Parsvnaths
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PDL/SEC/SE/2018-19/ March 19, 2019

National Stock Exchange of India Limited
"Exchange Plaza"
Bandra-Kurla Complex, Bandra (E),
Mumbai- 400 051

BSE Limited
Phiroze Jeejeebhoy Tower,
Dalal Street,
Mumbai- 400 001

Scrip Code: PARSVNATH – EQ (NSE); 532780 (BSE)

Sub: Intimation under Regulation 30 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

Dear Sirs,

In furtherance to our letters dated February 9, 2018 and April 05, 2018, we wish to inform that the Hon'ble Division Bench of Delhi High Court vide its judgment delivered on March 14, 2019, (uploaded on website of the Court yesterday late evening), has dismissed the appeal filed by Rail Land Development Authority (RLDA) under Section 37 of the Arbitration and Conciliation Act, 1996 and upheld the Arbitral Award dated November 25, 2017 and the Judgment of Hon'ble Single Judge of Delhi High Court dated April 03, 2018, whereby the claim of Rs. 1034,53,77,913/- (Rupees One Thousand Thirty-Four Crores Fifty-Three Lakhs Seventy-Seven Thousand Nine Hundred Thirteen only) made by the Company and Parsvnath Rail Land Project Pvt. Ltd., Subsidiary Company (PRLPPL) was upheld and payment of the said amount was directed to be made by RLDA alongwith interest @ 4% per annum from July 15, 2015 till the date of payment.

A copy of the said Judgment/ Order dated 14.03.2019 passed by the Hon'ble Delhi High Court is attached herewith.

Thanking you,

Yours faithfully,
For Parsvnath Developers Limited

(V Mohan)
Company Secretary &
Compliance Officer

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on 14th September, 2018*
Judgment pronounced on 14th March, 2019

\+ FAO(OS) (COMM) 136/2018
RAIL LAND DEVELOPMENT AUTHORITY ..... Appellant

Through: Ms. Maninder Acharya, ASG with Mr.Shaurya Sahay, Mr.Harshul Choudhary, Mr.Sahil Sood and Mr.Viplav Acharya, Advocates.

versus

PARSVNATH DEVELOPERS LIMITED AND ANR..... Respondents

Through: Mr.Rajiv Nayyar, Sr. Advocate with Mr.Ciccu Mukhopadhyay, Sr. Advocate, Mr.Vijay Nair, Mr.Saurav Agarwal, Mr.Kapil Rastogi, Mr.Shubham Paliwal, Mr.hitabhilash Mohanty, Mr.Prashant Jain, Mr.Satyajit Mohanty and Mr.Tajali Andrabi, Advocates for respondents.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J.

1. This is an appeal filed by the appellant under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") read with Section 13(1) of the Commercial Courts/Commercial Division and Commercial Appellate Division of High Courts Act, 2015 against the

order dated 03.04.2018 passed by the learned Single Judge by which the objections to the Arbitral Award dated 25.11.2017 have been dismissed.

2. The necessary facts, which are required to be noticed for disposal of this appeal, are as under :-

3. The appellant, Rail land Development Authority (RLDA), was constituted by the Central Government under section 4A of the Railway Act, 1989 on 31.10.2006 and bought into existence from 01.11.2006 with the purpose to undertake the development of vacant land of Railways for commercial use on behalf of the Railway Ministry to generate revenue through non-tariff measures and optimize the utilization of public property.

4. On 02.02.2010, the appellant floated a document of Request for Qualification (RFQ) for grant of lease for development of land including re-development of existing Railway Colony at Sarai Rohilla, New Delhi. On 05.06.2010, the bidders were called for a pre-bid meeting, where several queries raised by prospective bidders and were responded to with appropriate alterations being made in the Request for Proposal (RFP).

5. On 18.10.2010, RLDA invited tenders for commercial development of a parcel of land measuring 15.27 hectares. The Project also envisaged re-development of a Railway Colony existing over land measuring 4.37 hectares. Pursuant to the aforesaid invitation, the respondent (PDL) submitted its bid on 26.11.2010. PDL's bid of Rs. 1651,51,00,000/- (Rupees One Thousand Six Hundred Fifty- One Crore and Fifty-One Lakh only) was the lowest. Therefore, PDL was declared the successful bidder. Further, RLDA issued a Letter of Acceptance (LOA) dated 26.11.2010 in favour of PDL.

6. Further, PDL incorporated respondent No.2 as a Special Purpose Vehicle (SPV), for execution of the Project. PDL furnished a Performance Bank Guarantee in the sum of Rs. 82,57,55,000/- (Rupees Eighty Two Crores Fifty Seven Lakh Fifty Five Thousand Only) for due performance of the Project on 30.05.2013. Thereafter, the parties entered into the Development Agreement (Agreement) on 31.05.2013.

