between parties, monthly progress reports and evidence rendered by respective witnesses, etc, the Tribunal has held Petitioner responsible for handing over ROW in various stretches to MMOPL.

84) In my view, the number of sub-stretches divided by the Arbitral Tribunal while conducting enquiry into the aspect of delay are large in number and merely because MMRDA is absolved in respect of allegations of delay for few sub-stretches, the same would not mean that the overall finding of the Arbitral Tribunal about Petitioner being responsible for such delay suffers from an element of perversity. The



Tribunal has ultimately concluded in paragraph 12.404 of the majority Award as under:

12.404 The above discussion shows that the respondent had delayed handing over of portions of various stretches to the claimant which had in turn delayed the completion and commissioning of the Project. The respondent delayed handing over of the complete ROW till 17/2/2014 when it finally handed over the Encumbrance free ROW for one of the Lifts for Jagruti Nagar Station. Thereafter as estimated by the 1E, the claimant was granted three months period' to complete and commission the Project and accordingly SPCD was extended till 13/5/2014. The Provisional Completion Certificate was issued by IE as per provisions of CA, on 6/5/2014. Subsequently the Railway Board, Ministry of Railways, Gol granted, technical clearance on 5/6/2014 as well as sanctioned introduction of operation of Standard Gauge Coaches. Excluding the time taken by the Railway Board to grant technical clearance and sanction introduction of operation of Standard Gauge Coaches, which cannot be attributed to the claimant, the claimant achieved SPCD in time extended by the respondent. The delays in achieving SPCD being on account of various breaches / default's attributable to the respondent, now the claimant's claim for extension of time upto 7/6/2014 and damages by way of additional / increased cost needs to be considered.

85) Petitioner has relied upon English judgment in *De Beers* (supra) in support of his contention that where there is a concurrent delay, the contractor is only entitled to extension of time and cannot recover damages for loss caused by delay. It is held in paragraph 177 and 178 of the judgment as under:

177. **The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay.** In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there



had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary.

178. By contrast, the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible.

(emphasis added)

86) In my view, the judgment in *De Beers* would have no application to the facts of present case. In case before the UK High Court, the contractor was also found to have delayed execution of the contract but was seeking to recover damages from the employer by accusing employer of delay. In the present case, however the Arbitral Tribunal has not held MMOPL concurrently responsible for delay in execution of the project. There is difference in the concept of MMOPL being concurrently responsible for delay and MMRDA being held not responsible for delay in few sub-stretches. If the Tribunal was to hold MMOPL concurrently responsible for delay, what Mr. Sen argues would have been right. However, my attention is not drawn to any findings even in the majority award where it is held that the ROW was available, but MMOPL delayed execution of Project at a particular stretch. Absolving MMRDA of delay in respect of few stretches is an altogether different and distinct concept than holding MMOPL responsible for delay in execution of work where ROW was available. As observed above, the entire ROW was not available and was provided in a phased manner by MMRDA, the last hindrance being removed on 17 February 2014 i.e. few months before commercial operations commenced. In that view of the matter, the general rule discussed in *De Beers* of grant of only



extension of time and not damages in case involving concurrent delay by contractor cannot be attracted in the present case.

87) In my view, the Tribunal has conducted factual enquiry in respect of delay for each of the sub-stretches and has thereafter reached a conclusion that the complete ROW came to be handed over only on 17 February 2014 and that the delay in handing over ROW in respect of the various sub-stretches delayed completion and commissioning of the project. I am unable to notice any element of perversity and as observed above, no attempt has been made on the part of the MMRDA to demonstrate an element of perversity in those findings of fact.

88) The issue here is about overall delay in handing over ROW, which Mr. Sen brands as 'global delay' and merely because MMRDA is absolved of allegation of delay in respect of some of the sub-stretches, the same would not render the overall finding of delay as perverse. The case does not involve contributory delay on the part of MMOPL. There is no finding by the Arbitral Tribunal that though ROW was available MMOPL did not execute the work. The work apparently progressed as ROW became available with passage of time. As observed above, the last element of ROW became available to MMOPL on 17 February 2014 when lifts for Jagruti Nagar station were installed and extension for COD was granted till 13 May 2014. Thereafter provisional certificate was granted by the IE on 6 May 2014 and commercial operations started on 8 June 2014. I therefore do not find any valid reason to interfere the overall finding recorded by the Arbitral Tribunal in respect of 'global delay' in provision of ROW by MMRDA.



89) Mr. Sen submits that the substantial portion of ROW (of 7.7 kms out of 11.302 kms) was handed over to the MMOPL by December 2007, which position is ignored by the majority award. He relies on correspondence between MMRDA and MMOPL of 21 December 2007 and 27 April 2009 in support of his contention that by April 2009, 9.90 km of ROW was made available to MMOPL. It appears that in similar manner letter dated 12 May 2011 was relied upon by MMRDA in support of its claim of handing over of 98% ROW by 31 August 2011. The majority award discusses this in paras 12.86 and 12.87 and has found the claim to be factually incorrect. Also, there is no point in considering the numerical percentages of ROW which was allegedly handed over. The issue here is whether MMOPL delayed construction work despite handing over ROW in a particular stretch and when is the last part of ROW handed over. Firstly, there is no evidence to hold that MMOPL sat tight at the relevant portion of site and failed to execute the work despite availability of encumbrance free ROW. Secondly, it is an admitted position that the last part of the ROW was made available to MMOPL by MMRDA in February 2014 (*Para 404 of the majority award*). Therefore, this Court is unable to hold that the conclusion reached in the majority award about MMRDA being responsible for delay in handing over encumbrance free ROW is an impossible conclusion which no fair and reasonable minded person can ever record.

90) Mr. Sen has relied on findings recorded in the dissenting award in which it is held as under:

They were aware of the existence of shops, monuments, religious places and other difficulties inherent in the situation, which is clear



from a reading of Art. 11A(1) and (2). In some cases, land had to be acquired which could not have been done hurriedly. Several other public authorities were involved in the sense that several underground utilities were owned and operated by them, namely MCGM (water and drainage lines) Gas lines, communication lines by TATA and Reliance companies and so on. **In short, the approach of the parties was to go ahead with the construction work. As and when work progressed, the utilities and encumbrances standing in the way were relocated / diverted or were resolved in a manner permitting the progress of the work.** The Respondent was not insisting that before the encumbrances were removed all the utilities should be relocated / diverted, nor did the Claimant insist that all the encumbrances be cleared at one go all along the rail track within 180 days. It should also be borne in mind that mere clearing/ removing the encumbrances was not enough for the construction work to proceed; the utilities should also be relocated/ diverted/ resolved for the work to commence and proceed. Even if there were overhead or over-arching utilities and encumbrances, they too needed to be resolved for the work to proceed. In short, the parties were intent upon completing the work in the given difficult circumstances and were not so much concerned with the letter of the Agreement; that was the right attitude in the given difficult circumstances, some of which have been mentioned hereinabove.

91) The above findings in the dissenting award again deal with the issue of making available the entire ROW at one go within 180 days of execution of the CA. However, even if it is accepted *arguendo* that it was practically impossible to make available the entire ROW for 11.4 kms at one go or that the MMOPL also did not insist on such requirement before starting the work, the majority award makes a detailed analysis as to how delay in removing each hurdle delayed execution of the project. The dissenting award makes general observations of possibility of temporary shops resurfacing after removal, non-requirement of removal of a mosque, temple or hospital before start of work at the relevant site, etc. While the findings in the dissenting award about impossibility to ensure removal of each hinderance/structure at one go are general in nature, the majority award



discusses each of the hurdle/encumbrance/structure coming in the way of construction of Metro line in over 600 pages. There are specific findings recorded in the majority award as to how each of the hurdle delayed construction work. No attempt is made to demonstrate any element of perversity in those findings.

92) Also, perusal of the findings in the dissenting Award would indicate that the same lays emphasis on some of the delays being attributable to MMOPL and to the third parties. However, as observed above, what the majority Award does is to consider the overall delay and the findings of fact recorded in respect of overall delay cannot be set at naught by selectively relying on some of the findings where MMRDA is absolved in respect of allegations of delay.

93) I am therefore of the view that the conclusion in the majority award about MMRDA being responsible for delay in handing over encumbrance free ROW does not warrant interference in exercise of powers under Section 34 of the Arbitration Act.

ENTITLEMENT OF MMOPL FOR MONETARY COMPENSATION/DAMAGES OR ONLY EXTENSION OF CONCESSION PERIOD

94) According to the Petitioner-MMRDA, the CA does not provide for remedy of seeking damages or monetary compensation from MMRDA even for delay in provision of ROW. MMRDA contends that the contractual remedy available for delay in provision of ROW is only by way of extension of concession period. Petitioner has relied on Article 4.4 of the CA, which provides thus:



4.4 Non-fulfilment of conditions precedent

If the Conditions Precedent set forth in Article 4.1 except in Sub-Articles 4.1 (b) and (c) have not been satisfied on or before the Financial Close and MMRDA has not waived, fully or partially, such conditions under Article 4.2, MMRDA may, notwithstanding anything to the contrary contained in this Agreement, terminate this Agreement by giving a 30 (thirty) Days notice, without being liable in any manner whatsoever to the Concessionaire and forfeit the Bid Security and/or the Performance Security by way of Damages. **If MMRDA does not meet its Conditions Precedent set forth in Sub-Articles 4.1 (b) it shall be entitled to extend the date for meeting such Conditions Precedent up to a period not exceeding 180 Days. On such delay in meeting Conditions Precedent by MMRDA, it shall extend the date for achieving Financial Close and the Concession Period by a period equal in length to such delay. If MMRDA is not able to meet its Conditions Precedent even after such extension, MMRDA and the Concessionaire shall mutually decide to either provide any further extension to MMRDA or mutually agree to terminate this Agreement.** Upon such termination of the Agreement under this Article 4.4, MMRDA shall refund in full Bid Security or the Performance Security, as the case may be and reimburse costs incurred by the Concessionaire and as certified by the Statutory Auditor and recommended by the Independent Engineer.

(emphasis and underlining added)

95) Thus Article 4. 4 of the CA, provided for extension of COD and concession period in the event of MMRDA not fulfilling the ‘conditions precedent’. Based on this contractual clause, it is submitted on behalf of Petitioner-MMRDA that Respondent is already sufficiently compensated by increase in the concession period and having benefitted from Article 4.4, MMOPL could not have claimed further damages. The Tribunal’s award of damages is criticized as override of contractual stipulations.

96) It must be noted at once that though Article 4.4 of the CA provides for the remedy of extension of concession period, it does not



specifically bar the remedy of damages. It does not stipulate that no damages would be payable for MMRDA's inability to meet the 'conditions precedent'. The Arbitral Tribunal has dealt with Petitioner's objection to award of damages in the light of contractual remedy of extension of concession period in paragraphs 12.88 to 12.109 of the majority Award. The Tribunal has noted the aspect of absence of contractual stipulation not barring the claim for monetary losses in para 12.101 of the Majority Award.

97) It is well settled position in law that stipulation in the contract restricting right of a party to claim damages on commission of breach by opposite party is not enforceable. The Arbitral Tribunal has discussed the judgment of the Delhi High Court in *Simplex Concretev Piles (India) Ltd. Versus. Union Of India*³⁵ in which it is held that provisions of the contract, which sets at naught the legislative intendment of the Indian Contract Act, 1972 by restricting right of a party to claim compensation /damages would be void as being against public interest and public policy. The Arbitral Tribunal has also taken note of judgment of the Apex Court in *P.M. Paul Versus. Union Of India*³⁶ negating the similar objection of availability of only remedy of extension of time and not damages. The Apex Court held that if arbitrator has jurisdiction to find out whether there was delay attributable to the Respondent therein, the Respondent was liable for consequences of delay viz., increase in price. The Tribunal has also taken note of the ratio of the judgment in *A.N. Sathyapalan Versus*

³⁵ 2010 SCC OnLine Del 821

³⁶ 1988 Sub 1 SCC 368



*State of Kerala*³⁷ where there was specific prohibition for price escalation due to delay in execution of the work and the Apex Court upheld arbitral award awarding claim for escalation of costs even though there was bar for price escalation under the contract.

98) In relation to execution of metro work contract and in the light of contractual provision for only extension of time of concession period in the event of breach, the Delhi High Court in *MBL Infrastructures Ltd. v. Delhi Metro Rail Corporation*³⁸ has held that the clauses which restrict the right of a party to claim damages are restrictive and that such clauses defeat the purpose of the Sections 55 and 73 of the Indian Contract Act, 1872

99) In *Regus South Mumbai Business Centre Pvt. Ltd.* (supra) this Court has repelled the contention of impermissibility to award monetary damages on account of contract providing for other consequences for breach. This Court held thus:

It is contended on behalf of the Petitioner that the award of damages of Rs.10,10,01,000/- by the learned Arbitrator is in the teeth of the contract Clause-21. According to the Petitioner, if it had failed to perform as per revenue projections to the liking of the Respondent, only two consequences could flow therefrom viz. (i) termination of Agreement and vacation of premises, or (ii) conversion of agreement into leave and license. It is contended on behalf of the Petitioner that under no circumstances, any third consequence in the form of damages could be awarded by the learned Arbitrator and that award of damages is like rewriting the terms of contract. Reliance is placed on judgment of the Apex Court in *PSA Sical Terminals Private Limited Versus Board of Trustees* (supra) in support of the contention that the learned Arbitrator cannot rewrite the terms of the contract. **I am unable to agree that award of damages would amount to rewriting any**

³⁷ (2007) 10 SCC 43

³⁸ 2023 SCC Online Del 8044



clauses of the Management Agreement. The effect of Clause-21 of the Management Agreement, cannot be that no damages can be awarded upon breach of contract and all that can be done is to terminate the contract or convert the same into a license.

48) Petitioner's submission that breach of obligation to make best endeavor to achieve revenue projections made in the Business Plan would entail only consequences stipulated in Clause-21 of the Management Agreement. As rightly pointed out by Mr. Sancheti, the proposition is well settled, and Mr. Andhyarujina does not fairly dispute, that any contract stipulating nonpayment of damages would be void. Reliance by Mr. Sancheti on judgment of Delhi High Court in *MBL Infrastructures Limited* (supra) in this regard is opposite. **In fact if the learned Arbitrator was to hold that no damages were payable on account of stipulation in Clause-21, such finding would have been in conflict of public policy of India.**

49) It therefore cannot be accepted that though breach on the part of the Petitioner to make best endeavours to achieve revenue projections is proved, Petitioner will still walk away without any consequence. No person with a common business sense would ever agree that upon breach of the agreement there would be no consequence for party committing breach. The Respondent in the instant case has expended amount of Rs.7.8 crores in furnishing the premises to the liking of the Petitioner. Therefore it could never have agreed to a term that even if Petitioner was not to earn any revenue for the Respondent, there would be no consequence to be suffered by the Petitioner. Going by that interpretation, Petitioner could have not commenced the operations and not inducted any person for use of the premises and could have paid zero amount to the Respondent and all that Respondent could suffer for such act was only termination of the Agreement or to convert the same into leave and license. This would make an absurd business proposition, which no fair-minded person would ever agree for. In my view therefore, the objection to award of damages raised on behalf of the Petitioner is clearly erroneous. If Petitioner was to lead some evidence to prove any mitigating factors, the learned Arbitrator could have reduced the amount of damages. However, Petitioner thought it appropriate not to avail opportunity of leading evidence and left no choice for the learned Arbitrator but to award full difference in projected premium and actual premium as damages.

(emphasis added)



100) The Arbitral Tribunal has also analyzed the contractual stipulations under Articles 4.4, 13.4 and 13.7 of the CA and has concluded that there was no express bar against MMOPL seeking any relief on account of MMRDA's delay in providing encumbrance-free ROW, including by way of monetary compensation. This again is an exercise conducted by the Arbitral Tribunal in its exclusive domain of construction of contractual stipulations warranting no interference by this Court in exercise of powers under Section 34 of the Arbitration Act.

101) In my view, therefore, the Arbitral Tribunal has rightly concluded that claim for compensation / damages of MMOPL could be adjudicated even though CA provided for only extension of concession period as a consequence for delay.

AWARD OF DAMAGES UNDER CLAIM NO. 6

102) The Respondent-MMOPL sought damages in aggregate amount of Rs.1372.47 crores under various sub-heads. These amounts were sought as a result of delay in commencement of commercial operations (*original date 31 July 2010 and actual commencement dated 8 June 2014*). However, the Arbitral Tribunal has allowed claim in the sum of only Rs. 411,70,21,968/- in favour of MMOPL against only four sub-heads while rejecting claims in respect of other four sub-heads. The summary of demanded amounts and awarded amounts under Claim No. 6 is as under:



No.	Particulars	Amount	Amounts/ relief awarded
6(i)			
A.	Increased Price Variation in Civil Contracts	Rs. 59.89 Crores	0
B.	Price Adjustment in Civil Contracts	Rs. 10.33 Crores	0
C.	Increase in cost of civil work due to engagement of other agencies	Rs. 83.13 Crores	0
D.	Increase in the cost of system works	Rs. 195.92 Crores	Rs.163,22,44,188/-
E.	Additional amount paid to Project Management Consultants, including the Claimant's share of the fees to the IE	Rs. 87.57 Crores	0
F.	Additional Overhead Expenses	Rs. 255.06 Crores	Rs.100,00,00,000/-
G.	Additional Interest and Financing Expenses during construction	Rs. 369.51 Crores	Rs.125,00,00,000/-
H.	Opportunity cost on loss of profit	Rs. 42.26 Crores	Rs.23,48,00,000/-
I.	Sub Total (A to H)	Rs. 1103.68 Crores	Rs.411,70,21,968/-
J.	Interest on 1 (Sub-total), from 7th June 2014 till 10th June, 2014	Rs. 186.39 Crores	0
K.	Interest and Refinancing charges on additional loan from 8th June 2014 til 10th June, 2015	Rs. 82.40 Crores	0
L.	Total	Rs. 1372.47 Crores	Rs.411,70,21,968/-



103) Thus, the Arbitral Tribunal has rejected claims of the Respondent-MMOPL under sub-heads of (i) increase in price verification in civil contract, (ii) price adjustment in civil contracts, (iii) increase in cost of civil work (iv) Additional amount paid to Project Management Consultant (**PMC**) and IE. Only four claims have been awarded under the sub-heads of (i) increase in the cost of system works, (ii) additional overhead expenses (iii) additional interest and financial expenses during construction and (iv) opportunity cost on loss of profit.

104) Before I proceed to examine each of the sub-heads under Claim VI, which have been awarded by the Arbitral Tribunal, it would be necessary to deal with the Petitioner's objection to the findings recorded by the Arbitral Tribunal on 'Total Project Cost'.

TOTAL PROJECT COST

105) The Total Project Cost for the purpose of execution of CA was capped at Rs.2356 crores under clause 1.1 thereof. This means that even if actual capital cost of the project upon completion was higher, for the purpose of CA the total project cost was not to be considered higher than Rs.2356 crores. It appears that the same was relevant for the purpose of fare computation and for computation to be made in case of termination etc. According to MMRDA, the total project cost indicted in the CA did not necessarily represent actual cost, which was likely to be incurred for execution of the project and the commercial risk in respect of increase in the project cost beyond Rs.2356 crores was to be borne by MMOPL.



106) MMOPL claims that the total project cost went upto Rs.4321 crores as indicated in minutes of Board Meeting dated 23 May 2012. However, ultimately from financial statement as on 31 March 2015, the figure under the head 'intangible asset-right under the CA' is indicated as Rs.4032 crores and accordingly even in the pleadings MMOPL ultimately admitted the figure of Rs.4032 crores as the total project cost. Thus, differential increase in the project cost is Rs.1670 crores. According to MMRDA the Respondent did not prove that the project cost was actually increased to Rs.4032 crores by leading any independent evidence. It is further contended that the amounts do not tally as the minutes of Board Meeting indicated figure of Rs.4321 crores whereas claimed expenditure is Rs.4026 crores. The MMRDA accordingly criticises the finding of the Arbitral Tribunal about total project cost as being based on no evidence and hence perverse.

107) The Arbitral Tribunal has recorded a finding of increase in total project cost from Rs.2356 crores to Rs.4026 crores by taking into consideration (i) minutes of Board Meetings, (ii) audited financial statements and (iii) minutes of special resolution amending Articles of Association of MMOPL. In Paragraph 12.412 of the Award, the Arbitral Tribunal has taken into consideration 46 documents, which are minutes of MMOPL's Audit Committee, minutes of MMOPL's board of directors, audited financial statements and minutes of special resolution for amending the Articles of Association. The Tribunal took into consideration provisions of Section 292A of the Companies Act, 1956 and held that the audit committee was empowered to investigate in relation to any items and that the audit committee's role was not



confined to only overseeing or checking the auditors. Petitioner's Officer (RW-2) was the chairman of the Audit Committee. The Tribunal considered that under the Shareholders Agreement, Petitioner had right to appoint three out of the 12 directors on MMOPL. It took into account the minutes of Board meeting dated 23 May 2012 and 23 January 2013 in which the Board noted the revised project cost of Rs. 4321 crores and resolved to avail additional loan of Rs. 936 crores. The Tribunal also noted the Special Resolution adopted by the Board on 5 February 2013 when the Board decided to amend the Articles of Association of MMOPL to raise debt finance from lenders so as to meet the revised project cost. The Arbitral Tribunal ultimately concluded in paragraph 12.422 and 12.425 as under:-

12.422 Having regard to these provisions, the minutes of meeting of claimant's Audit Committee chaired by RW-2, minutes of claimant's Board meetings, audited financial statements of the claimant and the minutes of special resolution amending claimant's AoA for facilitating raising of additional funds for meeting the revised Project cost, are relevant and admissible in evidence to prove that there was a revision in Total Project Cost. These cannot be ignored merely on the basis that the same were not produced along with SoC or the affidavit of evidence of witnesses of claimant. A Party is entitled to prove its case through cross-examination of the witnesses of its opposite Party. Besides, this Tribunal in minutes of 52nd meeting held on 8/3/2009 recorded that documents produced during cross-examination of RW-2 would cause no prejudice to the respondent and respondent was given liberty to recall any of the witnesses if it so deemed fit. However, respondent chose not to recall any of the witnesses. The respondent has not pointed out any prejudice suffered by it on account of non-production of the minutes of meetings of claimant's Audit Committee, Board of Directors or Shareholders or its financial statements, by confronting RW-2.

12.425. For the foregoing reasons, it is held that the claimant has established that there was an increase / revision in Total Project Cost from Rs.2356 Crores to Rs.4026 Crores. The difference between revised



Project cost of Rs.4026 Crores and the original estimated cost of Rs:2356 Crores under CA, works out to Rs. 1670 Crores.

108) The above findings recorded by the Tribunal in the majority award are well supported by the material on record and cannot be termed as perverse by any standards.

109) Petitioner has contended that the Board Minutes cannot be the basis to impose the liability on MMRDA. Petitioner accuses the majority Award of having adopted illegitimate shortcut by accepting the figures approved in the Board Meetings. Petitioner has particularly relied on Minutes of Board Meeting dated 23 May 2012 in which it was resolved that *'analysis with respect of the revision in estimation of total project cost, as advised by the nominee directors of MMRDA, be undertaken and the company to provide all necessary and a reasonable support towards the same'*. The dissenting award is relied on by the Petitioner in which it is held that the approval was not final. Petitioner has also contended that mere 'right to verify' cannot be the basis for imposition of liability on MMRDA as its role was to merely supervise the work and that it was not involved in day-to-day management of the project. In my view, however, Petitioner's criticism of majority award in this regard is not fair. The findings on Total Project Cost are not based merely on Board Minutes. There was an Audit Committee, which was supposed to audit the accounts and the MMRDA's Officer was the chairman of the Audit Committee. The case does not involve just a stray entry in the books of accounts, which needs independent evidence to prove the same. The Articles of Association of MMOPL are amended to indicate the increased Total Project Cost and additional loans are procured to meet the



additional expenditure. Thus there is additional material to support the figure indicated in the board minutes and financial statements. Reliance by Petitioner on the caveat in the minutes of board meeting dated 23 May 2012 also does not cut any ice as the figure of Rs.4321 crores has ultimately been brought down to Rs.4032 crores in the financial statement and the Tribunal has considered the reduced figure of Rs. 4032 crores while computing the Total Project Cost.

110) Petitioner has sought to contend that the Total Project Cost did not necessarily represent the actual cost that may be incurred and that the Tribunal has simply sought to determine the 'global loss' by comparing originally estimated cost with the costs reflected in the financial statements. The contention, I must say, is not entirely correct. The finding of rise in the Total Project Cost is recorded for satisfying itself that there has actually been increase in the cost of the project than the one originally estimated. It cannot be contended that the figure of Total Project Cost is absolutely irrelevant as the initial bidding was based on the estimated project cost of Rs. 2356 crores and the consortium had demanded VGF of Rs.1351 crores from MMRDA. After negotiations, the VGF demand was brought down to Rs. 650 crores and the remaining amount of Rs.1706 crores was to be ultimately arranged by the bidder, which finally became the SPV of MMOPL. Here the rise in the Total Project Cost (Rs.1676 crores) is almost equivalent to the Consortium's contribution in the project (Rs.1706 crores). Therefore, the moment Total Project Cost increases phenomenally, the question would obviously arise as to who would bear the increased cost. Mr. Sen has contended that MMOPL bore the commercial risk of increase in the



total cost of project beyond Rs. 2356 crores. However, in the present case, increase in the Total Project Cost is not on account incurring of additional cost during agreed project completion period, but the same is on account of delay in execution of project. Can it be said that even if MMRDA is found responsible for delay in completion of project, MMOPL must bear the entire increase in the cost of project. The answer appears, to my mind, to be emphatic in the negative.

111) However, it is not necessary to delve deeper into the aspect of increase in the Total Project Cost as the Arbitral Tribunal has not awarded any sum in favour of MMOPL representing difference between estimated project cost and final project cost. As against the difference of Rs.1676 crores in the Project cost, the Arbitral Tribunal has awarded only claims in the sum of Rs.496.48 crores. This is clear from following findings in paragraphs 12.426 of the Award :

12.426 However, merely because there was an increase / revision in cost as against originally envisaged cost it cannot be presumed that the same was on account of delays / defaults attributable to the respondent. For ascertaining if increase / revision in cost was on account of respondent's delays / defaults and if so to what extent, the pleadings of the Parties and the evidence on record need to be examined.

112) The Arbitral Tribunal has decided each sub-head of the claims under Claim No.6 and has decided them independently based on evidence on record and none of the claims are granted merely because there was increase in the Total Project Cost. Ordinarily once execution of the project gets delayed, there is bound to be some escalation in the project cost and even MMRDA would not dispute this. How much



increase actually occurred in the total project cost could be a subject matter of debate, but it cannot be presumed that there is actually no increase in the project cost at all. This dispute about the exact amount of increase in the total project cost takes a back seat since this is not the yardstick applied by the Arbitral Tribunal for deciding any of the claims of the MMOPL. Therefore, instead of making any further discussion on the issue of increase in the total project cost, it would be appropriate to discuss various claims granted by the Arbitral Tribunal against four sub-heads of Claim No.6.

INCREASE IN COST OF SYSTEM WORKS

113) This claim was premised on the basis that some of the systems contracts were executed with agencies to whom the cost was to be paid in foreign currencies and that the delay resulted in actual purchases taking place much later than what was envisaged as per CA. According to MMOPL value of Indian Rupee had depreciated against foreign currency, as a consequence of which MMOPL had to bear additional cost in Rupees for procuring foreign currency to be paid for system contracts. The Respondent-MMOPL had claimed amount of Rs.195.92 crores towards increase in cost of system works, out of which the Tribunal has excluded sum of Rs.11.96 crores as the same related to incremental octroi charges, which were not provided for or paid as per MMOPL's books of accounts. Out of the balance amount of approximately Rs.183.96 crores, the Tribunal has awarded the claim in the sum of Rs. 163,22,44,188/-.



114) There is no dispute to the position that execution of contract involved import of goods and systems, the major component being the import of the rolling stock required for operation of Metro line. According to MMOPL, the proposed completion date was 31 July 2010 when various goods and systems, including rolling stock, would have been imported by it. However, the same was actually imported much later, by which time, there was substantial increase in the cost of foreign currency due to depreciation of Indian Rupee. Respondent- MMOPL produced Annexure-E to its rejoinder compilation, which was a table representing data of exchange rate of Indian Rupee vis-a-vis foreign currency during 1974-75 to 2012-13. The Respondent also relied upon Annexure-9 to the Affidavit of Evidence of C.W.2 setting out the details of MMOPL's foreign vendors for Metro Project and the amount paid in foreign currency to each of those vendors (which also form part of audited financial statement of MMOPL). The Respondent also relied on the minutes of Board Meeting dated 29 April 2008, (which included MMRDA's representative), which approved amount of USD 116,480,015 towards supply and service operation of rolling stock to be procured for the project. The Tribunal took into consideration the above material and has concluded in paragraphs 12.466 as under:

12.466. Having regard to the facts of the case it cannot be disputed that there was foreign exchange rate variation on account of delay in commissioning of the Project. It having been held that the delays were attributable to respondent, claimant is entitled to be compensated for the increased cost on account of such variation in foreign exchange rates. The amount payable to the foreign Vendors had been approved by the Board of Directors of the claimant which included the representatives of the respondent. Considering that the foreign exchange rate variation from CA till actual COD was unanticipated and that had there been no delay on the part of respondent in delivering



Site / ROW, the claimant could have achieved COD by 31/7/2010 and would have paid the consideration for imported items required for the Project in foreign currency at the exchange rates applicable during 2009-10, the claimant is held entitled to difference in average rate of foreign exchange applicable in the year 2009-10 and the rates applicable as on the date of actual purchase as given in Annexure-E to the Rejoinder Compilation 21 submitted on 1/2/2021 amounting to Rs.163,22,44,188/-.

115) According to the Petitioner, the Respondent-MMOPL was required in law to establish by leading evidence as to when orders would have been placed by it and delivery taken in normal course, when the orders were actually placed and the delivery was taken and whether the delay in placing orders and delivery was due to reasons attributable to MMRDA and lastly when payments were made to vendors. According to MMRDA, none of the above was proved by MMOPL and that therefore award of claim in the sum of Rs.163,22,44,188/- is *ex-facie* perverse. According to Petitioner, MMOPL relied merely on Annexure-9 to affidavit of evidence of C.W.2, who himself was not personally familiar with figures and statement of Annexure-E to rejoinder submission, which was a new material introduced without opportunity of cross-examination. In any event, it is contended that neither Annexure-E nor Annexure-9 is sufficient to prove cause of any loss to MMOPL.

116) Annexure-9 to the affidavit of evidence of C.W.2 contains details of claims in respect of loss caused due to foreign exchange fluctuations. Enclosure-I to Annexure-9 gave details of each of the vendors to whom foreign exchange is paid. Said enclosure contained details of the amount booked in foreign currency, amount booked in Indian rupee, average rate of booking, purchase order in foreign



currency, purchase order in Indian currency and average rate of purchase order. The rate differential was arrived at in column-G and thereafter the exact amount of foreign currency loss was indicated in column-H. It therefore cannot be contended that the Respondent- MMOPL did not produce any details in support of claim of loss due to fluctuations in rate of foreign currency. The Tribunal also considered alternative methodology for calculating foreign exchange variations at length and accepted MMOPL's version in paragraph 12.464 and 12.465 of the Award. While doing so, the Arbitral Tribunal considered the exchange rate applicable for the year 2009-2010 and compared the same with the actual foreign currency spent by MMOPL for arriving at the figure of foreign currency loss. It has particularly highlighted the fact that MMRDA's representative participated in board decisions that approved amounts payable to foreign vendors. What Petitioner expects is that MMOPL ought to have produced documentary evidence of actual purchase of foreign currency and payment thereof to each of the vendors and thereafter compare the same with the rate of foreign exchange at the time when it was expected to purchase imported goods if the contract was to be performed in time. The Arbitral Tribunal, on the other hand, has considered the figures produced by MMOPL as paid to each of the vendors and has compared the same with applicable foreign exchange rates during the year 2009-2010, when the goods would have been imported if project was to completed in time. While it cannot be contended that methodologies suggested by the Petitioner -MMRDA is entirely wrong, at the same time, it cannot be contended that methodology adopted by the Arbitral Tribunal is so irrational that no fair-minded person would ever adopt the same. In my view, there is



some evidence on record to support award of claim for increase in the cost of system works. This Court cannot judge the adequacy of evidence or quality thereof in exercise of powers under Section 34 of the Arbitration Act. So long as there is some evidence on record to support the claim, the Award would pass the muster under Section 34 of the Arbitration Act.

117) Petitioner-MMRDA has sought to raise questions about genuineness of MMOPL's claim towards loss arising out of foreign exchange fluctuations by inviting attention of this Court to the balance sheet for the year ending 31 March 2014, in which the figure of foreign exchange loss is indicated as Rs.39,25,45,808/-. Though Mr. Bhatt has attempted to explain this by contending that the said entry pertains to only for a particular year, Mr. Sen has invited my attention to figure of opening balance as on 1 April 2013 as Rs.7,52,83,144/- and after adding the additional loss of Rs.31,72,62,664/- as on 31 March 2014, the cumulative figure is indicated as Rs.39,25,45,808/-. This is further explained by Mr. Bhatt and his written note in this regard reads thus:

MMRDA for the first time in its written submissions seeks to rely upon certain financial statements to contend that the financial statements never showed any expense in foreign currency except a sum of Rs.167.01 crores for the first time in FY 2014-15 and that the only foreign currency loss that was shown was a sum of approximately Rs.39 crores in the balance sheet ending 31 March 2014. It is submitted that the aforesaid is an incorrect statement. Right from the beginning, year in and year out, the duly approved balance sheets clearly show expenditure in foreign currency and the CIF value of imported goods. The CIF value of imported goods for the balance sheet for FY 2013-14 is shown at Rs.336,60,75,390/ which is the expenditure in foreign currency. Again so far as the allegation regarding the sum of Rs.39.25 crores being the approximate foreign exchange loss is concerned, the same is incorrect. The amount of Rs.39.25 crores of foreign exchange



loss relates to a cumulative figure of loss in foreign exchange being the difference between the amount booked in the books of accounts (being only a book entry) when a bill is raised by the foreign supplier and the amount either that was later paid in the year or if not paid, the foreign exchange rate on 31 March of the financial period. This is in accordance with the Statutory Accounting Standards produced during the hearing for the Hon'ble Court's perusal and has nothing to do with the difference between the amount that would have been paid in rupee terms had the contract been completed on 31 July 2010 and the date on which the contract was actually completed.

118) It appears that point of indication of figure of Rs.39,25,45,808/- towards foreign exchange loss in balance sheet for year ending 31 March 2014 was not raised by the Petitioner before the Arbitral Tribunal, which appears to be the reason why the Arbitral Tribunal has not dealt with the same. I am not persuaded to accept the contention raised on behalf of the MMRDA in this regard because it is too dangerous to set at naught award of the claim only on account of surmise expressed by the MMRDA by relying on balance sheet in the written notes of arguments without raising the same before the Arbitral Tribunal. This is particularly so because the contention of the Petitioner is essentially that award of claim in the sum of Rs.163.22 crores is highly inflated and contrary to the financial statements. Furthermore, the surmise of incurring of exchange loss as only Rs.39,25,45,808/- is factually incorrect, as observed in the latter part of the judgment.

119) MMRDA has contended that no expenditure is reflected in the foreign currency in financial statement from 1 April 2013 to 31 April 2014 and that for the first time an amount of Rs.167 crores is mentioned as 'expenditure in foreign currency' against 'project expenditure' and it is claimed that the same is contrary to MMOPL's claim of having



incurred total expenses in foreign currency of Rs.840 crores in Annexure- 'E'. This is demonstrated to be wrong by Mr. Bhatt by inviting my attention to financial statement as on 31 March 2009 in which expenses in foreign currency is indicated as Rs.90,24,65,301/-. Similarly, for the year ending 31 March 2010, the expenditure incurred in foreign currency is indicated as Rs.18,85,36,472/-. For the year 2010-2011, the same is Rs.19,01,96,337/-. For the year 2011-2012 the figure is Rs.17,29,72,517/-. Therefore, the contention of the Petitioner that no expenditure on foreign currency is incurred upto 31 March 2011 appears to be factually incorrect. It is therefore dangerous to rely upon surmises raised by the Petitioner for the first time before this Court that the foreign currency loss cannot be more than Rs. 39,25,45,808/-. I am therefore inclined to accept explanation put forth by Mr. Bhatt in paragraph 15 of his written submission as quoted above.

120) Thus, there is some evidence produced before the Arbitral Tribunal about the losses incurred towards purchase of foreign exchange by MMOPL. There can otherwise be no dispute to the position that the Rupee value has depreciated during 2010 to 2014. Incurring of additional expenses due to foreign exchange fluctuations is thus a known position. The only issue is about the quantum of losses suffered by the Respondent. The Tribunal has assessed the losses by taking into consideration various material before it as discussed above. It is not that the Tribunal did not have any material to assess the losses. At Annexure-E to rejoinder submissions, MMOPL produced the historical data of Rupee value vis-à-vis other currencies before the Arbitral Tribunal. Based on that data, MMOPL provided revised details of



purchase of foreign currencies in the respect of systems contracts for each of the foreign vendors. The major impact of fluctuation in foreign currency value was in respect of the rolling stock for operation of Metro Line, which can be taken by way of illustration. The statement at Annexure E to Rejoinder submissions show details of payments made to CSR Nanjing Puzen Rollin in USD. During 2009-20 the average exchange value of USD was Rs. 47.42. However, by the time the rolling stock was purchased the same went up to Rs. 55.59 and Rs. 62.78 making difference of Rs. 8.17 and Rs. 15.36 at the time of actual purchase. However, the average rate differential is taken by MMOPL as Rs. 11.78 and this is how the additional expenditure of Rs. 128.26 crores is indicated in the statement at Annexure-E for purchase of rolling stock. Thus, it cannot be contended that the Tribunal had zero evidence for deciding the claim. Increase in the cost of purchase of foreign exchange cannot be a matter of debate and there is no perversity in the assessment of additional expenditure made by the Tribunal.

121) In view of the above discussion, I am inclined to reject the objection of Petitioner in respect of award of claim for increase in cost of system works of Rs.163,22,44,188/-.

ADDITIONAL OVERHEADS AND SUPERVISION OF CONSTRUCTION WORKS

122) The Arbitral Tribunal in its majority award has considered the three subheads under Claim No. 6 of (i) additional payments made to Project Management Consultant and Independent Engineer, (ii) additional overheads and supervision of constructions works and (iii)



additional interest during construction. The first claim in respect of additional payments made to PMC and IE is rejected whereas second and third claims are partially allowed in the sum of Rs.100 crores and in the sum of Rs.125 crores. The first sub-claim of additional payments made to PMC and IE is rejected by recording a finding that the MMOPL did not produce before the Tribunal the original agreed fees of PMC and whether there was increase in the same on account of delay in execution of the project. Similarly, in respect of the fees payable to IE, the Tribunal observed that MMOPL did not produce record/agreement with IE to show that enhanced fee was paid by it to IE. The Tribunal refused to believe the figures in the books of MMOPL while awarding the claims of additional fees allegedly paid to PMC and IE. The findings recorded by the Arbitral Tribunal in para-12.495 of the majority Award read thus:

12.495. In absence of claimant having produced contract with / work orders issued to PMC, it is not possible for this Tribunal to consider what was the originally agreed fee of PMC and whether there was any increase in the same on account of delay in execution of the Project. Though Ex.C50 shows that originally Rs.7.48 Crores was payable by the claimant to IE, claimant has not produced records / agreement with IE to show the enhanced fee paid by it, if any, to IE. This Tribunal cannot assume that the amount as per the Books of claimant shown to have been expanded towards "other professional expenses incurred", included the enhanced fee of IE, if any. Hence, the claimant's claim for additional amount claimed to have been paid towards PMC or IE is rejected.