7. The payments in terms of the RFP were linked with the date of issuance of the LOA and the lease premium was to be paid in six installments (Four instalments of 20% of the lease premium and balance two installments of 10% of the lease premium). Accordingly, the first instalment was required to be paid within 90 days from the date of issuance of LOA; the second instalment was to be paid within the period of 18 months from the date of payment of 1st installment; the third installment was payable within thirty months of the first installment; and, the fourth, fifth and sixth installments were payable within forty-eight months, fifty four months and sixty months, from the due date of payment of the first installment, respectively.

8. As per the mutually agreed terms, the respondent paid an aggregated sum of Rs. 665,80,27,505/- (Rupees Six Hundred Sixty Five Crores Eighty Lakhs Twenty Seven Thousand Five Hundred and Five Only) towards the first two installments of the lease premium along with interest as a pre-requisite of the Agreement. Thereafter, on 22.08.2013, a further sum of Rs. 478,93,79,000/- (Rupees Four Hundred Seventy Eight Crores Ninety Three Lakhs and Seventy Nine Thousand Only) was to be paid to the appellant towards the third installment of the lease premium. The abovementioned amount also included a sum of Rs 148, 63,59,000/-

(Rupees One Hundred Forty Eight Crores Sixty Three Lakhs Fifty Nine Thousand Only) towards the interest at the rate of 15% per annum in terms of Article 9.2 of the Agreement. Additionally, a payment of Rs.21,91,79,408/- (Rupees Twenty One Crores Ninety One Lakhs Seventy Nine Thousand Four Hundred and Eight Only) was also made towards the shortfall in the payment of the second installment of the lease premium.

9. Pursuant to the fulfillment of the pre-requisites for signing of the Development Agreement, the agreement was executed between the parties. The Development agreement being a self- contained code stipulated the amounts to be forfeited in case of breach of the agreement terms and the said amounts were mutually agreed upon as genuine pre-estimates of damages. The amounts were not disputed in the pre-bid meetings and as such, reflected accurately, the damages likely to be suffered.

10. On 22.08.2013, the respondents had deposited a sum of Rs. 1166,65,85,913/-(Rupees One Thousand One Hundred Sixty Six Crores Sixty Five Lakhs Eighty Five Thousand Nine Hundred Thirteen Only) which comprised of Rs.990,90,60,000/- (Rupees Nine Hundred Ninety Crores, Ninety Lakhs and Sixty Thousand) as principal amount of the lease premium and the remaining Rs.175,75,25,913/- (Rupees One Hundred Seventy Five Crores Seventy Five Lakhs Twenty Five Thousand Nine Hundred and Thirteen Only) as interest for the delayed installments.

11. On the date of execution of the agreement, a dispute arose between the parties pertaining to the agreement and the same was referred to the

arbitration (the first arbitration). The respondents alleged that the appellant was responsible for significant delay in the execution of the work. Resultantly, the appellant was responsible to provide the respondent with the relief in terms of extension of the time period of the contract along with the damages. However, the respondent failed to pay the fourth installment of lease premium, which was due on 22.02.2015.

12. As recorded by the learned Single Judge, the parties exchanged a series of letters seeking extension of time and refund of payments including restraining from invoking the Performance Bank Guarantee (PBG). Thereafter, the appellant vide letter dated 06.08.2015 terminated the agreement retrospectively w.e.f 23.02.2015 on the account of default in payment. Consequently, appellant claimed the same default as breach under Clause 9.4.1 of the agreement and forfeited the entire payment made by the respondents till date.

13. The Arbitral Tribunal upheld the contention of the respondents regarding the termination of the contract under the provision of Article 4.2 and 7.2.1 of the agreement. The Award further referred the appellant's claim for terminating the contract retrospectively and concluded that the agreement stood terminated w.e.f 15.06.2015 due to non- achievement of financial close by the respondents. In lieu of the termination, the Arbitrator further upheld that the appellant's claim for the forfeiture of the entire amount of Rs. 1166,65,85,913/- (One Thousand One Hundred Sixty Six Crores Sixty Five Lakhs Eighty Five Thousand Nine Hundred and Thirteen Only) towards the liquidated damages was not sustainable as the actual damages were not suffered. However, the arbitral tribunal held that the appellant was entitled to the recover a sum equivalent to

Performance Bank Guarantee (PBG) in terms of Article 7.2.2 of the agreement. Accordingly, the tribunal awarded a sum of Rs. 1034,53,77,913/- along with interest at the rate of 4% per annum w.e.f 16.06.2015.

14. Learned ASG appearing on behalf of the appellant has reiterated the submissions made before the learned Single Judge. She submits that admittedly, the agreement entered into between the parties was terminated. However, it is contended that the agreement was terminated with effect from 23.02.2015 by a communication dated 06.08.2015 on account of non-payment of lease premium by the respondents within the prescribed time.