123) However, the Arbitral Tribunal has allowed the sub-claim under the head 'additional overheads and supervision of construction' in the sum of Rs.100 crores. It is the contention of Petitioner-MMRDA that if the claim of additional payments made to PMC and IE is rejected on account of non-production of documents and by refusing to believe the



figures in the books of accounts, same yardstick ought to have been adopted for the claim of additional overheads and supervision of construction works, for which also no evidence was produced.

124) In the Statement of Claim, MMOPL had claimed a sum of Rs.261.66 crores towards additional overhead expenses, which was reduced by it to Rs.255.06 crores after amending the Statement of Claim. The basis for raising claim of Rs. 255.06 crores towards additional overhead expenses was towards the expenses incurred in maintenance of establishment for the purpose of supervision of construction works till achievement of COD. The relevant pleadings in the Statement of Claim in para-6.174 are as under:

6.174. Additional Overhead Expenses

i.The Claimant had to maintain its establishment for the purposes of supervision of the construction works till the achievement of COD. Such indirect expenses were planned to be incurred only till the achievement of the scheduled COD of 31 st July 2010.

ii.If the Respondent had not caused delay to the achievement of the scheduled COD by way of its several failures, then the Claimant would not have the incurred the indirect cost at all.

iii. As such, the Respondent is liable to reimburse the overhead cost of Rs. 261,66,95,571/- incurred by the Claimant in this regard.

(emphasis and underlining added)

125) Annexure-K-119(A) was filed by the Respondent along with the Statement of Claim giving particulars of claim which reads :-

"ANNEXURE K-119(A) Additional Overheads Expenses incurred after 31 July 2010



(A) Overheads

Description	Amount (Rs. Cr).
Total Overheads (as per books)	347.23

(B) Reductions

Description	Amount (Rs. Cr).
Pre-operative Expenses	96.29
Deposits and Advances	6.43
Operation & Maintenance	16.45
Total	119.17

Net Overhead (A – B)	255.06
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126) Petitioner-MMRDA opposed the claim towards overheads incurred after 31 July 2010. Respondent-MMOPL led evidence of C.W.2 in support of the claim of additional overhead expenses, who deposed as under :-

Claim No.6: Additional costs / expenses incurred by the claimant on account of delays on part of the respondent.

12. The Claimant has provided Particulars of Claim as per Annexure K-121 of the Statement of Claim amounting to Rs.1,547.78 Crores. I have checked calculation of the same and observed that the said claim works out to Rs.1,372.47 Crores as per Annexure 6 hereto. The said amount of Rs.1,372.47 Crores includes the following:

(e) Additional Overhead Expenses amounting to Rs.255.06 Crores. The claimant has incurred these Overhead Expenses after 31st July 2010 upto Commercial Operation Date (for short 'COD') on 8th June 2014. The calculation is provided as Annexure 11 hereto."

127) In support of the claim, C.W.2 produced tabular statement at Annexure-11 of his Affidavit of Evidence as under:-



Annexure-11: Additional Overheads Expenses incurred after 31 July 2010

(A) Overheads

Description	Amount (Rs. Crores)
Overheads	374.23

Description	Amount (Rs. Crores)
Pre-operative expenses	96.29
Deposits and Advances	6.43
Operation and Maintenance	16.45
Total	119.17

Net Overheads	255.06
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128) Thus, beyond leading oral evidence of C.W.2 and producing mere statement showing break up of amounts, Respondent-MMOPL did not produce even a single piece of document in support of the claim of additional overheads expenses of Rs.255.06 crores. All that Annexure-11 to affidavit of evidence of C.W.2 depicts is that the total overheads as per books was Rs.374.23 crores, from which deductions are made towards preoperative expenses, deposits/advances and operation/maintenance expenses amounting to Rs.119.17 crores and figure of Rs.255.06 crores is arrived at, which was claimed as additional overheads. C.W.2 was subjected to cross-examination by MMRDA, in which he stated that Annexure-11 was prepared on the basis of SAP report, which was not produced on record. He was unaware as to how and who carried out the identification of overhead expenses in the management. The Arbitral Tribunal has reproduced relevant cross-examination of C.W.2 in para-12.478 of the Majority Award, which reads thus:



Q.33 Please go through the aforesaid exhibits and tell us that in respect of which of the aforesaid exhibits, you have personally verified merely the arithmetical accuracy of the calculations made and not the correctness of the figures mentioned therein?

Ans....

(xvii) With regard to item (A) of Annexure 12 at page 52, the same SAP report which is part of books of accounts has been referred. The management has identified the interest and finance cost which has been test-checked by me. Paragraph (B) is calculated by the management as per interest and finance expenditure during construction as envisaged in the financial closure which has been reduced from item (A) above.

Q.158 Are SAP reports referred to by you in the aforesaid answer, are on record of the present proceedings?

Ans: I am not aware.

Q.167 , Are you, aware of the basis on which the management identified the overheads and interest and finance costs as stated by you in your aforesaid answer?

Ans: These are identified based on the chart of ledgers and narration mentioned in the SAP report.

Q.168 Who in the management carried out this process of identification?

Ans: I am not aware.

Q.170 From what documents were the figures mentioned in Item (B) of Annexure-11 and 12 arrived at?

Ans: With regard to item (B) of Annexure-11, these were arrived by the management based on daily cash flow details. With regard to Item (B) of Annexure-12, these were calculated as envisaged in the financial closure.

Q.171 Which was the document you referred to as envisaged in the financial closure?

Ans: Term loan agreement, wherein the details of cost of project and means of finance were mentioned.

Q.172 Do you know whether the term loan agreement is on record in the present proceedings?

Ans: I am not aware."

(emphasis added)



129) Thus, in support of the claim for additional overheads, MMOPL did not produce any evidence of having incurred any expenditure. Beyond production of Annexure-11, which was in the nature of particulars of claim and beyond examining C.W.2, who did not have any personal knowledge about alleged expenditure, no other evidence was produced to demonstrate that any additional expenditure was indeed incurred by the Respondent.

130) The Tribunal was faced with this problem of absence of evidence and has noted the same in paras-12.486 and 12.489 of the majority Award, which reads as under :-

12.486 Similarly opposing the claimant's claim for additional overhead expenses the respondent submitted that claimant did not produce any evidence in SoC in support of; that the deposition made by CW-1 and CW-2 are without personal knowledge; CW-2 claimed additional overhead expenses amounting to Rs.255.06 Crores for the period 31/7/2010 upto COD on 8/6/2014; that CW-2 merely produced tabular statement showing alleged overheads as per-Books amounting to Rs.374.23 Crores minus pre-operative expenses, deposits and advances and operation and maintenance expenses amounting to Rs.119.17 Crores. The response of CW-2 to Q.33, 158, 167, 170 and 173 show that CW-2 claimed that for arriving at figure of Rs.274.23 Crores he had gone through SAP reports; he however, admitted that SAP reports were not on record; CW-2 claimed that overhead expenses were identified by the management, but he was unaware as to who in management carried out the identification; CW-2 admitted that the figure of Rs.119.17 Crores was arrived by management based on daily cashflow details; CW-2 was not aware as to why date of 31/7/2010 was taken and admitted that he only verified the calculations; the claim under the said Head was not a 'direct cost' within the purview of Article 29; Claimant failed to prove the claim; it failed to produce SAP reports; daily cashflow details, Bills, Invoices, Books of Accounts; the same called for adverse inference; that claimant only produced tabular statement, without supporting document; and claimant not only failed to prove the actual expenditure, but also failed to prove the estimates of original cost.



12.489 In relation to claim for additional overheads and supervision of construction works, the claimant contended that the total overheads booked / incurred by the claimant amounting to Rs.374.23 Crores and the amount of Rs.119.17 Crores towards pre-operative expenses etc., are taken from the Books of Accounts which formed the basis of duly audited financial statements of the claimant including by the Audit Committee and hence the claim is proved. **However, the claimant did not produce the SAP reports which formed the basis of amounts mentioned in Annexure K- 119A, Annexure-11, daily cashflow details, Bills, Invoices, Books of Accounts or any other relevant / necessary documents to substantiate the claim.**

(emphasis added)

131) Thus, in para-12.486, the Arbitral Tribunal has recorded an emphatic finding of non-production of any evidence in support of claim for additional overhead expenses. It has however still proceeded to award the same partially in the sum of Rs. 100 crores. The only reason recorded by the Arbitral Tribunal for awarding part claim towards additional overheads is to be found in para-12.496 of the Majority Award, which reads thus:

12.496. However having regard to the nature of the Project which required claimant to employ manpower and machinery for its execution, it cannot be disputed that on account of prolongation of the execution period, claimant had to incur additional cost towards overheads by having to retain the requisite manpower and by having to deploy the requisite machinery etc., during the extended period. At the same time, during initial period of execution, considering that entire stretch was not available, the extent of manpower and machinery deployed would have been limited. **Taking into account the overall facts of the case and the overhead expenses for the prolonged period as recorded in Books of the claimant, a sum of Rs.100,00,00,000/- is awarded towards additional Overhead cost.**

(emphasis added)



132) Thus, the claim of Rs.100 crores is awarded by the Arbitral Tribunal towards additional overheads by recording a general finding that “*considering the magnitude of the Project, it cannot be disputed that on account of prolongation of the execution period, the claimant had to incur additional costs by requiring to retain manpower and by having to deploy the requisite machinery etc*”. The factor of ‘magnitude of the project’ is thus considered by the Tribunal for awarding the claim of additional overheads, that too in the round figure of Rs. 100 crores. Because the ‘magnitude of the project’ was large, the Tribunal has presumed that additional overheads must have been incurred by MMOPL. Thus, the findings are presumptive in nature and do take the colour of a surmise. Since the claim is allowed for alleged retention of machinery during extended period, some evidence of such retention was required to be produced. More importantly, how Respondent suffered losses due to such extension was also required to be proved. Whether Respondent had any other contract, which could not be performed due to overstayal at the Project was also required to be established. However, instead of expecting the Respondent to prove cause of loss, the Arbitral Tribunal has held that ‘it cannot be disputed’ that claimant had incurred additional cost. The claim was disputed by the Petitioner. The findings are thus totally perverse.

133) Also, the Tribunal did take note of the fact that the extent of manpower and machinery deployed was limited during initial days on account of non-availability of the entire stretch. On this count, it has reduced the claim from Rs. 255.06 crores to Rs. 100 crores. This finding again indicates internal inconsistency in the Award. If Respondent did



not deploy the requisite machinery due to non-availability of ROW, the claim for incurring of additional cost due to deployment of machinery during extended period was clearly incapable of being granted.

134) The further finding of the Tribunal in para-12.496 of the majority award that *'taking into account the overall facts of the case and the overhead expense for the prolonged period **as recorded in the books of the claimants**, a claim of Rs.100,00,00,000/- is awarded towards additional overhead costs'* is criticized by Petitioner-MMRDA as being grossly perverse lacking any basis. The Tribunal has sketchily referred to the *'books of the claimant'* in para-12.496 for awarding huge sum of Rs.100 crores in favour of the Respondent. However, the Tribunal did not have before it any such *'books of accounts'* of MMOPL. C.W.2 gave an express admission in the cross-examination that he had gone through the SAP report in which the management had identified overheads and that he had test checked them. However, it is an admitted position that the said SAP reports were not filed by MMOPL on record. Upon being cross-examined as to how the management had identified the overheads, the witness replied that the identification was based on chart of ledgers and directions mentioned in the SAP report. The ledgers were however not produced. He was unaware about the exact person in the management who had carried out the process of identification. In answer to Question No.169, the witness referred to various overhead ledgers relating to expenses incurred during construction period such as employee related expenditure, traveling expenses, administration expenses and other indirect expense related to the project. He has also referred to cash flow details in answer to Question No.170. Finally, the



witness admitted that he was not aware about the basis from which the date of 31 July 2010 was arrived at and admitted that he had only verified the calculation. Thus the witness, beyond verifying the calculations, did not have any personal knowledge about incurring of any expenses. Though he referred to the SAP reports, overhead ledgers, daily cash flow details etc. none of them were produced on record. Therefore, the Arbitral Tribunal did not have before it any 'books' of the claimant referred to in para-12.496 of the Award.

135) In my view, therefore the claim of Rs.100 crores towards additional overheads and supervision of construction works is granted by the Arbitral Tribunal without any evidence on record and merely on a surmise. There is absolutely no basis as to how the figure of Rs.100 crores is chosen by the Arbitral Tribunal. The Claimant demanded amount of Rs.255.06 crores and after facing the situation of absence of any evidence in support having actually incurred overhead expenses, the Tribunal decided to choose an imaginary figure of Rs.100 crores, without any underlying basis.

136) There are two more angles from which the claim towards additional overhead expenses can be viewed. Firstly, MMOPL expressly admitted in the Statement of Claim that the same was an 'indirect expense'. Petitioner has relied upon Article-29.2 of CA which stipulated thus :

29.2 . Compensation for default by MMRDA

In the event of MMRDA being in material default of CA, MMRDA shall pay MMOPL as compensation, **all direct additional costs** suffered of



incurred by the Concessionaire arising out of such material default by MMRDA, either:

- (a) in one lump sum within 30 (thirty) Days of receiving the demand or
- (b) An increase in the Concession Period as per the recommendations of the Independent Engineer for reimbursement of Force Majeure Costs or
- (c) by permitting the Concessionaire to undertake any other mutually agreed revenue generating activity.

(emphasis added)

137) According to the Petitioner-MMRDA, only direct additional costs' suffered or incurred could be payable as compensation in the event of material default of CA by MMRDA. While I am not basing my findings with regard to the award of claim towards additional overheads and supervision of construction works only on account of Article 29.2 of the CA, this is a relevant factor to be taken into consideration and cannot be ignored altogether. Parties specifically agreed that only direct additional costs suffered or incurred by the concessionaire arising out of material default by MMRDA could be paid as compensation. Since MMOPL admitted in Statement of Claim that the expenses towards additional overheads were 'indirect expenses', the Respondent-MMOPL was not entitled to claim the same. The second way of looking at the claim towards additional overheads is that MMOPL ought to have proved the actual incurring of expenses so as to fit into the phrase 'all direct additional costs' appearing in Article-29.2 of the CA. The very admission that the claim is towards indirect expenses would mean that the Respondent never intended to lead any evidence for actually incurring thereof. Thus, failure to produce direct evidence of incurring of additional overhead expenses has twin effects of (i) denial of claim on fundamental principle of law and (ii) non-entitlement to claim under Article-29.2 of the CA.



138) Now I proceed to examine the effect of failure to lead evidence of sufferance of actual direct loss on award of claim for additional overhead expenses.

IMPERMISSIBILITY TO AWARD DAMAGES WITHOUT EVIDENCE OF LOSS SUFFERED

139) By now it is well established principle that claim for damages/compensation cannot be awarded in absence of production of proof of actual cause of loss. Under Section 73 of the Indian Contract Act 1872, when a contract is broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach. Such compensation cannot be for any remote and indirect loss or damage sustained by reason of the breach. Therefore sufferance of loss of damage is *sine qua non* for awarding damages due to breach of contract. Cause of such loss needs to be proved by leading evidence.

140) Mere entries in the books of accounts depicting sufferance of loss are not sufficient for awarding the claim in absence of any supporting evidence. Reliance by Mr. Sen on the judgment in ***Central Bureau of Investigation Vs. V. C. Shukla*** (supra) in this regard is apposite in which it is held thus:

34. The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree a probability of trustworthiness (Wigmore on Evidence, § 1546). Since, however, an element of self-interest and partisanship of the entrant to



make a person — behind whose back and without whose knowledge the entry is made — liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in Section 34 by incorporating the words “such statements shall not alone be sufficient to charge any person with liability”.

39. A conspectus of the above decisions makes it evident that even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness, fix a liability upon a person.

(emphasis added)

The Delhi High Court in **Chakradhar Goswamy** (supra) has held that under Section 34 of the Evidence Act, liability cannot be saddled merely on the basis of entries in books of accounts in absence of evidence. In **Khushal Chand** (supra), the Punjab & Haryana High Court has followed the judgment in **CBI Vs. V. C. Shukla** and it is held that few entries in the books of accounts would not be sufficient to fix liability on the person against whom the entries are produced and that the entries so recorded are not substantive piece of evidence in itself unless the entries are proved by leading cogent evidence.

141) Also, when the claim is for loss of profits due to overstay at the contract site in construction contracts, damages can never be awarded in absence of credible evidence of sufferance of loss. There is a fundamental difference between the concepts of ‘loss of profit’ and ‘loss of profitability’, which has been dealt with by the Single Judge of Madras High Court in **State Industries Promotion Corporation of Tamil Nadu Ltd. Versus. RPP Infra Projects Limited**³⁹. While dealing with the concepts of ‘loss of profit’ and loss of profitability’, the Madras High

³⁹ 2025 SC OnLine Mad 8166



Court had referred to several judgments of the Apex Court. The discussion by the learned Judge is long and illustrative and attention of some part of the discussion would be appropriate. The Madras High Court has held in paras-25 to 27 as under :-

25. The march of law, in order to understand the **difference between loss of profit and loss of profitability**, is traced hereunder:

a) The first judgment is in ***Mohd. Salamatullah v. Government of Andra Pradesh***, (1977) 3 SCC 590 and the relevant portions are extracted hereunder:

XXXX

b) ***A.T. Brij Paul Singh v. State of Gujarat***, (1984) 4 SCC 59 and the relevant portions are extracted hereunder:

XX

11. Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.

c) ***Dwaraka Das v. State of M.P.***, (1999) 3 SCC 500 and the relevant portion is extracted hereunder:

9. xxx

Such a finding of the appellate court appears to be based on wrong assumptions. The appellant had never claimed Rs. 20,000 on account of alleged actual loss suffered by him. He had preferred his claim on the ground that had he carried out the contract, he would have earned profit of 10% on Rs. 2 lakhs which was the value of the contract. This Court in ***A.T. Brij Paul Singh v. State of Gujarat*** [(1984) 4 SCC 59] while interpreting the provisions of Section 73 of the Contract Act, 1872 has held that damages can be claimed by a contractor where the Government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn



by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed : (SCC pp. 64-65, paras 10-11)

xxx

To the same effect is the judgment in **Mohd. Salamatullah v. Govt. of A.P.** [(1977) 3 SCC 590 : AIR 1977 SC 1481] After approving the grant of damages in case of breach of contract, the Court further held that the appellate court was not justified in interfering with the finding of fact given by the trial court regarding quantification of the damages even if it was based upon guesswork. In both the cases referred to hereinabove, 15% of the contract price was granted as damages to the contractor. In the instant case however, the trial court had granted only 10% of the contract price which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial court regarding breach of contract by specifically holding that “we, therefore, see no reason to interfere with the finding recorded by the trial court that the defendants by rescinding the agreement committed breach of contract”. It follows, therefore, as and when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate court was, therefore, not justified in disallowing the claim of the appellant for Rs. 20,000 on account of damages as expected profit out of the contract which was found to have been illegally rescinded.

26. Insofar **loss of profitability** which always is considered only based on the evidence, was discussed in the following judgments:

a) The first judgment is **Unibros v. All India Radio**, 2023 SCC OnLine SC 1366 and the relevant portions are extracted hereunder:

xxx

b) **Batliboi Environmental Engineers Limited v. Hindustan Petroleum Corporation Limited**, (2024) 2 SCC 375 and the relevant portion is extracted hereunder:

23. Ordinarily, when the completion of a contract is delayed and the contractor claims that s/he has suffered a loss arising from depletion of her/his income from the job and hence turnover of her/his business, and also for the overheads in the form of workforce expenses which could have been deployed in other contracts, the claims to bear any persuasion before the arbitrator or a court of law, the builder/contractor has to prove that there was other work available that he would have secured if not for the delay, by producing invitations to tender which was declined due to insufficient capacity to undertake other work. The same may also be proven from the books of accounts to demonstrate a drop in turnover and establish that this result



is from the particular delay rather than from extraneous causes. If loss of turnover resulting from delay is not established, it is merely a delay in receipt of money, and as such, the builder/contractor is only entitled to interest on the capital employed and not the profit, which should be paid.