15. Learned ASG has placed strong reliance on conditions under Articles IV, VII and IX of the Agreement, we deem it appropriate to reproduce the same to lend clarity to the rival submissions made by the learned counsel appearing for the parties. The conditions under Article IV, VII and IX of the Agreement are reproduced below:-

"ARTICLE IV
CONDITIONS PRECEDENT

4.1 Conditions Precedent

4.1.1 Save and except as expressly provided in Articles IV, XVII, XVIII, XX, XXVII, XXXI and XXXII, the Grant, the respective rights and obligations of the Parties under this Development Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1.2 (herein the "Conditions Precedent").

4.1.2 The Conditions Precedent required to be satisfied by the Developer on or prior to two hundred and forty (240) days from the Effective Date (herein the 'Appointed Date') shall be deemed to have been fulfilled when the Developer shall have:

a. executed and procured execution of the Substitution Agreement and the Escrow Agreement;

b. appointed a Project Manager to supervise and be overall in charge of all construction activities being undertaken by the

Developer at the Development site during the construction period and also be the site representative of the Developer for interaction with the authorized representative of RLDA;

c. achieved the Financial Close in terms of Article VII and delivered to RLDA, 2 (two) true copies each of the Financing Agreement, the Financial Package and the Financial Model, duly attested by a director of the Developer, along with 2 (two) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Lenders;

d. delivered to RLDA a legal opinion from the legal counsel of the Developer with respect to the legal capacity of the Developer to enter into this Development Agreement and the enforceability of the provisions thereof.

Provided that upon request in writing by the Developer, RLDA may in its sole discretion, grant time, amend, alter, modify or waive any of the Conditions Precedent set forth in this Clause 4.1.2.

4.1.3 The Developer shall make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated herein and RLDA shall provide such reasonable cooperation as may be required to assist the Developer in satisfying its Conditions Precedent.

4.1.4 The Developer shall notify RLDA in writing at least once a month on the progress made in satisfying the Conditions Precedent. The Developer shall promptly inform RLDA when any Conditions Precedent for which it is responsible has been satisfied.

4.1.5 The Developer shall be given permission to commence Redevelopment Project upon execution of the Development Agreement. Save and except the construction permitted for land development under this Development Agreement, any other construction work upon the site shall be undertaken only upon achievement of Financial Close.

4.2 ***Termination due to non fulfillment of Conditions Precedent by the Developer***

Notwithstanding anything to the contrary contained in this Development Agreement, but subject to Article XXVII and reasons not directly attributable to RLDA, in the event the Conditions Precedent as specified in Clause 4.1.2 hereinabove is not fulfilled by the Developer for any reason whatsoever on or prior to the Appointed Date, all rights, privileges, claims of the Developer, including those related to the Grant, shall be deemed to have been waived by, and to have been ceased with the concurrence of the

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Developer, and this Development Agreement shall be deemed to have been terminated by mutual agreement of the parties.
Provided that upon termination of this Development Agreement for non-achievement of Conditions Precedent, RLDA shall be entitled to invoke the Performance Bank Guarantee deposited by the Developer with RLDA as provided in Article XVIII and in addition an amount equivalent to 15% (fifteen percent) of the Lease Premium towards first installment shall be forfeited.

ARTICLE VII
FINANCIAL CLOSE

7.1 Financial Close

7.1.1 The Developer hereby agrees and undertakes that it shall achieve Financial Close within 240 (two hundred and forty) days from the Effective Date and in the event of delay, it shall be entitled to a further period not exceeding 120 (one hundred and twenty) days, subject to payment of Damages to RLDA in a sum calculated at the rate of 0.01% (zero point zero one per cent) of the value of Performance Bank Guarantee for each day of delay; provided that the Damages specified herein shall be payable every week in advance and the period beyond the said 240 (two hundred and forty) days shall be granted only to the extent of Damages so paid and any further extension of the period of Financial Close shall be at the sole discretion of RLDA; provided further that no Damages shall be payable if such delay in Financial Close has occurred solely due to Force Majeure Event.

7.1.2 The Developer shall, upon occurrence of Financial Close, notify RLDA forthwith, and shall have provided to RLDA; at least 2 (two) days prior to due date of Financial Close, 2 (two) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Developer, along with 2 (two) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Lenders.

7.2 Termination due to failure to achieve Financial Close

7.2.1 Notwithstanding anything to the contrary contained in the Development Agreement in the event that if the Financial Close does not occur, for any reason whatsoever, except that the same is not due to Force Majeure Event within the period set forth in Clause 7.1.1, all rights, privileges, claims and entitlements of the Developer under or arising out of the Development Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Developer, and the Development Agreement shall be deemed to have been terminated.

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7.2.2 Upon Termination under Clause 7.2.1, RLDA shall be entitled to invoke the Performance Bank Guarantee deposited by the Developer with RLDA as provided in Article XVIII and in addition, forfeit an amount equivalent to 15% (fifteen percent) of the Lease Premium paid towards First Installment and appropriate the proceeds thereof as Damages in accordance with the provisions of Article XXIII.