27. The **marked difference between the loss of profit and loss of profitability** was discussed by the Calcutta High Court in State of West Bengal v. S.K. Maji, 2025 SCC OnLine Cal 3945 and the relevant portions are extracted hereunder:

14. There lies a fundamental difference between claims raised by contractors against employers for loss of profit and loss of profitability. While loss of profit indicates claims for loss of expected profit due to unexecuted work resulting from an illegal or premature termination of the contract, loss of profitability of loss of business signifies claims for reduction in the estimated profit margin due to prolongation of the contract or claims for loss of opportunity to take up other projects during the extended period where the contractor could have earned a profit. Loss of profit and loss of profitability are often mistakenly used interchangeably which has been noted by the Delhi High Court in **Ajay Kalra v. DDA** as follows : (SCC OnLine Del para 137)

“137. ‘Loss of Profits’ and ‘Loss of Profitability’ has often been interchangeably used in recovery cases. The former stands for the loss incurred due to the non-completion/prevention from completing of the contract on account of breach committed by the respondent. The latter refers to the loss incurred due to the delay in the project attributable to the respondent, due to which the claimant has lost the opportunity to earn profits through other projects after the contractual period.”

15. It is now an established position of law that claims for loss of profitability are not generally allowed in the absence of evidence to prove such loss. The view of the courts on this issue is explicit through judgments like **Unibros** case; **Bharat Coking Coal Ltd.** case and **Batliboi Environmental Engg. Ltd.** case, as has also been relied upon by the appellants in this matter. However, reliance on such cases is not apposite in the present case since those conflate the concepts of loss of profit and loss of business. It is pertinent to note here that even though the Supreme Court used the expression “loss of profits” in essence the claim was that of “loss of profitability” and thus, the requirement to prove actual loss was mandated only for losses arising out of delay and should not be misunderstood to be applicable to loss of profits for unexecuted works.

16. In **Unibros** case the Supreme Court was faced with a similar situation wherein the appellant's claim for loss of profit stemmed from the delay attributable to the respondent in completing the project. It had also been established that the loss of profit claimed was based on the ground that the appellant having been retained longer than the period stipulated in the contract and its resources being blocked for



execution of the work relatable to the contract in question, it could have taken up any other work order and earned profit elsewhere.

25. It is a general principle of law of contract that in case of breach of contract, the injured must be put back in the same position that he would have been if he had not sustained the wrong. Once the contractor has established an illegal and unjustified termination of contract and a breach thereof on the part of the employer, which was also a finding of fact by the sole arbitrator in the present case, the contractor cannot be further obligated to establish a loss suffered on account of such breach, because a reasonable expectation of profit is implicit in a works contract. [See MSK Projects India (JV) Ltd. case12]. Therefore, any loss occasioned due to illegal termination of works contract, has to be compensated by way of damages once the breach on part of the erring party is established. This is obviously subject to the caveat that the compensation must be reasonable and the parties should not be allowed to make a windfall profit, by a mere allegation of breach of contract. However, it is a settled position of law that for estimating damages, courts are not required to go into the minute details; a broad evaluation of the same would suffice.

26. In *J.G. Engg. (P) Ltd. v. Union of India* the Supreme Court upheld the award of loss of profits measured at 10 per cent of the value of the remaining part of the contract which could not be performed due to illegal termination of the contract. The measure of profit was assessed at 15 per cent of the value of the remaining part of the work in A.T. Brij Paul Singh case7. The Delhi High Court in *R.K. Aneja v. DDA*19 was of the view that the petitioner was entitled to 10 per cent loss of profit on the balance amount of work left undone without proof of loss of profit which he expected to earn by executing the balance work.

xxx

(emphasis and underlining added)

142) Thus when the claim for damages/ compensation due to prolongation of contract is raised, concerned, the same falls under the head of 'loss of profitability' whereas when the claim for damages/ compensation relate to reasonable expectation of profit which is denied due to illegal termination, the same falls under the head of 'loss of profits'. In the present case the claim for additional overhead expenses would fall under the former head of 'loss of profitability'. When the claim is for 'loss of profitability', production of direct evidence is



mandatory and in absence of which, the claim for damages cannot be allowed.

143) I proceed to examine ratio of some of the judgments of the Apex Court dealing with the effect of non-production of evidence to prove cause of additional loss due to delay in extension of work. In ***Bharat Coking Coal limited Versus L.K. Ahuja***⁴⁰ the Apex Court has held in paragraph 24 as under:-

24. Here when claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading "Loss or Profit". **It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted.** In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in Sunley (B) & Co. Ltd. v. Cunard White Star Ltd. 5 by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs 6,00,000 awarded to the claimant.

(emphasis added)

144) The above principles enunciated in ***Bharat Coking Coal Ltd*** have been reiterated by the Apex Court in the recent judgment in ***Unibros*** (supra) in which the Appellant therein was awarded work contract to carry out construction of Delhi Doordarshan Bhawan and there was delay of 42 and ½ months in completion of the project. The

⁴⁰ 2004 (5) SCC 109



Appellant claimed amount of Rs.1,44,83,830/- towards 'loss of profit' by computing the same as profits that could have been earned during the delay period of 42 and ½ months. The computation was based on figure of 7 ½ % profit per year which was divided into figure of Rs.3,40,796/- per month and by multiplying the said by figure of 42.5 months, damages of Rs.1,44,83,830/- were sought. It appears that no independent evidence was produced for having suffered actual loss during the overstayed period. The Apex Court in Unibros held that for supporting claim for loss of profit arising from a delayed contract or missed opportunity from other available contracts, it becomes imperative for the claimant to substantiate the presence of a viable opportunity through compelling evidence. By referring to the Hudson's Formula, the Apex Court held that the same cannot be applied in vacuum as it merely provides an estimate of losses that a contractor may suffer. It is held that the formula may be useful when needed but that cannot alone prove contractor's loss of profits. The Apex Court has held that the formula can only be used if the contractor has shown with evidence the loss of profits and loss of opportunities it suffered owing to the prolongation. The Apex Court held in paras-15 to 19 of the judgment as under:

15. Considering the aforesaid reasons, even though little else remains to be decided, we would like to briefly address the appellant's claim of loss of profit. In Bharat Cooking Coal (supra), this Court reaffirmed the principle that a claim for such loss of profit will only be considered when supported by adequate evidence. It was observed:

"24. It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not



have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same."

(emphasis ours)

16. To support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that the appellant could have earned elsewhere by taking up any, it becomes imperative for the claimant to substantiate the presence of a viable opportunity through compelling evidence. This evidence should convincingly demonstrate that had the contract been executed promptly, the contractor could have secured supplementary profits utilizing its existing resources elsewhere.

17. One might ask, what would be the nature and quality of such evidence? In our opinion, it will be contingent upon the facts and circumstances of each case. However, it may generally include independent contemporaneous evidence such as other potential projects that the contractor had in the pipeline that could have been undertaken if not for the delays, the total number of tendering opportunities that the contractor received and declined owing to the prolongation of the contract, financial statements, or any clauses in the contract related to delays, extensions of time, and compensation for loss of profit. While this list is not exhaustive and may include any other piece of evidence that the court may find relevant, what is cut and dried is that in adjudging a claim towards loss of profits, the court may not make a guess in the dark; the credibility of the evidence, therefore, is the evidence of the credibility of such claim.

18. Hudson's formula, while attained acceptability and is well understood in trade, does not, however, apply in a vacuum. Hudson's formula, as well as other methods used to calculate claims for loss of off-site overheads and profit, do not directly measure the contractor's exact costs. Instead, they provide an estimate of the losses the contractor may have suffered. While these formulae are helpful when needed, they alone cannot prove the contractor's loss of profit. They are useful in assessing losses, but only if the contractor has shown with evidence the loss of profits and opportunities it suffered owing to the prolongation.

19. The law, as it should stand thus, is that for claims related to loss of profit, profitability or opportunities to succeed, one would be required to establish the following conditions: first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability. On perusal of the records, we are satisfied that the fourth condition, namely, the evidence to substantiate the claim of loss of profitability remains unfulfilled in the present case.



145) Recently, this Court has also dealt with the issue of difference in concepts of 'loss of profits' and 'loss of profitability' in *Solapur Municipal Corporation Vs. SMC GECP Ltd (JV)*⁴¹. Referring to the judgment of the Madras High Court in *State Industries Promotion Corporation of Tamil Nadu Ltd* (supra), this Court has held as under:

60) The conceptus of the above discussion is that the concept of 'loss of profit' and 'loss of profitability' cannot be conflated. The former refers to damages arising out of wrongful termination of contract, whereas the latter arises out of overstay of the contractor at the site due to delay in execution of the work. In the former case, the contractor is an injured party who is prevented from executing balance work. Therefore, his claim for loss of profit is dependent only on the issue of validity of termination of contract. Once termination is found to be unjustified, it is permissible for the Court to award reasonable percentage of unexecuted work as damages. However, in a case involving claim for loss of profitability it, becomes necessary for the contractor to prove as to how delay in execution of work and his overstay at the site has led to actual sufferance of damages. In such case, it is necessary to prove as to how detention of manpower or machinery at the contract site prevented the contractor from utilizing the same at some other contract site and how he suffered loss on account of the same.

146) Thus, when the claim is for damages suffered due to overstay at the contract site due to delay in execution of the contract, production of concrete, credible and reliable evidence of having incurred the expenses towards additional overheads is a *sine qua non* and in absence of such evidence, the claim cannot be granted on a general presumption or assumption that since execution of the contract got delayed, the claimant must have incurred some additional overheads. In the present case, the Tribunal has awarded huge sum of Rs. 100 crores to MMOPL in absence of scrap of evidence.

⁴¹ Commercial Arb. Petition No. 444 of 2024 decided on 6 February 2026



147) In my view, production of credible and cogent evidence of having incurred additional overhead expenses was *sine qua non* for entertaining the claim of MMOPL. Since MMOPL has failed to produce the same, the Arbitral Tribunal ought to have rejected the claim. The Tribunal could not have inferred that MMOPL must have incurred expenses towards additional overheads just because the magnitude of the Project was large. As observed above, there is an internal inconsistency in the findings of the Arbitral Tribunal where it has held that there was no sufficient deployment of manpower or machinery on account of non-availability of entire Right of Way during initial contract period. Despite this, the Tribunal has thought it prudent to award a huge sum of Rs.100 crores towards additional overheads in absence of any evidence being produced by MMOPL of having actually incurred any additional overheads. In my view therefore, the award of claim in the sum of Rs.100 crores towards additional overheads and supervision of construction works deserves to be set aside.

RELEVANCE OF DISSENTING AWARD :

148) In the Minority Award, this claim is rejected by recording following findings:

It is significant to note that the 'SAP Report' referred to in the witness's answer to Q.No.33 has not been produced. Similarly, the person/ persons in the management who have identified the overheads from the SAP Report are neither examined nor is his/their names shown. Again, the witness's answer to Q.No.167 and 169 show that the overheads were Identified by the management based on the chart of ledgers/ various overhead ledgers and narration mentioned in the SAP Report. None of those documents or ledgers are produced. In answer to Q.No.168, he answered that he is not aware whether the SAP Reports



referred by him are produced before the Tribunal. Indeed, they were not produced before the Tribunal. To reiterate the above answers of the witness show that the relevant figures concerning overheads were identified by the management and the witness merely 'test checked' the calculations. It is equally important to note that SAP report and or the 'ledgers' on the basis of which the management identified the overheads has not been produced before the courts. The witness is not aware as to who in the management had identified the overheads in the SAP report. The witness does not identify such person he does not even know his name'. The Books of Accounts have also not been produced. In the absence of such books and in view of the failure of the Claimant to produce SAP reports, which formed the basis of amounts mentioned in Annexure K.119(A) (Annexure 11), the correctness of the figures mentioned in Annexure 11 (Annexure K.119(A)) cannot be held established. Again, daily cash flow details, bills, invoices of the books of accounts or any other relevant document (including overhead ledgers) have also not been produced.

In such a state of evidence, there is absolutely no basis upon which the "additional overhead expenses" can be said to be established. Merely, on the ground that the construction period was extended (as alleged by the Claimant but denied by the Respondent), or on the presumption that it was wholly or partly extended on account of the Respondent's delays, the Tribunal cannot award any amount on this score.

149) Thus, the dissenting Award rejects the claim on account of absence of any evidence in support of the claim.

150) In *Dakshin Haryana Bijli Nagam Ltd.* (supra) the Apex Court has dealt with the aspect of relevance of a dissenting opinion. It is held that dissenting opinion of a minority award can be relied upon by a party seeking to set aside the award to buttress its submission in proceedings under Section 34 of the Arbitration Act. It is further held that while exercising powers under Section 34 of the Arbitration Act, the Court is not precluded from considering the findings and conclusions of the dissenting opinion of minority member of the Tribunal. The Apex Court considered the commentary of *Russel on Arbitration* and of *Garry B. Born* on International Commercial Arbitration and the ratio of the



judgment in *Ssangyong Engineering* (supra) and has held in paragraphs 39 to 43 as under:-

Relevance of a dissenting opinion

39. The dissenting opinion of a minority arbitrator can be relied upon by the party seeking to set aside the award to buttress its submissions in the proceedings under Section 34. At the stage of judicial scrutiny by the court under Section 34, the court is not precluded from considering the findings and conclusions of the dissenting opinion of the minority member of the Tribunal.

40. In the commentary of *Russel on Arbitration*, the relevance of a dissenting opinion was explained as follows:

"6-058. Dissenting opinions.-Any member of the Tribunal who does not assent to an award need not sign it but may set out his own views of the case, either within the award document or in a separate "dissenting opinion". The arbitrator should consider carefully whether there is good reason for expressing his dissent, because a dissenting opinion may encourage a challenge to the award. This is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge or may add weight to the arguments of a party wishing to appeal against the award."

41. *Gary B. Born* in his commentary on International Commercial Arbitration opines that:

"Even absent express authorization in national law or applicable institutional rules (or otherwise), the right to provide a dissenting or separate opinion is an appropriate concomitant of the arbitrator's adjudicative function and the Tribunal's related obligation to make a reasoned award. Although there are legal systems where dissenting or separate opinions are either not permitted, or not customary, these domestic rules have little application in the context of party-nominated co-arbitrators, and diverse Tribunals. Indeed, the right of an arbitrator to deliver a dissenting opinion is properly considered as an element of his/her adjudicative mandate, particularly in circumstances where a reasoned award is required. Only clear an explicit prohibition should preclude the making and publication to the parties of a dissenting opinion, which serves an important role in the deliberative process, and



can provide a valuable check on arbitrary or indefensible decision making."

It is further commented that:

"There is nothing objectionable at all about an arbitrator "systematically drawing up a dissenting opinion, and insisting that it be communicated to the parties". If an arbitrator believes that the Tribunal is making a seriously wrong decision, which cannot fairly be reconciled with the law and the evidentiary record, then he/she may express that view. There is nothing wrong and on the contrary, much that is right - with such a course as part of the adjudicatory process in which the Tribunal's conclusion is expressed in a reasoned manner. And, if the arbitrator considers that the award's conclusions require a "systematic" discussion, that is also entirely appropriate; indeed, it is implied in the adjudicative process, and the requirement of a reasoned award."

It is further observed that:

"... the very concept of a reasoned award by a multi-member Tribunal permits a statement of different reasons if different members of the Tribunal in fact hold different views. This is an essential aspect of the process by which the parties have an opportunity to both, present their case, and hear the reasons for the Tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process."

42. In *Ssangyong Engg. & Construction Co. Ltd. v. NHAI* this Court upheld the view taken in the dissenting opinion to be the correct position in law. In this case, the Court was hearing a special leave petition from an order 19 passed by a Division Bench of the Delhi High Court. This Court noted that: (*Ssangyong Engg. & Construction Co. Ltd. case 2, SCC p. 150, para 12*)

12. A Section 34 petition which was filed by the appellant was rejected by the learned Single Judge of the Delhi High Court, by a judgment and order dated 9-8-2016 (*Ssangyong Engg. & Construction Co. Ltd. v. NHAI 20*), in which it was held that a possible view was taken by the majority arbitrators which, therefore, could not be interfered with, given the parameters of challenge to arbitral awards. The learned Single Judge 20 also went on to hold that the New Series published by the Ministry could be applied in the case of the appellant as the base indices for 2004-2005 under the New Series were available. Having so held, the learned Single Judge stated 20 that even though the



view expressed in the dissenting award is more appealing, and that he preferred that view, yet he found that since the majority award is a possible view, the scope of interference being limited, the Section 34 petition was dismissed. A Section 37 appeal to the Division Bench of the Delhi High Court yielded the same result, by the impugned judgment dated 3-4-2017.

43. This Court set aside the award. However, in para 77 of the judgment, the Court held as under: (Ssangyong Engg. & Construction Co. Ltd. case 2, SCC p. 200)

"77. The judgments of the Single Judge 20 and of the Division Bench 19 of the Delhi High Court are set aside. Consequently, the majority award is also set aside. Under the scheme of Section 34 of the 1996 Act, the disputes that were decided by the majority award would have to be referred afresh to another arbitration. This would cause considerable delay and be contrary to one of the important objectives of the 1996 Act, namely, speedy resolution of disputes by the arbitral process under the Act. Therefore, in order to do complete justice between the parties, invoking our power under Article 142 of the Constitution of India, and **given the fact that there is a minority award which awards the appellant its claim based upon the formula mentioned in the agreement between the parties, we uphold the minority award, and state that it is this award, together with interest, that will now be executed between the parties.** The minority award, in paras 11 and 12, states as follows:

'11. I therefore award the claim of the claimant in full.

12. Costs no amount is awarded to the parties. Each party shall bear its own cost. "

In Ssangyong, this Court upheld the view taken by the dissenting arbitrator in exercise of its powers under Article 142 of the Constitution, in order to do complete justice between the parties. The reason for doing so is mentioned in para 77 i.e. the considerable delay which would be caused if another arbitration was to be held. This Court exercised its extraordinary power in Ssangyong keeping in mind the facts of the case, and the object of expeditious resolution of disputes under the Arbitration Act.

151) Thus, this Court can take into consideration the findings in the dissenting Award. The dissenting opinion rightly holds that there is



absolutely no evidence to award claim in the sum of Rs. 100 crores towards additional overhead expenses. It is however clarified that the dissenting opinion in the minority award is considered only for buttressing this Court's independent finding that award of claim is grossly perverse and patently illegal.

152) In view of above discussions, the claim for Rs.100 crores awarded by the Tribunal in the Majority Award towards additional overhead expenses deserves to be set aside.

ADDITIONAL INTEREST AND FINANCIAL EXPENSES

153) The Respondent-MMOPPL claimed sum of Rs.408.59 crores towards additional interest and financial expenses, which claim was reduced by it by effecting amendment in the Statement of Claim to Rs.369.51 crores. According to MMOPPL, it was required to bear the burden of paying additional interest on borrowed sums on account of delay in execution of the Project. In the Statement of Claim, MMOPPL raised following pleadings in paragraph 6.175 as under:

6.175 Additional Interest during Construction

a) The schedule of interest repayments as given in the Financing Documents stipulated payment of financing charges and interest amount of Rs.144,00,00,000 Crores. On the other hand, the total interest and financing charges payment incurred by the claimant during the period of delay till the actual achievement of COD is Rs.513.51 Crores.

b) This is another cost which the claimant would not have incurred if the respondent had not caused delay to the achievement of COD. The respondent is thus liable to reimburse the additional interest cost of



Rs.369.51 Crores to the claimant, as set out in the statement enclosed as Annexure K-119(8) hereto."

154) Along with the Statement of Claim, MMOPL produced Annexure-K-119(B) providing the break up amount of Rs.369.51 crores which is as under :

Annexure-K-119(B)

Additional Interest and Financing Expenditure during Construction.