ARTICLE IX

9.4 Default in payment of the Consideration

9.4.1 In the event the Developer fails to pay/defaults in the payment of full amount of any of the Subsequent Installments (& interest thereon, if any) as specified in Clauses 9.1 & 9.2 and/or the installments of additional Lease Premium as specified in Clause 9.3 and/or the Annual License Fee as specified in Clause 8.2 and/or the Annual Lease Rent as specified in Clause 8.3 along with interest thereof due for payment by the respective due date, it shall be construed as a payment default (herein the "Payment Default") on behalf of the Developer.

On the occurrence of a Payment Default in respect of payment of Subsequent installments, Installments of Additional Lease Premium, the License Fee of the Annual Lease Rent, the Developer shall be liable to pay a liquidated damages @ 18% (eighteen percent) per annum on the outstanding amount of the respective payments from the respective due dates till the respective amount due is fully paid.

However, in case the Developer opts for submission of the bank guarantee in terms of Clause 9.5.1, on the occurrence of the Payment Default in respect of payment of any Subsequent Installment(s), RLDA shall invoke the respective bank guarantee for the Installment without any notice to the Developer.

9.4.2 Subject to the provisions of Clause 9.4.1 hereinabove, it is expressly agreed between the Parties hereto that in the event, there is a Payment Default and the said Payment Default is not rectified within 120 (one hundred and twenty) days of the occurrence of such default, the same shall constitute an Event of Default under Clause 29.1. No extension whatsoever shall be provided beyond the aforesaid period and the payment of interest in accordance with clause 9.4.1 above for such period would not entitle the Developer to seek any further extension.

9.4.3 Notwithstanding anything contained herein, in the event there are two Payment Default(s) in an Accounting Year or Payment Default in two consecutive Accounting Years by the Developer, the

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same shall constitute a Developer Event of Default under Clause 29.1.
9.4.4 Notwithstanding anything contained herein, in the event of Payment Default(s), no Cure Period of any nature whatsoever, other than the period of 120 (one hundred and twenty) days specified in Clause 9.4.2, shall be available to the Developer before termination of this Development Agreement."

16. Learned ASG submits that admittedly, the respondents is a defaulting party as it did not fulfill the conditions prescribed under Clause 4.1.2 (a) of the Agreement, which was required to be fulfilled within 240 days and on failure, thereof the consequence is deemed termination. The respondent has never sought any extension nor any termination of the agreement. Resultantly, the question of deemed termination does not arise and it has been waived by the respondent, otherwise the agreement would have been terminated upon the completion of the stipulated period. Additionally, the respondent has also defaulted in the payment of the 4th installment of lease premium and, thus, the respondent being a defaulting party could not have terminated the contract by mutual agreement.

17. Furthermore, the learned ASG contends that in addition to the above-mentioned Clause, another condition under Clause no.4.1.2 (c) was also not fulfilled within 240 days+120 days (cure period) and further extension was sought. It is thus, contended that since the aforesaid two clauses, 4.1.2(a) and 4.1.2(c) were not fulfilled and further extension was sought, which was beyond its period of applicability, the said clause no.4.1.2 read with clause no.7.1.1 would deem to have been waived. It is accordingly, submitted that once clause no.4.1 read with clause no.7.1.1 have been waived the appellant would still have the

right to invoke clause no.9.4, which falls under the heading Default in payment of the Consideration. Consequences arising out of clause 4.1 and 7.4 are deemed to have been waived and accordingly, clause no.9.4 would apply.

18. Learned ASG laboured hard to submit that the respondents are the defaulting party and thus, the defaulting party cannot be allowed to choose as to which provision would apply and which would benefit them. On the other hand, the terms of the Agreement are crystal clear and once the agreement was not terminated under clause 4.1, no benefit can accrue to the respondents. Counsel for the appellant thus, contends that both the Arbitral Tribunal and the learned Single Judge have failed to interpret the terms of the agreement dated 31.05.2013 in its correct perspective. Learned ASG further submits that the learned Single Judge has failed to appreciate that the termination was not retrospective, but in fact, was with effect from the date of breach was committed by the respondents. Counsel further contends that the deemed termination would have been possible only in the case of failure of the developer to achieve the financial close in the period set forth under Article 7.1.1 of the Agreement i.e. 240+120 i.e. 360 days. It is accordingly, contended that the deemed termination provision would become inoperative as the extensions for achieving financial close have repeatedly been granted as '*post-facto extension*' by the appellant and in case of such extension there can be no deemed termination.

19. Learned Counsel for the appellant further contended that the findings of the Arbitral Tribunal, as also the order of the learned Single Judge

are perverse, and thus, liable to be set aside. It is strongly urged before us that Article 4 of the Agreement being an umbrella provision, envisaged deemed termination if any one of the events were not fulfilled within 240 days i.e. up to 26.01.2014. Admittedly, neither condition under clause no.4.1.2 (a) was fulfilled nor any further extensions were sought and as far as condition under clause no.4.1.2 (c) is concerned, the same was not fulfilled within the prescribed period i.e. 240+120 days and at best the deemed termination provision would have been extended up to the said date and not beyond. Learned counsel has contended that the extensions sought beyond 240+120 days were not granted during the subsistence of the Agreement but were '*post facto*' granted, which fact has also been ignored and has not been taken into consideration either by the Arbitral Tribunal or the learned Single Judge. It is further the case of the appellant that the respondent has taken the benefit of extensions for achieving the financial close and in order to shed out their liability to pay the pending instalment of the lease premium, the respondent cannot resort to Article 7.2.2 and is bound by its own conduct, otherwise, the same would be contrary to the principle of estoppel.

20. Counsel for the appellant submits that a bare reading of Clause 9.4 reveals that the default for non-payment occurs as soon as the developer fails to make payment on the stipulated date. Ms. Acharya submits that the assigned period of 120 days in terms of Clause 9.4.2 is merely a cure period provided to the party for rectification of an already occurred default otherwise the same would constitute "Event of default" under Article 29.1 of the agreement.

21. It is also highlighted by the learned ASG that the condition attached to the extensions i.e. payment of damages, was also not satisfied by the respondents in advance and thus, no benefit can accrue in their favour. The consistent stand of the respondents is that the agreement was deemed to have been terminated on an account of non fulfillment of the financial close.

22. Mr. Rajiv Nayyar and Mr. Ciccu Mukhopadhya, learned senior counsels for the respondent contrary, to the submissions made by the learned ASG that the defaulter cannot choose the terms of agreement (article(s)) to his benefits, submits that the condition could not have been waived by either of the parties and the attention of the Court is drawn to Article 32.2 of the Agreement, which deals with amendment and waivers. The learned senior counsels contend that it's an admitted fact that there is no agreement in writing, which records, waiver of the provision relating to deemed termination of the Agreement in terms of Article 4.1.1 and 7.2.2, where in terms of Clause 32.2 of the Agreement, no such wavier, if at all, could be effective. Clause 32.2 is reproduced below:-

> *"**32.2 Amendments***
> *No amendment or waiver of any provision of this Development Agreement, nor consent to any departure by any of the Parties there from, shall in any event be effective unless the same shall be in writing and signed by the Parties hereto and then such amendment, waiver or consent shall be effective only in the specific instance and for the specific purpose for which it is given."*

23. Counsels for the respondent further contend that admittedly, it is not the case of the appellant that the finding of the Arbitral Tribunal is

perverse on the face of it, or a decision that no reasonable person could have arrived at such finding. It is the case of the respondent that the Arbitral Tribunal being the final arbiter on facts has found that the agreement was automatically terminated on 15.06.2015 on account of non- achievement of Financial Close, and all extensions were granted in accordance with Article 7.1.1. Mr. Nayyar further submits that even otherwise, assuming a waiver in respect of one or more extensions with regard to deemed termination has been granted, such waivers are only effective for that specific instances and do not apply to subsequent instances, which is evident from plain language of clause 32.2 of the agreement that mandates the same to be reduced in writing and duly signed by the parties. Furthermore, such waiver shall be effective only in the specific instance and for the specific purpose for which it is given, if a right is not exercised in one case does not preclude the right being exercised subsequently.

24. It is the contention of the counsels for respondent that the respondents vide its letter dated 22.05.2015 specifically informed that if appellants failed to act pursuant to the letter, then there will be a deemed termination on 15.06.2015. Mr Nayyar submits that despite the same, no plea of waiver was raised by the appellant, and thereby, the appellant waived their right to raise such a plea before the Arbitral Tribunal or thereafter.

25. Learned Senior counsels appearing for the respondents submit that there is no infirmity or illegality in the award rendered by the Arbitral Tribunal or the order passed by the learned Single Judge. Learned counsels have highlighted the scope of interference by this Court in

proceedings under Section 37 of the Act. It is contended that the scope of interference is even narrower while deciding an appeal under Section 37 of the Act in comparison to deciding the objections under Section 34 of the Act. Counsel further contended that the entire arguments of the learned ASG revolves around the interpretation of Articles IV, VII and IX of the Agreement, which has been already rejected by both the learned Single Judge and the Arbitral Tribunal. Thus, the same question of interpretation cannot be adjudicated at this stage by this Court. Further, the submissions of the appellant in present appeal would also demonstrate that pleas of the appellant are beyond the contours of consideration under Section 37 of the Arbitration Act. To support his contention, Mr. Nayyar placed reliance on a decision rendered by this Court in the case of ***"State Trading Corporation of India v. Helm Dungemittel Gmbh"*** **2018 SCC OnLine Del 9334**., particularly on paragraphs 30 to 34, which are herein reproduced below:-