(A) Interest and Financing Expenditure during Construction.

Description	Amount (Rs. Cr)
Total Interest And Finance Cost (as per books)	513.51

(B) Reduction

Description	Amount (Rs. Cr)
Interest Cost as per Original Cost Structure	119.00
Financing Charges as per original Cost Structure	25.00
Total	144.00

Ner Claimed (A-B)	369.51
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155) In support of the claim towards additional interests and financial expenses, Respondent-MMOPL examined C.W.2 as witness, who deposed as under:

Claim No.6:

Additional costs / expenses incurred by the claimant on account of delays on part of the respondent

12. The Claimant has provided Particulars of Claim as per Annexure K-121 of the Statement of Claim amounting to Rs.1,547.78 Crores. I have checked calculation of the same and observed that the said claim works



out to Rs.1,372.47 Crores as per Annexure 6 hereto. The said amount of Rs.1,372.47 Crores includes the following:

(f) Additional Interest and Financing Expenditure during Construction amounting to Rs.369.51 Crores. The claimant has incurred Additional Interest Expenses and Financing Expenditure during construction above Rs.144 Cr. as envisaged in the Financial Closure upto COD on 8th June 2014. The actual interest and Financing Expenditure incurred by the claimant upto 8th June 2014 is Rs.513.51 Crores. The calculation is provided as Annexure 12 hereto."

156) Along with his affidavit of evidence, C.W.2 produced following statement at Annexure-12:-

Annexure-12

Additional Interest and Financing Expenditure during Construction.

(A) Interest and Financing Expenditure during Construction.

Description	Amount (Rs. Cr)
Total Interest And Finance Cost (as per books)	513.51

(B) Reduction

Description	Amount (Rs. Cr)
Interest Cost as per Original Cost Structure	119.00
Financing Charges as per original Cost Structure	25.00
Total	144.00

Ner Claimed (A-B)	369.51
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157) Thus, the only details provided in the statement at Annexure-12, which was in the nature of particulars of claim, was the figures of total interests and finance cost of Rs.513.51 crores (less) interest cost and finance cost as per the original cost structure of Rs.144 crores. This is how the figure of Rs.369.51 crores was claimed as cost



incurred towards additional interests and financial expenses. C.W.2 was subjected to cross-examination and the relevant part of his cross-examination reads thus :-

12.484. Relevant cross-examination of CW-2 as regards the claim for additional interest during construction period is as below:

"Q.33 Please go through the aforesaid exhibits and tell us that in respect of which of the aforesaid exhibits, you have personally verified merely the arithmetical accuracy of the calculations made and not the correctness of the figures mentioned therein?

Ans. ..

(xvii) With regard to item (A) of Annexure 12 at page 52, the same SAP report which is part of books of accounts has been referred. The management has Identified the interest and finance cost which has been test-checked by me. Paragraph (B) is calculated by the management as per interest and finance expenditure during construction as envisaged in the financial closure which has been reduced from item (A) above.

Q.158 Are SAP reports referred to by you in the aforesaid answer, are on record of the present proceedings?

Ans: I am not aware.

Q.167, Are you aware of the basis on which the management identified the overheads and interest and finance costs as stated by you in your aforesaid, answer?

Ans: These are identified based on the chart of ledgers and narration mentioned in the SAP report.

Q.168 Who in the management carried out this process of identification?

Ans: I am not aware.

Q.170 From what documents were the figures mentioned in Item (B) of Annexure-11 and 12 arrived at?

Ans: With regard to item (B) of Annexure-11, these were arrived by the management based on daily cash flow details. With regard to Item (B)



of Annexure-12, these were calculated as envisaged in the financial closure.

Q.171 Which was the document you referred to as envisaged in the financial closure?

Ans: Term loan agreement, wherein the details of cost of project and means of finance were mentioned.

Q.172 Do you know whether the term loan agreement is on record in the present proceedings?

Ans: I am not aware."

158) Thus, in the cross-examination, C.W.2 stated that for arriving at the figures in Item-A of Annexure-12, he had gone through the SAP report and that the same was not available on record. He further stated that interest and final costs were identified by the management and he was not aware as to who in the management carried out identification. He further admitted that the figures mentioned in Item-B of Annexure-12 were calculated by the management as envisaged in financial closures and that the documents referred to in the financial closures was term loan agreement. He admitted that he was not aware as to whether the term loan agreement was not on record. This was the only evidence available with the Arbitral Tribunal and Petitioner-MMRDA specifically raised the issue of absence of evidence in support of claim. The defence adopted by Petitioner-MMRDA in respect of the claim towards additional interests and financial expenses is noted by the Arbitral Tribunal in paragraph 12.487 of the majority Award, which reads thus:

12.487 Contesting the claimant's claim for additional interest, the respondent submitted that the claimant did not produce any evidence in support of said claim. CW-1 and CW-2 deposed in the matter



without personal knowledge; according to CW-2 the claimant incurred additional interest and financing expenditure during construction above Rs.144 Crores as envisaged in financial closure upto COD / 8/6/2014 amounting to Rs.513.51 Crores; that in support of said claim CW-2 merely produced tabular statements; the statement made by CW-2 in response to Q.33, 158, 167, 168 and 170 to 172 show that CW-2 claimed that the figures in Annexure-12 were arrived based on SAP reports; **however, CW-2 admitted that SAP reports were not on record**; CW-2 claimed that the interest and finance cost were identified by the management, but he could not identify the person in the management who did so; CW-2 claimed that the amount of Rs.144 Crores 'was as envisaged in financial closure / term loan agreement, **but admitted that term loan agreement was not on record.**

159) Thus the Arbitral Tribunal has noted the factum of non-production of SAP report and term loan agreement in para 12.487 of the majority Award. However it has still proceeded to award the claim. The exact reasons recorded by the Tribunal for awarding the claim towards additional interests and financial expenses are not very clearly discernable from the Award. However, it has observed in Para12.490 of the majority Award thus:

12.490 Claimant claimed total interest and finance cost as Rs.513.51 Crores. CW-2 in response to Q.33 stated that the same is based on SAP report which forms part of claimant's Books of Accounts. Claimant stated that it had reduced from Rs.513.51 Crores, interest cost as per original cost structure amounting to Rs.119 Crores and financing charges as per original cost structure amounting to Rs.25 Crores i.e., totally Rs.144 Crores to arrive at additional interest claimed. **In response to Q.170 and 171 CW-2 stated that the interest cost and financing charges as per original structure were calculated based on term loan agreement, which formed part of financial closure. The claimant contended that the respondent was aware of the term loan agreement, as the same was approved by respondent under the provisions of CA; and there is no evidence led by respondent that the figures mentioned by CW-2 based on term loan agreement was incorrect.**



160) What is stated in Para 12.490 are not really the reasons for awarding the claim. But it appears that the Arbitral Tribunal has considered the term loan agreement, referred to by C.W.2, which admittedly was not produced on record by MMOPL. It has only recorded submission of MMOPL that the MMRDA did not produce evidence to prove that the figure mentioned by C.W.2 based on term loan agreement was incorrect. The Award does not indicate whether this contention of MMOPL is accepted by the Tribunal or not. Suffice it to observe that the contention was outrageous and ought to have been rejected by the Tribunal. The onus was not on MMRDA to disprove the statement of C.W.2.

161) The findings recorded in Para 12.492 to 12.494 of the majority award do not throw any light on claim towards additional interest and financial expenditure.

162) The Tribunal thereafter straightaway proceeded to award claim for additional interest and financial expenditure in the sum of Rs.125 crores by recording following findings in paragraph 12.497:

12.497. Similarly, **it cannot be disputed that** on account of extension of execution period, the claimant had to incur additional interest and financial expenditure. **Considering the interest cost and financing charges as shown in the Books of the claimant, having regard to the facts of the case, the claimant is held entitled to additional interest cost and financing charges amounting to Rs. 125,00,00,000/-.**

(emphasis added)

163) Thus, in absence of any evidence on record, a huge sum of Rs.125 crores is offered on a platter to MMOPL by recording generic



finding that *'it cannot be disputed that on account of extension of execution period, the claimant had to incur additional income/financial expenditure'*. This finding is again based purely on a surmise in absence of any concrete evidence on record. Petitioner-MMRDA had specifically disputed the claim and therefore the finding that incurring of additional interests and financial expenditure could not be disputed is perverse. More importantly, the Arbitral Tribunal had zero evidence in respect of incurring of any actual additional interest or financial expenses by MMOPL. No evidence is discussed in the Award. The Tribunal has made vague reference to 'books of the claimants' even though no books showing incurring of any additional interest during extended period of contract were produced before the Arbitral Tribunal or are discussed by the Tribunal. Again, while awarding sum of Rs.125 crores as against the claim of Rs.369.51 crores, no underlying basis is provided by the Tribunal.

164) In my view, award of claim of Rs. 125 crores towards additional interests and financial expenses suffers from the same vices as discussed while dealing with the claim of additional overheads and supervision of construction works. Here also, the claim is towards 'indirect expenses' and was barred under Article-29.2 of the Concession Agreement. It was incumbent for MMOPL to demonstrate that any expenses towards additional interest were actually incurred by it by leading evidence so as to fit the same in the expression 'direct additional costs' appearing in Article-29.2 of the CA. However, even if the aspect of indirect expense is to be ignored, the claim is not supported by any evidence.



165) Since the award of claim of Rs.125 crores towards additional interests suffers from the same vices as discussed in relation to claim for additional overhead costs, it is not necessary to repeat the discussion for need to lead credible evidence to establish the claim and impermissibility to award the claim in absence of any evidence.

166) Mr. Bhatt has submitted that the Arbitral Tribunal had sufficient evidence before it for awarding the claim of additional interest and financial expenses. He has submitted that the Arbitral Tribunal has considered evidence of witness of MMOPL and duly approved balance sheets at Exhibits-C73 and C76. I have already considered and analyzed the evidence of C.W.2 and have recorded a conclusion that the oral testimony of C.W.2, by itself, does not provide any succor to MMOPL's claim for additional interest or financial expenses. So far as MMOPL's reliance on audited balance sheets at Exhibits-C73 and C76 are concerned, the Tribunal has not referred to the same in the majority Award. However, even if the documents at Exhibits C-73 and C-76 are taken into consideration, it is difficult to arrive at a conclusive finding that MMOPL incurred expenditure of Rs.369.51 crores towards additional interest /financial expenses. Exhibit-C73 is the balance sheet for the year ending 31 March 2011 and in that document, the figure indicated against 'Bank and Financial charges' is cumulatively at Rs.10.34 crores. Similarly, in the document at Exhibit-C-76, the cumulative figure indicated in the balance sheet for the year ending 31 March 2014 against the head 'Bank and Financial Charges' is Rs.25.36 crores.



167) Though this Court is not supposed to independently assess the evidence on record while exercising powers under Section 34 of the Arbitration Act, I have still proceeded to consider the two documents in the form of audited balance sheets at Exhibits-C-73 and C-76 to find out whether any underlying basis can be gathered for award of sum of Rs.125 crores in favour of MMOPL by applying the principles in the judgment of the Apex Court in **OPG Power Generation Limited**. However, even after going through the documents produced before the Arbitral Tribunal and to which Mr. Bhatt has drawn my attention, I am unable to arrive at a conclusion that MMOPL produced any concrete or credible evidence of having incurred expenditure of Rs.369.51 crores towards additional interest or financial expenses. Mr. Bhat has attempted to salvage the situation by contending that what is granted by the Arbitral Tribunal is only a conservative figure of Rs.125 crores though MMOPL has actually incurred additional financial expenses and interest of Rs.369.51 crores. I am unable to agree. As observed above, the Arbitral Tribunal can enter into realm of guesswork only if it is impossible to arrive at the exact amount to be awarded as compensation due to peculiar nature of contract. The principle cannot be invoked in a case where there is total absence of evidence of having incurred the actual expenditure. In my view therefore, award of sum of Rs.125 crores towards claim for additional interest and financial expenses cannot pass the muster of Section 34 of the Arbitration Act merely because same is significantly lower than what was claimed by MMOPL (Rs.369.51 crores).

168) As observed above, reasons recorded for rejection of claim towards additional overheads squarely applies in relation to claim for



additional interest and financial expenses. Award of claim of Rs.125 crores towards additional interest and financial expenses is thus patently illegal and liable to be set aside. In the dissenting Award, the claim is rejected by holding as under:

It may be noticed that both in Annexure K-119B as well as Annexure 12 to CW.2's affidavit, the "total interest and finance cost" is stated to be "as per books". However, no such books (account books) have been produced by the Claimant, which means that the first and basic figure of Rs.513.51 crores has not been proved according to law.

It is relevant to notice that according to CW.2, item A of Annexure 12 at page 52 (of CW.2's affidavit) is said to be referable to "SAP Report which is part of books of accounts". But, the Claimant has not produced either the SAP Report or the books of accounts. So far as the figures in item (B) are considered the witness merely says they were 'calculated by the management as per interest and finance expenditure during construction period as envisaged in the financial closure.' The witness has not verified these figures and none from the management is examined to prove his calculations.

In the absence of Books of Accounts and the "SAP Reports" said to be part of Books of Accounts" of the Claimant, the exercise indulged by the Claimant is an exercise in futility.

This item of claim is accordingly rejected.

169) The dissenting award rightly holds that no account books have been produced by the Respondent. Rejection of claim in the light of absence of evidence in the dissenting award appears to be in order. Here also, it needs to be clarified that the dissenting opinion in the Award is considered only for buttressing the finding that the award of claim towards additional interest /financial expenses is without any evidence. Award of claim in the Majority Award is independently found to be grossly perverse and patently illegal.



170) In my view therefore, award of claim of Rs. 125 crores towards Additional interest and financial expenses cannot be sustained and is liable to be set aside.

OPPORTUNITY COST OF LOSS OF PROFIT

171) In its Statement of Claim, MMOPL claimed a sum of Rs.96.59 crores towards opportunity cost on loss of profit contending that if operations of the Metro Project had commenced from 31 July 2010, it would have been to realise the revenue as per its projections. It was contended by MMOPL that on account of delay caused by MMRDA in completion of the Metro Project, MMOPL was deprived of cash profit and accordingly it claimed interest on opportunity cost on such loss of cash profits. However, by amending the Statement of Claim, the claim under this sub-head was reduced to Rs.42.26 crores. The Arbitral Tribunal has allowed the claim under this sub-head only to the extent of Rs.23.47 crores.

172) In support of its claim of opportunity cost on loss of profit, the MMOPL raised following pleadings in paragraph 6.176 of Statement of Claim, which reads thus:

6.176 Opportunity cost on loss of Cash profit (revenue after deducting direct operating expenses and interest cost).

i) If the operations of the Project had been commenced as scheduled from 31st July 2010, the claimant would have been able to realize the revenue as per the revenue projections.

ii) Because of the delay caused by the respondent, the claimant has been deprived of the cash profit which it would have otherwise made if the operations had commenced from the scheduled COD.



iii)The respondent is liable to reimburse the interest on the Opportunity cost on loss of Cash profit amounting to Rs.42.26 Crores suffered by the claimant on account of the failure by the respondent. Such additional costs are set out In the Statement enclosed as Annexure K-120 hereto."

173) To prove the claim, MMOPL led evidence of C.W.2, who produced with his affidavit of evidence, a statement at Annexure A-13 which reads thus:-

Particulars	2011	2012	2013	2014	2015
Revenue(Rs.Cr)	110.00	229.00	288.00	298.00	310.00
Operating Exp	17.00	70.00	95.00	76.00	77.00
EBIDTA	93.00	159.00	193.00	222.00	233.00
EBIDTA%	84.55%	69.43%	67.01%	74.50%	75.16%
Interest	75.00	150.00	150.00	150.00	150.00
Net Earnings	18.00	9.00	43.00	72.00	15.80
Time Period (In Yrs)	3.52	2.69	1.69	0.69	0.19
Annual Compounding Factor @ 18% upto 7 th June 2014	1.79	1.56	1.32	1.12	1.03
Amount (Rs. In Crores)	14.23	5.04	13.84	8.66	0.49
Total	42.26				

*Net earnings for the year 2015 adjusted on proportionate basis upto 07th June, 2014 (COD Date). The same is based on the Information Memorandum prepared by IDBI in May 2008, which has been appraised by the lenders.

174) MMOPL's witness-C.W.2 deposed that MMOPL was entitled to interest on opportunity cost of loss of cash profit due to delay in achievement of COD and that he had verified calculations and that claim worked out to Rs.42.26 crores based on loss of cash profit upto 2014 as



apprised by Lenders. C.W.2 deposed in his affidavit of evidence as under:-

12. The Claimant has provided Particulars of Claim as per Annexure K-121 of the Statement of Claim amounting to Rs. 1,547.78 Crores. I have checked calculation of the same and observed that the said claim works out to Rs. 1,372.47 Crores as per Annexure 6 hereto. The said amount of Rs. 1,372.47 Crores includes the following:

(g) Interest on Opportunity Cost on Loss of Cash Profit (revenue after deducting direct operating expenses and interest cost) due to delay in achievement of the COD. I have checked calculation of the same and observed that the Claim works out to Rs.42.26 Crores based on Loss of Cash Profit upto 07 June 2014 as appraised by the Lenders. The calculation is provided as Annexure 13 hereto."

175) C.W.2 was subjected to cross-examination, relevant part of which has been culled out in paragraph 12.503 of the majority Award and which is as under:

12.503 Relevant cross-examination of CW-2 as regards claim for cost on loss of profit is as under.

"Q.33. Please go through the aforesaid exhibits and tell us that in respect of which of the aforesaid exhibits, you have personally verified merely the arithmetical accuracy of the calculations made and not the correctness of the figures mentioned therein

Ans.

(xviii) With regard to Annexure 13 at page 53, the management has calculated interest on opportunity cost on loss of cash profit based on the Information Memorandum prepared by IDBI Bank and appraised by the lenders. I have checked the mathematical accuracy.

Q.174. Have you personally computed any of the figures mentioned therein?

Ans: I have checked the mathematical correctness.



Q.175. Do I take it that all that you have done in respect of this Annexure is to check as to whether the arithmetical additions and subtractions contained therein are correct?

Ans: Yes.

Q.176. To your knowledge, since when is the Claimant generating cash profits?

Ans: I was the auditor of the Claimant upto 2013-14. During that time, the project was under construction, which means that during those years, there was no cash profits."

(emphasis added)

176) Thus, upon being asked as to whether he had personally verified the figures in the exhibits or had only checked the mathematical accuracy in calculations, the witness deposed that he had checked only the mathematical accuracy. The witness further deposed that he was auditor of the Claimant only upto 2013-14 and that till that time, the project was under construction and that there was no question of generating any cash profit. The Arbitral Tribunal recorded the objection of the Petitioner-MMRDA about failure to produce any supporting documents in support of the claim in paragraphs 12.504 and 12.505 as under:-

12.504 The respondent submitted that in SoC claimant merely annexed a Chart at Annexure K-120 setting out calculation of alleged loss. The evidence of CW-1 and CW-2 is not based on their personal knowledge: CW-2 stated that he had checked the calculation towards claim and observed that the claim works out to Rs.42.46 Crores based on loss of cash profit upto 7/6/2014 as appraised by the lenders; that in support of the claim, CW-2 merely produced tabular statement showing the calculation; the statement made by CW-2 in response to Q.33, 174 to 176 show that CW-2 had only checked the mathematical accuracy of the figure and CW-2 was only aware that upto 2013-14 the claimant was not earning any cash profits; that the claim is not a direct cost contemplated under Article 29 of CA; claimant failed to produce Books of Accounts, the Information Memorandum prepared by IDBI Bank



etc., warranting adverse inference. Claimant not only failed to prove loss of profit, but also failed to prove the originally estimated profits.

12.505 The claimant claimed that opportunity cost of loss of cash profit was derived from Information Memorandum prepared by IDBI. However, it did not produce the same. Claimant contended that since the Information Memorandum prepared by IDBI was submitted to the respondent for approval as part of Financing Documents under Article 4 of CA and on the basis of the same financial close took place with the approval of the respondent and that there was no evidence led by respondent that figures mentioned by CW-2 based on said Information Memorandum were incorrect. Claimant enclosed extracts of Business Plan as Annexure-H to the Rejoinder Compilation 21 submitted on 1/2/2011. The claimant computed loss of opportunity based on its business plan dated 10/1/2006 as under:

Particulars	2011	2012	2013	2014	2015
Cash Surplus During the year (Rs. In Crores)	10	21	54	55	12.10
Time Period in years	3.52	2.69	1.69	0.69	0.19
Annual Compounding Factor @18% (upto 7 June 2014)	1.79	1.56	1.32	1.12	1.03
Amount	7.91	11.76	17.38	6.61	0.38
Total	44.04				

177) The Arbitral Tribunal further relied upon Information Memorandum prepared by IDBI, which was not produced before it by MMOPL on the ground that the same was produced with MMRDA for approval as a part of financial documents under Article 4 of the CA. However, MMOPL enclosed extracts of business plan as Annexure-H with rejoinder compilation, which the Arbitral Tribunal took into consideration. After considering the so-called extract of 'business plan' (culled out in para 12.505 of award and which is reproduced above) the Arbitral Tribunal considered that the revenue of Financial Year 2011 was



projected as Rs. 110 crores, the operative cost was 17 crores and accordingly earnings before interest, depreciation, tax and amortization was Rs.93 Crores. After considering the projected interest of Rs.75 crores, the net earnings in the year 2011 was projected as Rs.18 crores. The Arbitral Tribunal applied 18% interest on the figure of Rs.18 crores and accordingly arrived at an amount of Rs.5.04 crores for Financial Year-2012, Rs.13.84 crores for Financial Year-2013, Rs.8.66 crores for Financial Year-2014 and Rs.0.49 crores for Financial Year-2015. Findings of the Arbitral Tribunal in paragraph 12.506 read thus:-

12.506. In the Information Memorandum based on which the lenders sanctioned loans, for FY 2011 revenue of Rs.110 Crores was projected. Operative cost was taken as Rs.17 Crores. Earnings before interest, depreciation, tax and amortization were at Rs.93 Crores (i.e., Rs.110 Crores minus Rs.17 Crores). Interest projected in the said year was Rs.75 Crores based on the value of loan which was sought and eventually granted. Based on these the net earnings for the year 2011 were projected as Rs.18 Crores (i.e., Rs.93 Crores minus Rs.75 Crores). On the said amount of Rs.18 Crores the claimant contended that it could have earned 18% interest p.a. computed annually for a period of 3.52 years i.e., from 1/8/2010 to 7/6/2012. Claimant made similar calculations for FY 2012, FY 2013, FY 2014 and FY 2015 (i.e., from 1/4/2014 to 7/6/2014) for which it claimed Rs.5.04 Crores, Rs.13.84 Crores, Rs.8.66 Crores and Rs.0.49 Crores, respectively.

178) However, the Arbitral Tribunal ultimately reduced the rate of interest from 18% to 10% and accordingly decided to award cumulative amount of Rs.23,47,77,780/- in favour of the MMOPL.

179) In my view, there is absolutely no basis for awarding the claim of interest on the alleged loss of profit. The claim is awarded merely on the basis of Information Memorandum prepared by IDBI and the so-called 'business plan' produced at Annexure-H to the rejoinder.



Admittedly, the IDBI's Information Memorandum was never produced before the Arbitral Tribunal. C.W.2, on his own, did not contribute anything in his oral testimony to support the claim. He testified that beyond checking mathematical corrections, he had no knowledge about the correctness of figures claimed by MMOPL. The Award of the claim is thus based on zero evidence as MMOPL failed to produce even a single document to prove that it could have earned profits during the alleged delay period of 3.5 years. As observed above, concrete and credible evidence needs to be produced in support of claim of loss of profitability. When the claim of loss of profit itself was unsustainable, the question of awarding any interest thereon was far too stretched. It is another matter that MMOPL itself failed to generate any profit from the project after COD for 5 years till Financial Years 2019-20.

180) Mr. Bhatt has attempted to suggest that non-reporting of actual net profits after COD till 2019-20 cannot be a ground for presuming that there could have been no cash profit in respect of the project after the COD. He has contended that the figure of net profit is arrived at after deducting interest liability, depreciation, amortization, etc. and therefore one cannot only consider the net profit figure for assuming that no cash profits were earned. In my view, this justification sought to be provided by MMOPL is not only speculative in nature, but also no figures are placed before the Arbitral Tribunal even in respect of alleged cash profits after COD.

181) Award of claim of Rs.23.47 crores merely by taking into consideration figures in the so-called business plan is against



fundamental policy of Indian Law and contravenes public policy doctrine. The claim was based on so called statement prepared by C.W.2, who himself admitted that beyond checking mathematical accuracy, he himself had no knowledge about underlying figures indicated in the said statement. The claim was clearly speculative in nature and could not have been awarded in absence of any concrete evidence.

182) It has been rightly held in dissenting Award that MMOPL did not produce its books of accounts or so-called Information Memorandum of IDBI bank. The dissenting Award records as under:-

It is worth noticing that while the Claimant has made this item of claim for "opportunity cost on loss of cash profit", CW.2 repeatedly speaks of "interest on opportunity cost...". This contradiction is by itself sufficient to reject this item of claim since the only evidence, oral and documentary" in support of this item of claim is that of CW.2 alone.

Significantly the Claimant has not produced its Books of Accounts nor did it produce the 'Information Memorandum prepared by IDBI Bank' referred to in CW.2's answer to Q.No.133 (quoted above). Indeed, the witness admits in so many words that all that he did was to 'check as to whether the arithmetical additions and subtractions contained therein are correct'.

It is further clear that the Claimant has based its estimates of the amount claimed herein on the basis of the business plan (part of its bid submitted in 2005-06) which can hardly be an acceptable basis for computing loss. It has also claimed Annual compounding factor at the rate of 18% per annum upto 7.6.2014.

When CW.2 has not produced the Information Management prepared by RBI (referred to in his answer to Q.33 (xviii), the argument of the Claimant that the said Memorandum submitted to the Claimant and which formed the basis of financial close is sufficient to shift to burden to the Respondent to disprove the contents of the said Memorandum, is wholly unacceptable.

For the above reasons, this item of claim is rejected.



183) The dissenting Award has taken into consideration the contradictions in the head of the claim which was ‘opportunity cost on loss of cash profit’ whereas C.W.2 repeatedly referred to the same as ‘interest on opportunity cost’. The majority Award itself grants 10% interest on alleged possibility of making net earnings of Rs.18 crores per year. This claim is awarded as if the same is an interest over the opportunity cost. Be that as it may. The dissenting award rightly holds that mere business plan submitted as part of bid documents cannot be an acceptable basis for computing loss.

184) In my view, the award of claim of Rs.23,47,77,780/-under the heading ‘opportunity cost on loss of cash profit’ is clearly unsustainable and is liable to be set aside as being patently illegal.

WHETHER TRIBUNAL COULD HAVE AWARDED CLAIMS BASED ON GUESSWORK?

185) It is contended on behalf of Respondent-MMOPL that even if it is held that there is no direct evidence to support the claims for (i) overhead expenses, (ii) additional interest and (iii) opportunity cost on loss of profits, the Arbitral Tribunal was entitled to award the claims by undertaking the exercise of guesswork and by applying rough and ready formula. It is contended that Courts have repeatedly upheld the arbitrators’ power to award damages/compensation on the basis of guesswork or on guesstimate and that it is not necessary in every case to prove the actual figure of loss suffered.



186) Mr. Bhatt has strenuously relied on judgment of the Apex Court in *A.T. Brij Paul Singh* (supra) in support of his contention that the Tribunal was entitled to make 'guesstimate' of damages considering that the case involves delay by MMRDA. In my view, the judgment in *A.T. Brij Paul Singh* is clearly distinguishable and would have no application to the facts of the present case. In the case before the Apex Court, the contract was terminated and the claim was for expected profit out of the remaining work. It is in the light of this position that the Apex Court held that when the Respondent therein was guilty of breach of contract and where rescission of the contract by the Respondent was held to be unjustified, since Plaintiff-contractor had executed part of the work, he would be entitled to damages by way of loss of profits which was computed as 15% of balance value of work. The present case does not involve termination of contract nor does it involve a claim towards reasonable expectation of profit for uncompleted work. Therefore, the judgment in *A.T. Brij Paul Singh* would have no application to the facts of the present case.

187) Mr. Bhatt has also relied on the judgment of the Apex Court in *Mohd. Salamatullah* (supra) in which the Government had placed orders with the plaintiff therein for manufacture of certain number of guns and on account of breaches of the contract committed by the State, the same could not be performed. The plaintiff contractor claimed compensation at the rate of 15% of total amount invested in gun making and the same was upheld by the Apex Court. Thus, in *Mohd. Salamatullah* the claim involved claim for 'loss of profit' of remaining part of unperformed work and the judgment would have no application



to the facts of the present case, which involves the claims for 'loss of profitability' due to delay in execution of contract.

188) Award of sums of Rs.100 crores towards additional overheads, Rs. 125 crores towards additional interest and Rs. 23.47 crores towards opportunity cost is sought to be justified by Mr. Bhatt by contending that the Tribunal has merely performed a 'guesswork'. In my view, though the Tribunal is entitled to undertake the exercise of guesswork in a given case, the same can be done only when it is not possible to arrive at the exact figure of damages by the claimant. In a case where production of evidence is possible, but the claimant fails to produce the same, the Tribunal cannot take the alternative route of guesswork and award the claim for damages merely on surmises. To paraphrase, guesswork cannot be a short cut for production of evidence. Guesswork can be undertaken only when it is impossible to compute the exact quantum of losses suffered by the injured party. If evidence of sufferance of loss itself is not available, the Arbitral Tribunal cannot award damages of lesser sum than the one by presuming holding that some loss must have been suffered. When award of damages itself is not warranted due to absence of evidence, awarded claim cannot be sustained before Section 34 Court because the Tribunal awards far lesser sum or conservative sum than the one demanded.

189) In Satluj Jal Vidyut Nigam (supra) a Single Judge of Delhi High Court has deprecated award of claims merely on mathematical derivation without any proper foundation in pleadings and without any cogent evidence. The Court has held in para-57 as under :-



57. Entertaining financial claims based on novel mathematical derivations, without proper foundation in the pleadings and/or without any cogent evidence in support thereof can cause great prejudice to the opposite party. Especially in the context of construction contracts where amounts involved are usually astronomical, any laxity in evidentiary standards and absence of adequate diligence on the part of an arbitral tribunal in closely scrutinizing financial claims advanced on the basis of mathematical derivations or adoption of novel formula, would cast serious aspersions on the arbitral process. The present case is an example where substantial liability has sought to be fastened on one of the contracting parties based on specious paper calculations. It cannot be overemphasized that arbitral tribunals must exercise due care and caution while dealing with such claims.

(emphasis added)

190) Reliance by Mr. Bhatt on judgments of this Court in **Swastik Constructions** (supra), **New India Assurance Co. Ltd.** (supra) is inapposite since award of damages by the arbitrators in those cases is upheld by this Court in the light of peculiar facts of those cases. In **Hindustan Petroleum Corporation Vs. Aegis Logistics Pvt. Ltd** (supra) award of damages is held to be well supported by evidence on record.

191) In the present case, Arbitral Tribunal has not clarified that it is awarding damages by adopting the principle of guesswork. The theory of guesswork is pressed into service by Respondent to some how save the claims from being set aside. In any case the principle of guesswork cannot be applied in the present case as the Respondent has failed to produce evidence, which it could have produced if it has really suffered any losses.



CONTENTION THAT APPLICATION OF ERRONEOUS YARDSTICK IN DETERMINING DAMAGES IS NOT A GROUND TO SET ASIDE AWARD

192) On behalf of Respondent-MMOPL, an overarching submission is made to save award of claims for (i) overhead expenses, (ii) additional interest and (iii) opportunity cost on loss of profits that even if this Court comes to a conclusion that the yardstick applied by the Arbitral Tribunal for award of any of the claims is erroneous, that alone cannot be a ground for setting aside the award.

193) Mr. Bhatt has relied upon this Court's judgment in **Lotus Logistics and Developers Private Limited** (supra) in support of the contention that mere application of erroneous yardstick for arriving at figure of damages/compensation cannot always be a ground for invalidating the Award and that Section 34 Court could not interfere in the Award so long as it is satisfied that the ultimate amount awarded by the Tribunal is unduly excessive. In my view, the judgment has no application to the facts of the present case. In case before this Court in **Lotus Logistics and Developers Private Limited** one of the issues was about computation of amount of compensation /damages by taking into consideration value of flats and the building rather than considering the cost of demolition and reconstruction of the buildings. This court was satisfied that damages /compensation was required to be awarded and that the amount awarded is also found to be correct. The Arbitral Tribunal in that case had evidence in the form of total cost of flats and building and also the cost of demolition and reconstruction of the building. The Tribunal has chosen the former though the correct yardstick was the latter. Since the awarded sum is found to be justified



even by applying the latter yardstick, this Court upheld the award. In the light of the peculiar facts and circumstances of that case, this Court held that mere application of erroneous yardstick for quantifying the damages cannot be a ground for invalidating the Award in exercise of powers under Section 34 of the Arbitration Act. The judgment therefore has no application to the facts of the present case where this Court is satisfied that no damages/compensation deserve to be granted in favour of the MMOPL in respect of three heads of (i) additional overheads (ii) additional interest and (iii) opportunity cost on loss of profits.

CLAIM 3- CHANGE OF SCOPE

194) In Claim No. 3, MMOPL claimed an amount of Rs.87,03,96,777/- towards additional cost incurred in construction of overhead bridge above western railways track at Andheri station. MMOPL contended that Andheri bridge was originally planned by it to be constructed as Pre-Stressed Concrete Balanced Cantilever Bridge (**PSC Bridge**), but it was compelled to construct it as Truss Type Steel Girder Bridge (**Steel Bridge**). According to MMOPL, the change amounted to 'change of scope of work' as per the CA and that MMRDA was liable to pay to MMOPL cost and additional expenses allegedly incurred by it due to purported change of scope of work. The Arbitral Tribunal has awarded the claim in the sum of Rs.30,48,00,000/- against Claim No. 3 together with interest @10% per annum upto the date of Statement of Claim.



195) Under Chapter-VII of the technical proposal of MMRDA, the Andheri bridge was to comprise of PSC Bridge of single span of 60 meters and the said technical proposal became part of the CA. However, ultimately MMOPL was required to construct the Steel Bridge as per the requirement of Western Railways. Additionally, MMOPL also relied on clause-5 of the Agreement of March 2009 executed between Western Railway, MMOPL and MMRDA under which it was entitled to O & M and life cycle cost.

196) The claim was opposed by MMRDA by contending that change of methodology for construction of the bridge did not necessarily amount to 'change of scope' of work within the meaning of CA and that therefore, MMOPL was not entitled to be granted any amount towards alleged additional expenditure incurred towards construction of the steel bridge. Article 16 of the CA dealt with 'change of scope' of work and the same stipulated thus:-

16. Change of Scope

16.1. Change of Scope

MMRDA may, notwithstanding anything to the contrary contained in this Agreement, require provision of such additional works and services on or about the MRTS Project which are beyond the scope of the Project as contemplated by this Agreement ("Change of Scope"). All such changes shall be made by MMRDA by an order (the "Change of Scope Order") issued in accordance with the procedure set forth in this Article 16 and giving consideration to O&M and lifecycle costs. The cost thereof shall be expended by the Concessionaire and reimbursed to it by MMRDA in accordance with this Article 16.

16.2. Procedure for Change of Scope

(a) MMRDA shall whenever it desires provision of additional works and services referred to in Article 16.1, issue to the Concessionaire a notice of change of scope (the "Change of Scope Notice) specifying in reasonable detail the works and services contemplated thereunder.



(b) Upon receipt of such Change of Scope Notice, the Concessionaire shall provide to MMRDA and the Independent Engineer such information as is necessary and reasonable together with preliminary documentation in support of the following:

- (i) the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the work is required to be carried out before COD, and;
- (ii) the cost to the Concessionaire of complying with such Change of Scope Notice
- (iii) the options suggested for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time for the implementation thereof including a detailed breakdown by work classifications. Provided, however, that the costs of providing such information shall be reimbursed to the Concessionaire by MMRDA to the extent such costs are certified to be reasonable by the Independent Engineer.

If MMRDA desires, after receipt of information set forth in Article 16.2. to proceed with the Change of Scope, it shall convey the desired option to the Concessionaire by issuing a Change of Scope Order and thereupon the Parties shall, with assistance of the Independent Engineer, thereupon make good faith efforts to mutually agree upon the costs and time for implementing of the same. Upon reaching an agreement relating to such costs and time. MMRDA shall issue a written confirmation of the change of scope order and thereupon the Concessionaire shall proceed with performance of such orders. In the event the Parties are unable to agree. Mmrda may by issuing a confirmation in writing of such Change of Scope Order, require the Concessionaire to proceed with the performance of the change in Scope Order pending resolution of such dispute

16.3 OMITTED

16.4 Payment for Change of Scope

The Concessionaire shall after commencement of work, present to MMRDA bills for payment in respect of the works in progress or completed works, as the case may be, supported by such documentation as is reasonably sufficient for MMRDA to determine the accuracy thereof, including invoices from Contractors and subcontractors and certification of such claims by the Statutory Auditors. Within 30 (thirty) Days of receipt of such bills, MMRDA shall disburse to the Concessionaire such amounts as are certified by the Independent Engineer as reasonable, and in the event of any Dispute, the same shall be settled in accordance with the Dispute Resolution Procedure. For the removal of doubt, it is hereby clarified that any



undisputed amount shall be payable without resorting to Dispute Resolution Procedure.

16.5 Restriction on Change of Scope

Notwithstanding anything to the contrary contained in this Article 16, the Concessionaire shall be entitled to nullify any Change of Scope Order if it causes cumulative costs relating to all the Change of Scope Orders to exceed 5% (five per cent) of the Total Project Cost, provided however that the provisions of this Article 16.5 shall not be applicable in case inclusion of the Airport Link is provided as a part of the MRTS project resulting in a Change of Scope Order.

197) According to MMRDA, only additional works and services in respect of the project, which were beyond the scope of the project as contemplated by the CA qualified as 'change of scope' and that there was a detailed procedure agreed between the parties for changing the scope of work. The Arbitral Tribunal has considered Article 16 of the CA and has recorded a finding that construction of Steel Bridge instead of PSC Bridge amounted to change in scope as contemplated under Article 16. The Tribunal dealt with Petitioner's objection at great length. It took into consideration oral as well as documentary evidence on record. The Tribunal took note of letter dated 12 May 2011 by MMOPL addressed to MMRDA, in which MMOPL had specifically brought to the notice of MMRDA that change in construction of bridge would entitle MMOPL to reimbursement of cost. The Tribunal also took note of the fact that MMRDA had not refuted the claimed cost at that time. The Tribunal also took note of the fact that MMOPL addressed letter dated 14 June 2013 claiming additional cost on account of change in scope and the IE by letter dated 3 August 2013 proceeded to consider the MMOPL's entitlement by accepting that same amounted to change in scope. After considering the entire material on record, the Tribunal has concluded in paragraphs 11.30 to 11.33 of the majority Award as under:-



11.30. The respondent contended that “Change of Scope” under Article 16 applied only when respondent required provision of additional works or services beyond the scope of work of the claimant under the CA; that under Article 16 respondent was required to compensate or reimburse the claimant for every change in design or construction methodology. The provision of additional works and services which are beyond the scope of the Project, as mentioned in Article 16.1, was wide enough to include any additional works or services resulting from change in design or methodology from what was originally envisaged under the CA, particularly when the same entailed additional costs. Hence, change in design in the instant case amounts to change of scope as contemplated under Article 16.1.