> **"30.** It is no longer res integra that the scope of judicial interference in an application under Section 34 of the Arbitration and Conciliation Act, 1996 is limited in nature. It has further been held that the scope of interference while deciding an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is even more restrictive in nature. The Supreme Court of India has consistently held that an arbitration award should not be lightly interfered with. (See Renusagar Power Co. Ltd. v. General Electric, (1994) Supp. 1 SCC; ONGC v. Saw Pipes, (2003) 5 SCC 705, Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and Associate Builders v. DDA, (2015 3 SCC 49).
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> **31.** While deciding an appeal it must be kept in mind that the Arbitrator/Tribunal is the final arbiter on facts as well as

law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. In the case of P.C.L Suncon (JV) v. N.H.A.I.,2015 SCC Online Del 13192, in para 24, it was held that:

> "24. *As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost.*"

32. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted in comparison to deciding objections to the Award under Section 34 of the Act. In the case of **State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd,** reported at **2014(144) DRJ 220(DB),** in para 16 it has been held as under:

> "*16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe Vs. Steel Authority of India (2011) 123 DRJ 724 (DB) and Shree Vinayaka Cement Clearing Agency Vs. Cement Corporation of India (2007) 142 DLT385. It*

is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments."

33. In the case of **Steel Authority of India v. Gupta Brothers Steel Tubes Limited, (2009) 10 SCC 63,** the Supreme Court has laid down that an error relatable to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

34. In Associate Builders vs. Delhi Development Authority, reported at **(2015) 3 SCC 49,** the Supreme Court while further explaining the scope of judicial intervention under the appeal in the Act held as under:-

"33.It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score1 . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares and Stock Brokers (P) Ltd. v.

B.H.H. Securities (P) Ltd. (2012) 1 SCC 594, this Court held:

21. *A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye- law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."*

26. Learned senior counsel for respondent further submits that admittedly the respondents were unable to fulfill the condition in Article 4.1.2(a) and 4.1.2(c) read with clause 7.1.1 of the Agreement. It is also not disputed that no extension of time was sought regarding condition 4.1.2(a) however admittedly, to fulfill the condition 4.1.2(c), extension beyond 240 days was sought and granted and thereafter, further extension was sought, which although was granted '*post-facto*' but would deemed to have been granted from the day the expiry of extended period of 240 days became due. It is thus contended that condition no.4.1.2 read with condition no.7.1 got extended along with the extensions which were sought and granted and when the

respondents finally could not fulfill the conditions prescribed, the Agreement was deemed to have been terminated. Learned Senior counsel submits that the Arbitral Tribunal has duly considered the grounds raised in paragraphs 16 to 23 of the Arbitral Award which we reproduce below:-

> **16.** The controversy in the present case is whether the Development Agreement was 'deemed to be terminated' under Articles 4.2 and 7.2.1 consequent upon the Claimants' failure to achieve Financial Close on or before 15th June 2015, as contended by Claimants; or whether it stood terminated under Article 9.4 due to 'Payment Default' by the Claimants for non-payment of Fourth Installment of the Lease Premium, with effect from 23rd February 2015, as contended by the Respondent.
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> **17.** The Fourth Installment of the Lease premium became due on 22nd February 2015 as postulated in Article 9.1 (iv) of the Development Agreement. Article 9.4.1 stipulates that non-payment of the installment by the Developer/Claimant No.2 on its due date will constitute a 'Payment Default'. However, as stipulated in the very next covenant viz. Article 9.4.2, this is conditional upon the expiry of the rectification period/cure period of 120 days having not been availed of by the Developer/Claimant No.2 for making the overdue payments. Thus, from a plain reading of Article 9.4.2, it is apparent that the Claimant had time till 22nd June 2015 to make payment of the Fourth Installment of the Lease Premium, after availing benefit of the rectification period of 120 days. If the Claimant No.2 had failed to make payment within the rectification period, the Development Agreement unequivocally states that the Claimant No.2 could not be granted any further extension of time. In such an eventuality, the Respondent had the right to terminate the Development Agreement directly under

Article 29.3.2 without issuing any prior notice. Thus, the termination of Development Agreement for non-payment of Fourth Installment of Lease Premium could only occur after 22nd June 2015, subject to the Development Agreement being current and efficacious on that date. This is relevant for the reason that the Claimants contend that it stood terminated on 15th June 2015 because of the failure to attain Financial Close.

18. We cannot agree with the interpretation given to Articles 9.4.1 and 9.4.2 by the Respondent that if the Developer/Claimant No.2 fails to rectify the 'Payment Default' within the 120 days cure period, then the first date when the payment became due i.e. 23rd February 2015 will constitute the 'Event of Default' under Article 29.1. Ergo, the retrospective termination of the Development Agreement is against the basic principles of interpretation of commercial contracts as well as logic. The respondent does not dispute that the Claimant No.2 was entitled to a 120 days cure period to rectify the 'Payment Default'. Logically, the Respondent cannot plead or contend that it had the right to terminate the DA before the lapse of the 120-day cure period. If the interpretation given by the Respondent were to be accepted, then it would mean that even if the Developer/Claimant No.2 rectifies 'Payment Default' within the cure period and makes payment on or before 22nd June 2015, even then the respondent will have the right to terminate the Development Agreement with effect 23rd February 2015 as the 'Event of Default' has taken place. The interpretation proffered by the Respondent is against the established concept of 'Cure Period' in commercial contracts and finds no favour with this Tribunal. It is clear and understood from the covenants of the Development of Agreement that because of non-payment of Fourth Installment of Lease Premium by the Claimant No.2, the Development Agreement could only have been terminated on 23rd June 2015, i.e. after expiry of the 120 rectification/cure period.

19. In face of the clear interpretation and import of the Development Agreement, the sundry arguments raised by the Respondent that the Claimants had no intention of paying the installments cannot allow the Respondent to retrospectively terminate the Development Agreement from 23rd February 2015 vide its letter dated 6th August 2015 ('Exhibit C-17'). Similarly, the argument of the Respondent that Claimant No.2 committed repudiatory breach of the Development Agreement by non-payment of the installments holds no water in face of the clear understanding of the Development Agreement. This is buttressed by the fact that the Respondent issued the purported Termination Notice as late as on 6th August 2013. Where time is held to be critical by the Respondent it would only be expected that the Respondent would act with expedition.

20. The Claimants have relied heavily on the Rail Land Development Authority (Development of Land and Other works) Regulations, 2012, However, we do not find it necessary to discuss whether the non-payment of the installments of the Lease Premium by the Claimants was due to the fault of the Respondent or whether the Respondent should have granted extension of time for making payments to the Claimants in the circumstances of the case where blame has been placed on another statutory body, viz. the NDMC.

21. Now we shall examine the issue of 'deemed termination' of the Development Agreement due to non-achievement of Financial Close. The Claimants, aiding themselves with the Articles 4.1.2(c) and 4.2 have strenuously contended that last extension of time for achieving Financial Close was granted till 15th June 2015. In absence of any further extension of time for achieving Financial Close, the Development Agreement stood automatically terminated with effect from 15th June 2015 by operation of Article 4.2 of the Development

Agreement. However, the Respondent has argued that in view of the Article 7.1.1 of the Development Agreement, the Claimants had to achieve the Financial Close within 360 days (240 days+120 days) of the 'Effective Date' or date of execution of the Development Agreement i.e. by 25th May 2014. Nevertheless, the Respondents had granted post-facto extensions of time to the Claimants to achieve Financial Close under Article 7.1.1 of the Development Agreement, subject to payment of damages set forth therein, till 15th June 2015. Thus, it has been argued that the provision for 'deemed termination' of the Development Agreement due to non-fulfillment of Condition Precedent under Article IV has been rendered non-essential by the conduct of the Parties. It is further argued that hence, there could not be an automatic termination of the Development Agreement on 15th June 2015 as it could only have taken place on 26th January 2014 (240 days from the Effective Date), which was never acted upon by any of the parties. For the Respondent, Article 4.2.2 stood waived/altered, rendering the achievement Financial Close as non-essential. The sum total of the Respondent's argument is that this non-essential term of the Development Agreement cannot result in 'deemed termination' of the Development Agreement.

22. We do not find merit in the said argument raised by the Respondent as the extensions of time for achieving Financial Close were granted by the Respondent in terms of and subject to Article 7.1.1. The Development Agreement provides for 'extensions of period of Financial Close' to the Claimant, though at the 'sole discretion' of the Respondent. Thus, the extensions were in terms of the Development Agreement, not over and above it. The question of waiver could only be of any significance had the Development Agreement provided for a strict regime for achieving Financial Close. The said deduction finds further strength from Article 7.2.1 of the Development Agreement which clearly provides for

deemed termination in case the Financial Close was not achieved within the period '*set forth in Article 7.1.1*'. It is reiterated that Article 7.1.1 provides for extension of time though subject to terms.

23. Further, the Respondent argued that the Claimant had not 'executed the Substitution Agreement and the Escrow Agreement' in terms of Article 4.1.2 (b) of the Development Agreement; therefore, it cannot be allowed to 'pick and choose' its defaults to its own advantage and to terminate the Development Agreement. This argument cannot come to the advantage of the Respondent in the face of the proven fact that the execution of the Substitution Agreement and Escrow Agreement were part and parcel of the Financial close."

27. Learned Senior counsel for the respondents submits that the parties were *ad-idem* to the extensions being granted and the agreement had not been terminated and in fact while granting the extensions the period for fulfilling the clause 4.1.2(c) was also granted.