11.31. Article 16.1 of CA required respondent to issue notice of change. Even though respondent did not issue such notice, it kept quiet when claimant informed that it was made to construct steel bridge in place of PSC bridge and that the same would have cost implication. The respondent did not stop claimant from proceeding as per changed scope, It did not point out that any other alternative was possible. Once the claimant has proved that change in scope as contemplated under Article 16 indeed took place and the claimant undertook the work based on instructions of the respondent, the respondent cannot deny the compensation contemplated under Article 16 of the CA by citing its own failure or the failure of IE to arrive at the additional cost. There was substantial compliance with Article 16 of CA in that the change of scope did occur and the claimant completed the work accordingly. The other requirement of Article 16 for determination of additional cost with the assistance of IE, is not mandatory. In fact Article 16 itself contemplated that failing mutual agreement among the Parties as regards the additional cost, the respondent could require claimant to proceed with the work as per changed scope pending resolution of dispute in relation to the cost. More so in the instant case upon respondent’s failure to get the requisite ROW for originally envisaged PSC Bridge, there was no other option left to the claimant but to proceed with changed scope and only the determination of additional cost was left to a later date.

11.32. The respondent relied on *Dishambar Nath Agarwal v. Kishanchand and Ors.* AIR 1990 Allahabad 65, paragraph-22 and 23, wherein referring to terms of compromise between parties as to mode of payment, it was observed that if any agreement states that a particular act relating to the furtherance of the contract was to be done in a particular manner, then it should be done in that manner and it is not open to the concerned party to chalk out his own manner of performance. In such case as per the compromise the payment was required to be made by the plaintiffs through crossed A/c Payee Draft



in favour of defendant at Gwalior. It was admitted that plaintiffs had not got any draft prepared in favour of defendant in terms agreed in the compromise. In the circumstances the court held that any amount of readiness in any other manner on the part of plaintiffs by arranging for money, giving notice to defendant, sending telegram and remaining present at Sub-Registrar's office will not amount to due performance of the contract. The respondent also relied on Niloufer Siddiqui & Ors. V. Indian Oil Corporation Ltd., & Ors. 2007 SCC OnLine Pat 27 and G+H Schallschutz GmbH v. Bharat Heavy Electricals Ltd., 267 (2020) DLT 201 wherein the aforesaid decision in Dishambar Nath Agarwal has been followed. The facts of the said cases are clearly distinguishable and inapplicable to the present facts where respondent did not object to the claimant completing the work as per changed scope without respondent insisting for adherence with procedure contemplated under Article 16 of the CA. These decisions cited by respondent have no application to the instant case where the procedure contemplated is held to be not mandatory under the given circumstances..

11.33 In the circumstances, this Tribunal thus finds that the change from PSC Bridge to Steel Bridge amounted to change in scope as contemplated under Article 16 of the CA and it was on account of respondent's inability to get the requisite ROW from WR.

198) The Tribunal has thus constructed Article 16 of CA to mean that construction of Andheri bridge from originally planned PSC Bridge to Steel Bridge amounted to 'change of scope'. It is well settled principle that construction of contractual terms is in the exclusive domain of the Arbitral Tribunal. It is sought to be urged before me that interpretation of Article 16 by the Arbitral Tribunal is faulty. Even if it is momentarily accepted that any error is committed by the Arbitral Tribunal in interpreting Article 16, the said error is within the jurisdiction of the Arbitral Tribunal not warranting any interference in the Award by Section 34 Court.

199) Even otherwise, a plausible view is adopted by the Arbitral Tribunal in holding that change of originally planned PSC Bridge at Andheri station to Steel Bridge would be change in scope within the



meaning of Article 16 of the CA. The Respondent-MMOPL has proved by leading evidence that it has incurred additional cost and if the Arbitral Tribunal has arrived at a finding that MMOPL is required to be reimbursed in respect of additional cost incurred for construction of steel bridge at Andheri, it cannot be contended that the approach of the Arbitral Tribunal is so irrational that no fair minded person would ever adopt the same. I am unable to accept Mr. Sen's contention that the Tribunal has re-written the contract between the parties by holding that the construction of Steel Bridge at Andheri amounted to change of scope under Article 16 of the CA.

200) The dissenting Award has merely concentrated on following of procedure under Clauses 1 and 2 of Article 16 by holding that the said procedure was mandatory and that awarding the claim in absence of following of the procedure would amount to rewriting of Article 16 by nullifying the same. I am unable to agree with the said finding in the dissenting Award. It is a matter of fact that MMRDA's own IE has accepted position that construction of Steel Bridge amounted to change in scope. Therefore, mere non following of the procedure specified in Clauses-1 and 2 of the Article 16 cannot be a reason for holding that award of the claim would result in rewriting of Article 16. The Arbitral Tribunal in the majority award has taken note of the correspondence in which MMRDA had never taken a position that the prescribed procedure was not followed and has correctly concluded that MMRDA was estopped from raising the issue of non-following of procedure particularly after it allowed MMOPL to proceed with the work without strict adherence to Article 16 of the CA. This findings recorded by the



Arbitral Tribunal in majority award are plausible. They are neither perverse nor irrational for Section 34 Court to interfere in the same.

201) It is contended by the MMRDA that claim for additional cost for construction of Andheri bridge was barred by limitation. This objection, I must observe, is stated only to be rejected. MMOPL was not supposed to invoke arbitration or raise the claim towards incurring of additional expenditure for construction of Andheri bridge during currency of contract during pendency of and execution of work. The claim was under active consideration of MMRDA. Its IE certified the same in 2013. The Arbitral Tribunal has recorded following findings while repelling the objection of limitation in paragraph 11.38:

11.38. After the change in scope, the claimant by letter dated 17/11/2008 had intimated the respondent that the changes required by Railways shall be treated as change of scope and the cost and time impact of same shall be submitted in due course. The respondent did not refute the said understanding/assertion of the claimant. In terms of Article 16 of the CA the additional cost resulting from change of scope was required to be computed. The agreement between the Parties did not fix any period for payment of the additional cost. As per Article 18 of the Schedule to the Limitation Act, for the price of work done by plaintiff for the defendant at his request, where no time has been fixed for payment, the period of limitation is three years when the work is completed. The claimant has produced Completion Certificate issued by it to its Sub-Contractor engaged for construction of Deck Slab of Andheri Bridge on 20/3/2013 (Anx.M). Subsequent to the completion the claimant addressed a letter to the respondent on 14/6/2013 putting forth claim of Rs.109.87 Crores as additional cost on account of change of scope (Anx.N). IE by letter dated 3/8/2013 proceeded on the basis that there was a change in scope and called upon the claimant to further information (Anx.H-9). This was followed by correspondence between the Parties / IE pertaining to submission of information/documents relating to additional cost. The respondent itself by letter dated 28/11/2013 referred the claim for additional cost on account of change of scope to IE. The respondent by letter dated 16/1/2014 to the claimant required the claimant to submit certain documents to IE to facilitate the IE to examine the claim. However, in



meeting between the Parties and IE, on 3/2/2014, the respondent contended that change of scope from Cement to Steel was due to Railways and therefore respondent did not have an obligation to compensate claimant. By letter dated 24/2/2014 the respondent requested the claimant to clarify under what provision of CA the claimant was entitled to additional cost. These communications show that the respondent was still considering the claimant's claim. Invocation of arbitration by the claimant by notice dated 9/5/2015 was well within three years of completion of the Steel Bridge i.e., March 2013.

202) The findings recorded by the Arbitral Tribunal while rejecting objection of limitation are neither perverse nor irrational. The view taken by the Arbitral Tribunal is again plausible. The Arbitral Tribunal has considered the entire correspondence on record, from which it is established that the MMRDA's own IE had called for further information from MMOPL by treating construction of Steel Bridge as change in scope by letter dated 3 August 2013. The Tribunal also took note of letter dated 24 February 2014, in which MMRDA has requested MMOPL to clarify the exact provision of CA, under which additional cost was claimed. In my view, the findings of the Arbitral Tribunal on issue of limitation do not warrant interference by this Court.

203) Lastly, the Claim No.3 for additional cost for construction of Andheri steel bridge is objected by MMRDA by contending that no evidence was led by MMOPL in support of incurring of additional expenditure. However, perusal of the majority Award indicates that the Arbitral Tribunal has conducted detailed factual enquiry into the estimated cost of PSC Bridge and actual cost in construction of Steel Bridge. It has held that estimated cost of construction of PSC Bridge was Rs.19,97,88,706/- whereas actual cost incurred by MMOPL for



construction of steel bridge is Rs.46,16,94,636/-. MMOPL also produced invoice of M/s. Amit Constructions, who was one of the vendors whose services were utilized for construction of Andheri Bridge. It therefore cannot be contented that there was absolutely no evidence in support of actual cost incurred in construction of Steel Bridge at Andheri. Therefore this objection of MMRDA deserves rejection.

204) Consequently award of Claim No. 3 in the sum of Rs. 30.48 crores deserves to be upheld by rejecting the objection raised by MMRDA.

CLAIM NOS.1 AND 2 RELATING TO WADALA CASTING YARD

205) Claim Nos. 1 and 2 are essentially interrelated because MMRDA had withheld amount of Rs.35,78,79,565/- towards Viability Gap Funding on account of non-payment of rent for Wadala land by MMOPL.

206) As observed above, the MMRDA had contractually agreed to provide VGF totally amounting to Rs. 650 crores under the CA. However, amount of Rs.35,78,79,565/- towards VGF was withheld by the MMRDA complaining that MMOPL failed to pay rent in respect of land at Wadala used for casting yard during construction period. Under Claim No.1, MMOPL demanded the said withheld amount of Rs.35,78,79,565/- and interest of Rs.19,76,32,819/- (total of Rs. 55,55,12,384/-). Additional interest on delayed disbursement of VGF Rs.6,71,588/- was also claimed and this is how Claim No.1 was sought in the sum of Rs.62,26,63,972/-.



207) Thus, Claim No.1 hinged squarely on MMOPL's entitlement the rent in respect of Wadala land. Claim No.2 raised by MMOPL was in the sum of Rs.143.94 crores, breakup of which was as under:-

Sl. No.	Particulars	Revised Claim amount (In Cr)	Reference
A	Rent on Wadala Casting Yard paid/payable to MMRDA		
1.	Total demand made by MMRDA	79.01	As per Statement of Defence filed by Respondent/MMRDA - Annexure RB18 @ Pgs.1298-303 CC Vol 3
2.	Cost of funds of MMOPL calculated on Rent paid to MMRA (on Rs.44.99 Crores)	39.84	Enclosure 1 and 2
3.	Less: Rent for casting yard land that was supposed to be paid as per the Concession Agreement	(0.03)	Enclosure 1
	Total claim towards rent	118.82	
B.	Logistics Cost		
1.	Additional Logistics cost incurred (estimated) due to change in casting yard	9.83	Enclosure 4
2.	Cost of funds of MMOPL applicable on additional logistics cost	9.83	Enclosure 4
	Total Claim towards logistics cost	25.12	
	Total Claim (A+B)	143.94	

208) Since Claim No.1 has correlation with Claim No.2, it would be necessary to examine the background in which the dispute relating to rent payable in respect of Wadala land arose between the parties.



209) Under the CA, the Petitioner-MMRDA had permitted land admeasuring 13 hectares at D.N. Nagar, Versova, which was to be allotted for setting up a Car Depot, to be utilized as Casting Yard during execution of the Project. In the Casting Yard, the girders used for construction of overhead metro line were to be casted. Use of the land at D.N. Nagar for casting yard was to be at a nominal rent of Rs.1/- per sq.mtrs per year. However, it appears that there was delay in acquisition of land at D.N. Nagar and there were several other factors which delayed handing over of land to the Respondent for being used as casting yard. Therefore, Respondent-MMOPL was required to scout for alternate land. It identified the land belonging to MMRDA at Wadala which was handed over to MMOPL for setting up the casting yard. The land at Wadala admeasuring 60,000 square meters was allotted as per allotment letter dated 25 April 2007 at the rent of Rs.4.85 per sq.mtrs per day upto December 2007 and thereafter at Rs.5.35 per sq.mtrs per day from January 2008 to December 2008. MMOPL objected to the terms of allotment stating that the rent was very high and demanded nominal lease charges of Rs.1/- per sq.mtr per annum. To resolve the issue, joint meeting of MMRDA and MMOPL was held before the Hon'ble Chief Minister on 10 December 2007, when the Hon'ble Chief Minister directed that the land be allotted at the rate of average of concessional rate and commercial rate. The MMOPL accordingly took possession of 60,000 sq.mtrs of land at Wadala in January 2008 and commenced its activities. By the letter dated 14 January 2008, MMRDA demanded rent @ Rs.3.63 per sq.mtr per day for 2008 and Rs.4/- per sq.ft per day for 2009. Again, there were disputes between the parties about rent. It appears that possession of part of the land at D.N. Nagar admeasuring



9.06 hectares was handed over to MMOPL in August 2008 and according to MMOPL, condition of land at D.N. Nagar was not fit for immediate use. Further allotments in parts were made increasing the total area at 9.8 hectares on 5 May 2010, 30 November 2010 and 15 September 2010. By notice dated 14 June 2010, MMRDA directed MMOPL to vacate the land at Wadala on the ground that the same was to be handed over to Lodha Developers. After several rounds of correspondence, MMRDA demanded commercial rent from 1 March 2011. MMOPL pointed out that it had already paid rent upto 31 March 2012 and requested MMRDA to permit use of Wadala land till March 2012. Thereafter, MMRDA took possession of parts of the land at Wadala in various phases in 2012 and in the meeting held on 7 May 2012, it was recorded that the land admeasuring 1044.63 sq.mtrs was already handed over and additional land of 2500 sq.mtrs was ready to be handed over at Wadala. It appears that MMOPL finally vacated and handed over Wadala land on 23 August 2012. According to MMOPL, it paid rent of Rs.44,98,94,270/- for use of Wadala land from 18 January 2008 to 23 August 2012 whereas, the demand by MMRDA was of Rs.79,64,42,238/-.

210) In the above background, MMRDA demanded reimbursement of additional costs of Rs.99.22 crores by letter dated 28 September 2012. MMRDA's IE rejected the demand. In the Statement Of Claim, Respondent demanded Rs.143.94 crores towards reimbursement of rent and other expenses incurred in respect of use of Wadala land for casting yard. MMRDA denied liability to pay Rs.1,43,94,00,000/- and contended in the Statement Of Defence as under :-



4.1. In the 113th meeting of the Executive Committee of MMRDA held on 19.04.2005, the commercial rent rate for grant of lands for projects implemented by MMRDA through contractors was fixed at Rs.1.24 per day per sq. mtr. with revision by 10% every year from thereon.

4.2. The land at D.N. Nagar (which was to be used for the purpose of a car depot) was embroiled in litigation in the year 2007, which was beyond the control of MMRDA.

4.3. MMOPL vide its letter dated 16.02.2007 (i.e., even before the execution of the CA) identified the plot of land admeasuring about 60,000 sq. mtr. at Wadala for setting up of casting yard and requested MMRDA to permit them to use the same.

4.4. The land at Wadala was granted to the MMOPL vide Allotment Letter dated 25.04.2007 and the license to use the same was extended by 3 License Agreements.

4.5. The Respondent has charged/recovered rent for Wadala land in accordance with the meeting with the then Chief Minister of Maharashtra held on 10.12.2007 whereunder, in order to resolve the land and Right of Way (ROW) issues, the CM ordered MMRDA to make available possession of 6 hectares of land at Wadala to MMOPL for setting up of casting yard and the rent for the same land shall be paid at an average of the commercial and concessional rate:

4.6. Pursuant to the said Meeting, the parties executed License Agreements in respect of land at Wadala for development, construction and maintenance of casting yard, the factum of which was suppressed by MMOPL in the SoC.

License Agreement	Lease Period and Rent Stipulated	Annexures
1 License Agreement executed in March 2010	From 18.12.2008 to 30.09.2009 at Rs.3.60 per day per sq mtr upto 31.12.2008 and at Rs.4 per day per sq mtr upto 30.09.2009.	Annexure RB-14 @ Pgs.224-227 of CC Vol 1
2nd License Agreement executed in March 2010	From 01.10.2009 to 31.03.2010 at Rs.4 per day per sq mtr upto 31.12.2009 and at Rs.4.40 per day per sq mtr upto 31.03.2010	Annexure RB-15 @ Pgs.228-231 of CC Vol 1



3rd License Agreement executed in May 2010	From 01.04.2010 to 30.09.2010 at Rs.4.40 per day per sq mtr upto 30.09.2010.	Annexure RB-17 @ Pgs.232-235 of CC Vol 1

4.7. The aforesaid License Agreements were willingly and unconditionally entered into by MMOPL who agreed to the rates at which the rent was charged for Wadala land. Therefore, MMOPL is now estopped from making any claims for lower rent for the same.

4.8. MMOPL never contemporaneously demanded that the rent ought to be reduced to Rs.1 per month per annum as has been contended by them for the first time only in the SoC. On the contrary, MMOPL unconditionally paid the rent on Wadala land from time to time.

4.9. The proceedings qua D.N. Nagar land came to an end in July 2008. In the meanwhile, MMOPL vide its letter dated 21.11.2007 agreed to the revision of D.N. Nagar land to an area of about 9.33 hectares and accepted the reduced area without demur or protest.

4.10. The 3 License Agreement expired on 30.09.2010. MMRDA vide letters dated 02.02.2011 and 17.02.2011 called upon MMOPL to hand over the Wadala land to Lodha Builders. MMRDA vide letter dated 11.10.2011 informed MMOPL that it will be charged rent at commercial rates with effect from March 2011. It is to be noted that the commercial rent on Wadala land was only charged from October 2011. MMRDA took possession of the Wadala land on 05.10.2012.

4.11. MMRDA was under no obligation under the CA to provide additional or any land for the purposes of a casting yard.

4.12. Assuming whilst denying that there was any agreement to provide lands at concessional rates, the same was superseded by the subsequent conduct/License Agreements and there was a novation.

4.13. Assuming whilst denying that MMRDA was obliged to provide Wadala land under the CA, the same was not required to be provided at Rs.1 per sq. mtr. The obligation of MMRDA, if any, to provide land at nominal rent of Rs.1 per sq. mtr. was limited only to D. N. Nagar land.

4.14. Owing to MMOPL's failure to pay rent from 01.10.2010 till 23.08.2012 and failed to vacate Wadala land, MMOPL was bound to pay



rent at prevailing market rates w.e.f. 01.10.2010 onwards. Since MMOPL had occupied the Wadala land till October 2012, there was considerable delay caused to MMRDA in handing over the required land to Lodha Builders resulting in substantial losses to MMRDA.

211) Since there was an overlap in respect of Claim Nos.1 and 2, the Arbitral Tribunal in majority Award, has awarded sum of Rs.35 crores in respect of Claim No.1 towards deductions made by MMRDA in VGF tranches and also awarded interest of Rs.6,14,72,498/-. For Claim No.2, the Arbitral Tribunal has awarded sum of Rs.13,16,00,000/- towards compensation for additional costs incurred by MMOPL towards rent for Wadala land.

212) Mr. Sen has submitted that the Tribunal has rendered contradictory findings in respect of the various issues under Claim No.2. He particularly highlights the following findings rendered by the Arbitral Tribunal in para-10.116 to 10.118 of the Award:

10.116 It is seen that even though initially claimant had sought for allotment of Wadala land at concessional rate of Re.1/- per Sq.mtr. per annum, the various letters issued by the claimant particularly reply letters dated 15/1/2008 and 13/12/2008 shows that the claimant itself accepted the liability to pay rent for Wadala land in accordance with direction/decision of Chief Minister and paid the rent accordingly without any demur and even signed various License Agreements acknowledging the liability to pay the rent at rate stipulated therein. Though the claimant had initially sought for waiver of security deposit, the same was declined by the respondent and claimant even paid the security deposit amount. The claimant thus accepted the, decision as per meeting held with Chief Minister on 10/12/2007 and the terms of various License Agreements executed between the Parties as regard liability to pay the rent and security deposit for the Wadala Land.

10.117 As rightly pointed out by the respondent under Section 19 of the Contract Act a contract can be avoided on the ground that it was without free consent. For the said purpose a Party seeking to avoid the



contract is required to establish that its consent to the agreement in question was caused by coercion, fraud or misrepresentation. The claimant has not pleaded or alleged or proved that the agreements in relation to Wadala lands had been entered into on account of any fraud, coercion or misrepresentation.

10.118 Having regard to the above discussions, it is held that the decision as per the meeting with Chief Minister dated 10/12/2007 and the terms as to rate of rent and security deposit stipulated in the License Agreements between the Parties as regard Wadala Land, are binding on the claimant.

213) Mr. Sen has accordingly submitted that the Tribunal has held that rates stipulated in the license agreement executed between the parties in respect of Wadala land were binding on MMOPL. However, according to Mr. Sen, the Arbitral Tribunal has recorded a diametrically opposite finding while upholding the claim of the Respondent-MMOPL for reimbursement of half of the rent paid by it from 1 April 2010 onwards in para-10.150 as under:

10.150 The claimant is held entitled to reimbursement of half of the rent paid by it for the period 1/4/2010 onwards (as per Sl.Nos.6 to 13 of Anx.B3) amounting to Rs.1,316.00 lakhs (i.e., 2,632 lakhs / 2) by way of compensation towards additional cost incurred towards rent on account of respondent's failure to provide land at D.N. Nagar fully and in time for claimant to set up one of the Casting Yards.

214) According to MMRDA, though it was agreed in the CA to provide land at D.N. Nagar for casting yard at the rent of Rs.1/- per sq.mtr p.a., the said agreement stood novated/varied in the decisions taken in the meeting with the Hon'ble Chief Minister as incorporated in the License Agreement. It has also contended that MMOPL did not contemporaneously protest against MMRDA's letter's dated 11 October



2011 about charging of rate at commercial rates in respect of Wadala land from March 2011 nor cross-examined R.W.1 on that aspect.

215) The Arbitral Tribunal has rejected the theory of novation/variation of contract by recording following findings in paragraph 10.120 of the Award:

10.120 Merely because the claimant agreed to pay/fent for the Wadala land in accordance with the decision in the meeting with the Chief Minister and various License Agreements executed by the Parties, the obligation of the respondent under the CA to provide to the claimant the land at D.N. Nagar for the purpose of inter-alia setting up Casting Yard at concessional rate of Re.1/- per Sq.mtr. per annum, could not be superseded and no novation of contract between the Parties in said regard took place.

216) The Tribunal thereafter considered whether MMRDA was justified in charging market rent for Wadala land after expiry of license period on 30 September 2010 and it concluded in paragraphs 10.124 to 10.126 as under :-

10.124 It is not in dispute that there was no written License Agreement for the period beyond 30/9/2010 and that subsequently the claimant handed over the possession of Wadala land to the respondent, though there is dispute as to dates on which the possession was handed over.

10.125 In the aforesaid background it needs to be decided whether the respondent could have charged rent at commercial rate for the Wadala land with effect from 11/10/2011 to 4/10/2012. Both Parties having agreed that rent payable for Wadala land would be in accordance with the decision as per meeting with Chief Minister and in terms of the License Agreements executed between the Parties, if the license period expired and the claimant continued to be in possession, in absence of consensus ad idem between the Parties the respondent could not have unilaterally determined or fixed rent at a higher / commercial rate. Admittedly the claimant used the Wadala land for the purpose of the Project only. There is no basis for the respondent to have charged commercial rent from 11/10/2011, contrary to the decision arrived at the meeting with the Chief Minister that average of the commercial and concessional rent would be charged.



10.126 Hence, it is held that the respondent was not entitled to unilaterally demand/charge rent at commercial rate from 11/10/2011.

217) The Arbitral Tribunal thereafter took into consideration MMRDA'S obligation under the CA for provision of land for 2 casting yards for the Project, out of which land admeasuring 13 hectares at D.N. Nagar was to be allotted at concessional rate of Rs.1/- per sq.mtr per anum. However, the Arbitral Tribunal has held that MMOPL could not claim reimbursement of the entire additional rent/liability incurred by it for setting up the casting yard at Wadala and held that the claim was maintainable for reimbursement of additional rent/liability in respect of the Wadala land, which MMOPL could have saved by setting up casting yard at D.N. Nagar land. This is how the claim for reimbursement is sanctioned only in respect of half of the amount paid by MMOPL in respect of Wadala land. The Tribunal's findings in this regard in paragraphs 10.138 and 10.139 are as under:

10.138 Considering that the Parties envisaged two Casting Yards for the Project and the claimant was entitled to set up only one of the Casting Yards at Car Depot land at D.N. Nagar, which was to be made available at concessional rate and the respondent had no obligation to provide additional land for second Casting Yard, the claimant cannot claim reimbursement of the entire additional rent/liabilities incurred by it for setting up the Casting Yard at Wadala. The claimant can maintain claim for reimbursement of the additional rent paid/liability incurred in respect of Wadala land for setting up Casting Yard, which it could have saved by setting up the Casting Yard at D.N. Nagar land. In the Technical Proposal vide Clause 7.4.8.1 of Chapter VII the claimant had proposed to set up Casting Yard in around 35,000 Sq mtrs, area and a second Casting Yard requiring similar 35,000 sq. mtrs, area at Sahar International Airport. Considering that as per claimant's Technical Proposal which forms part of CA, two Casting Yards each in an area of about 35,000 Sq. mtrs.. including one at D.N. Nagar, was envisaged, on account of respondent's failure to deliver the land at D.N. Nagar timely and fully, the claimant was deprived of 35,000 Sq. mtrs, land for setting up the Casting Yard. In lieu of two Casting Yards



envisaged in claimant's Technical Proposal, it set up a single Casting Yard at Wadala land measuring 62,206.206 Sq.mtrs.

10.139. Having regard to above aspects the claimant is held entitled to reimbursement of half of the amounts paid by it in respect of Wadala land.

218) The Arbitral Tribunal has thus refused to accept the case of novation of contract on account of MMOPL's agreement to pay rent for Wadala land in accordance with the decision of the meeting with the Hon'ble Chief Minister. Agreement to pay rent for alternate land is altogether different concept than obligation of MMRDA to provide land at D.N. Nagar at concessional rate under the CA. It is just a matter of coincidence in the present case that even alternate land fell in the ownership of MMRDA. If MMRDA was not to make available alternate land, MMOPL would have identified some other private land and had paid rent for it. In such a case, the agreement between MMOPL and the land owner for payment of rent cannot have any possible reflection on MMRDA's obligation to make available D.N. Nagar land at concessional rates. Merely because MMOPL agreed to pay rent at a particular rate in respect of alternate land does not absolve contractual obligation on the part of MMRDA to provide land at D.N. Nagar at concessional rate. The act of MMOPL in using alternate land at Wadala was in the interest of expeditious completion of the project. MMOPL would have been justified in waiting for allotment of entire 13 hectares land at D.N.Nagar which would have further delayed execution of the project. It therefore made alternate arrangement for setting up casting yard and it is just a matter of coincidence that the alternate land also belonged to MMRDA. Therefore, the rate at which MMOPL agreed to pay rent in respect of



Wadala land can have no correlation with MMRDA's contractual obligation arising out of the CA. Therefore, MMOPL's agreement to pay rent in respect of Wadala land cannot amount to novation or variation of contractual obligations under the CA.

219) It was Petitioner's obligation to provide land at concessional rates for setting up casting yard for execution of the project. Since it has failed to provide the land, MMOPL was required to scout for alternate land and pay rent therefor. In such circumstances the Arbitral Tribunal has upheld the claim of MMOPL in respect of 50% rent actually paid by it for Wadala land. In my view, such a direction in the Award warrants no interference in exercise of powers under Section 34 of the Arbitration Act. It is not possible to accept Petitioner's contention that the Award in this regard suffers from perversity, non application of mind or absence of judicial approach and reliance in this regard on judgment in Associate Builders (supra) is inapposite.

220) The objection of estoppel raised by MMRDA is also without any substance. If MMOPL was forced to operate casting yard at alternate site, the same does not mean that MMOPL was estopped from claiming reimbursement of rent paid for alternate land. MMRDA has clearly mixed the two issues of disputes over the rent payable for Wadala land and MMRDA's contractual obligation under the CA to provide 13 hectares land at D.N. Nagar for casting yard. As observed above, it is just a matter of coincidence that the owner of alternate land is also MMRDA. MMOPL has resolved the disputes relating to land at Wadala through meeting with the Hon'ble Chief Minister. Before the Arbitral Tribunal, the dispute is not over the quantum of rent payable for Wadala land.



That dispute is outside the arbitration agreement under the CA. However, what is claimed by MMOPL is that MMRDA must reimburse it in respect of the rent paid for alternate site when casting yard was to be operated at D.N. Nagar almost free of cost. It is therefore difficult to accept the contention that the Arbitral Tribunal has created a new contract between the parties by rewriting the understanding and Petitioner's reliance on judgment of the Apex Court in PSA Sical Terminal is inapposite.

221) It also cannot be contended that the impugned award does not record reasons for its decision *qua* Claims Nos.-1 and 2 in the impugned award. The Arbitral Tribunal has considered every aspect of the case and has recorded detailed reasons for partly accepting the claim towards rent for Wadala land. It can also not be contended that any vital material is ignored by the Arbitral Tribunal. Therefore, reliance on judgment of the Apex Court in Dyna Technologies Pvt. Ltd. by the Petitioner is also inapposite.

222) It is sought to be suggested that the disputes relating to rent payable under the License Agreements in respect of Wadala land were outside the scope of arbitration and could only be decided by the Small Causes Court under Section 41 of the Presidency Small Causes Courts Act, 1882. This submission is raised by intermixing the issues of quantum of rent payable for Wadala land with Petitioner's contractual obligation to allow use of the land at D.N.Nagar at concessional rates. The Arbitral Tribunal was not concerned with the quantum of rent payable for Wadala land nor has determined the said issue. In fact, it has ruled against MMOPL that it is contractually bound to pay the agreed



rent. The issue in the arbitration is slightly different i.e. MMRDA's liability to reimburse the rent in respect of alternated land. This obligation for reimbursement cannot be decided by the Small Causes Court and has rightly been adjudicated by the Arbitral Tribunal.

223) In my view, therefore partial award of Claim Nos-1 and 2 do not suffer from any of the enumerated infirmities under Section 34 of the Arbitration Act.

SEVERANCE OF AWARD

224) This Court has sustained some of the claims and has found award of some of the claims in the majority Awards to be unsustainable. In my view, it is easily possible to severe good parts of the award from bad parts by applying the principles in the judgment of the Apex Court in *Gayatri Balasamy Versus. Isg Novasoft Technologies Limited*⁴² in which the Apex Court has held in paragraphs 32 to 37 and 44 to 45 as under:

32. In the present controversy, the proviso to Section 34(2)(a)(iv) is particularly relevant. It states that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the arbitral award which contains decisions on matters non-submitted may be set aside. The proviso, therefore, permits courts to sever the non-arbitrable portions of an award from arbitrable ones. This serves a twofold purpose. First, it aligns with Section 16 of the 1996 Act, which affirms the principle of kompetenz-kompetenz, that is, the arbitrators' competence to determine their own jurisdiction. Secondly, it enables the Court to sever and preserve the "valid" part(s) of the award while setting aside the "invalid" ones. Indeed, before us, none of the parties have argued that the Court is not empowered to undertake such a segregation.

33. We hold that the power conferred under the proviso to Section 34 (2)(a)(iv) is clarificatory in nature. The authority to sever the "invalid" portion of an arbitral award from the "valid" portion, while remaining

⁴² 2025 7 SCC 1



within the narrow confines of Section 34, is inherent in the Court's jurisdiction when setting aside an award.

34. To this extent, the doctrine of *omne majus continet in se minus*—the greater power includes the lesser—applies squarely. The authority to set aside an arbitral award necessarily encompasses the power to set it aside in part, rather than in its entirety. This interpretation is practical and pragmatic. It would be incongruous to hold that power to set aside would only mean power to set aside the award in its entirety and not in part. A contrary interpretation would not only be inconsistent with the statutory framework but may also result in valid determinations being unnecessarily nullified.

35. However, we must add a caveat that not all awards can be severed or segregated into separate silos. Partial setting aside may not be feasible when the "valid" and "invalid" portions are legally and practically inseparable. **In simpler words, the "valid" and "invalid" portions must not be interdependent or intrinsically intertwined.** If they are, the award cannot be set aside in part.

36. The Privy Council, in *Ram Protap Chamria v. Durga Prosad Chamria*² addressed this issue with the following pertinent observations:

(Dasuram Mirzamal/283, SCC OnLine Gau para 18)

"18.... if, however, the pronouncement of the arbitrators is such that matters beyond the scope of the suit are inextricably bound up with matters falling within the purview of the litigation, in that case, the court would be unable to give effect to the award because of the difficulty that it cannot determine to what extent the decision of the subject-matter of the litigation has been affected and coloured by the decision of the arbitrators in regard to matters beyond the ambit of the suit."

Thus, the power of partial setting aside should be exercised only when the valid and invalid parts of the award can be clearly segregated—particularly in relation to liability and quantum and without any correlation between valid and invalid parts.

37. We would now proceed to examine, the permissibility and scope of the Court's modification powers, within the parameters of Section 34 of the 1996 Act. In doing so, we will distinguish the Court's power of modification from: (i) the Court's power of setting aside an award; (ii) the arbitrator's power under Section 33 to correct, reinterpret, and/or issue an additional award; and (iii) the power of the Court to remand the award to the arbitrator under Section 34(4).



44. We are of the opinion that modification represents a more limited, nuanced power in comparison to the annulment of an award, as the latter entails a more severe consequence of the award being voided in toto. Read in this manner, the limited and restricted power of severing an award implies a power of the Court to vary or modify the award. It will be wrong to argue that silence in the 1996 Act, as projected, should be read as a complete prohibition.

45. We are thus of the opinion that the Section 34 Court can apply the doctrine of severability and modify a portion of the award while retaining the rest. This is subject to parts of the award being separable, legally and practically, as stipulated in Part II of our Analysis.

(emphasis added)

225) Here the bad part of the award is not inseparably interwoven with the good part. The claims which are found to be unsustainable are independent of the claims which are sustained. Therefore, setting aside claims towards additional overheads, additional interests, financial expenses and opportunity costs on loss of profit would have no impact on sustaining the claims towards Andheri Bridge, Wadala land and increase in cost of system works. Hence the principle of severability can easily be adopted in the present case.

COSTS

226) Since the majority Award is being partly sustained and partly set aside, I deem it appropriate not to award costs of the present Petition in favour of any of the parties. The Arbitral Tribunal has awarded costs of Rs.1 crore in favour of MMOPL. However, since some of the claims of MMOPL are found to be totally unfounded, I deem it appropriate to reduce costs of arbitration to Rs.50,00,000/- which shall be payable by MMRDA to MMOPL.



CONCLUSIONS

227) In view of the above discussions, award of following claims by the Tribunal is sustained:

- (i) Claim No.1 for deductions from VGF of Rs.35 crores plus interest of Rs.6,14,72,498/-.
- (ii) Claim No.2 for recovery of costs towards casting yard at Wadala land of Rs.13,16,00,000/-.
- (iii) Claim No.3 for additional costs incurred due to change of scope for Andheri bridge of Rs.30,48,00,000/-.
- (iv) Claim No. 6(d) for increase in the cost of system works of Rs.163,22,44,188/-.

228) Following claims awarded by the Arbitral Tribunal in the Majority Award cannot be sustained and are liable to be set aside:

- (i) Claim for additional overhead expenses of Rs.100 crores.
- (ii) Claim for additional interests and financing expenses of Rs.125 crores.
- (iii) Claim for opportunity costs on loss of profit of Rs.23,47,77,780/-.

Additionally, the costs of arbitration directed to be paid by the Petitioner need to be reduced to Rs. 50,00,000/-



INTERVENTION APPLICATION

229) National Asset Reconstruction Co. Ltd. has filed Interim Application No. 3495 of 2025 for intervention in the Arbitration Petition. NARCL is an Asset Reconstruction Company registered under the SARFAESI Act, 2002. The intervention is sought on the ground that MMOPL had availed loan facilities of Rs.1650 crores from various lenders. It is contended that MMOPL and lenders have entered into Escrow Agreement dated 16 March 2016, under which any amount received in relation to Metro Project by MMOPL through any source is to be deposited in the Escrow Account. It is further contended that under the Substitute Agreement dated 16 March 2016, MMRDA, MMOPL and the lenders have agreed that senior lenders have the right to substitute MMOPL by a selectee for residual period of concession. It is contended that MMOPL has defaulted in repayment of loans, on account of which the loan accounts are declared NPA and proceedings are initiated against MMOPL for recovery of debts in DRT. According to NARCL, Assignment Deed dated 23 December 2024 is executed by the lenders (*Canara Bank, Indian Bank, Bank of Maharashtra, State Bank Of India and IDBI Bank*), assigning their loans granted to MMOPL to NARCL. During the course of hearing of the Petition, Ms. Gathi Prakash, the learned counsel appearing for the Intervenor-NARCL has contended that in the event of the arbitral Award being sustained, the deposited amount alongwith accrued interest be transferred to the Escrow Account. Mr. Bhatt has expressed no objection for such arrangement. Since the Award is being partly sustained, the amount deposited in this Court, can be permitted to be transferred to the Escrow Account as per the prayer of the NARCL.

**ORDER**

- 230) I accordingly proceed to pass the following order:
- i) The Majority Award is partly sustained and partly set aside.
 - ii) Award of claims in the Majority Award in respect of Claim No.1 of Rs.35 crores for deductions made in the tranches of VGF together with interest of Rs.6,14,72,498/-, Claim No.2 of Rs.13,16,00,000/- towards compensation for additional costs incurred for payment of rent for Wadala land, Claim No.3 of Rs.30,48,00,000/- towards compensation for construction of steel bridge at Andheri and Claim No.6(d) of Rs.163,22,44,188/- towards increase in the cost of system works are upheld.
 - iii) Award of Claim No. 6(f) for additional overhead expenses of Rs.100 crores, additional interests and financing expenses of Rs.125 crores and opportunity costs on loss of profits of Rs.23,47,77,780/- are set aside.
 - iv) Accordingly, directions in para-19(i)(a) to (f) of the Majority Award are sustained and direction in para-19(i)(g) is modified to the extent that Respondent is entitled to sum of only Rs.163,22,44,188/- towards increase in the cost.
 - v) Directions for payment of interest in para-19(ii) and (iii) are also sustained, except with a modification that the interest would be payable only on the awarded sums.



- vi) Direction for payment of costs of arbitration in para-19(vi) is modified by directing that Respondent-MMOPL shall be entitled to costs of arbitration of Rs.50,00,000/-.
- vii) Rest of the award shall remain undisturbed.
- viii) If the amounts payable to MMOPL under the modified Award exceeds the amount deposited by MMRDA in this Court, the Prothonotary & Senior Master, shall transmit the entire deposited amount alongwith accrued interest to the Escrow Account details of which shall be provided by NARCL to the Prothonotary. In the event, the amount under the modified Award is less than the amount deposited in this Court together with accrued interest, after transfer of due amount to Escrow Account, balance amount shall be refunded to the Petitioner-MMRDA.

231) With the above directions, Arbitration Petition is partly allowed. Considering the facts and circumstances, there shall be no further order as to costs. All pending Interim Applications are disposed of.

[SANDEEP V. MARNE, J.]

232) After the judgment is pronounced, Mr. Vaishnav, the learned counsel appearing for the Petitioner prays for stay of direction No.(viii) for remittance of amount to NARCL, for a period of 8 weeks. The parties would be at liberty to present the exact amount payable to



the Respondent-MMOPPL under the modified Award as per the judgment before the Prothonotary & Senior Master. However, the Prothonotary & Senior Master shall transmit/pay the amount to the Escrow account of NARCL after a period of 8 weeks.

[SANDEEP V. MARNE, J.]

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