28. Counsel for the respondent referred to the abovementioned extract of the Arbitral Award and submits that Article 9.4.1 and Article 9.4.2 of the Agreement are pure question of interpretation and their applicability in content of letter dated 22.05.2015. Thus, terminating the contract retrospectively is against the basic notion of the contract. It can be either subsisting or terminated. Once it is in subsistence for any period or term, the same cannot be referred as deemed termination in the future for the same period. A termination letter can only take effect when issued, and not earlier.

29. Learned Senior counsels for the respondents submit that the judgment in the case of ***Sirmauli Infrastructure Pvt. Ltd., Pune vs. State of***

Maharashtra and others reported in **2011 (5) Mh.L.J.** Paragraphs 19 to 21 relied upon by the learned ASG would not apply to the facts of the present case, which are herein reproduced below:-

> ***19.*** *the communication, terminating the concession agreement and the contract, issued by the respondents on 20-11-2010 contain two parts. The concession agreement is terminated on account of failure of the contractor/appellant herein in achieving 'financial close' for the project within 180 days from the date of execution of concession agreement and also within additional 120 days granted on the condition of payment of delay damages to the department. The second ground noted in the termination letter relates to non-fulfillment of obligations/defaults committed by the contractor.*
>
> ***20.*** *It is contended by the Counsel appearing for the appellant that in terms of clause 16.2, it is not permissible for the respondents to terminate the agreement without issuing a notice in writing of its intention to issue the termination notice (preliminary notice). It was also incumbent upon the respondents to permit the contractor a 60 days' period for curing the deficiencies from the date of preliminary notice (cure period). It is contended that the respondents proceeded to take action of termination of agreement without issuing a preliminary notice and without providing for cure period of 120 days, as provided in clause 16.2 of the agreement. As such, action of termination of agreement, taken by the respondents, is illegal.*
>
> ***21.*** *On perusal of the letter of termination dated 20-11-2010, it can be divided in two parts. The first part refers to failure of the contractor in achieving the 'financial' close and second part deals with non-fulfillment of obligations/default. The action of termination of contract, if can be held valid on any one count, it cannot be invalidated on account of non-*

observance of the procedure for bringing home second charge which is separable. The letter of termination on account of non-fulfillment of obligations and defaults committed by the contractor is separable and the non-observance of the procedure prescribed in clause 16.2 in the concession agreement while terminating the contract in itself will render the action invalid. The action of the respondent department is still valid and cannot be faulted for the reason that the appellant-contractor has failed to achieve 'financial close' within the period stipulated in clause 10.5.1 The failure of adherence to the requirement contained in clause 10.5.1 i.e. making arrangement for submission of financial close results in deemed termination of the concession agreement in view of clause 10.6.1 of the concession agreement. It cannot be controverted that there is a failure on the part of appellant-contractor to achieve 'financial' close within the time stipulated and as such, in terms of clause 10.6.1, the concession agreement shall be deemed to have been terminated. The order of termination of contract issued by the respondents on 20-11-2010 is valid and good on one ground, although the second ground set out in the order may require observance of a different procedure".

30. Learned Senior counsel for the respondents submits that the aforesaid judgment would not be applicable to the facts of the present case as the said judgment is in the context of dealing with an appeal arising out of an order passed under Section 9 of the Act. He further submits that the above-mentioned judgment would also not apply to the present case as it is a matter of interpretation of the agreement, which lies squarely within the jurisdiction of an Arbitral Tribunal.

31. Lastly, counsel for the respondent rebutted the submissions of counsel for appellant with respect to forfeiture of amount and submits that the respondent has already led evidence before the Arbitral Tribunal and

established that no loss had been suffered by the appellant. Mr. Nayyar further submits that the appellant's witness failed to produce any evidence to show as to how the estimate was computed and how it could be a genuine pre-estimate of loss. Mr. Nayyar placed reliance on ***Kailash Nath & Associates vs. DDA***, *(2015) 4 SCC 136* and states that it is equally well settled that no party can make profit from damages. Further, no pecuniary liability can be attached unless it is proved that damages have been suffered.

32. We have heard the learned counsel for the parties and has taken their rival submissions into consideration, perused the arbitral award and the impugned order passed by the learned Single Judge and also gone through the evidence and documents placed on record.

33. Learned Single Judge has rightly upheld that no extension beyond 15.06.2015 was applied or granted by the appellant. Furthermore, in lieu of Clauses 9.4.1 and 9.4.2, the appellant had vested right in terminating the contract post the lapsing of the cure period. It is also evident from the letter dated 22.05.2015 that, the respondent had explicitly showed his intention of either seeking an extension or to consider the same communication as an intimation of deemed termination of the Agreement and that the right of the appellant to terminate the contract cannot be exercised retrospectively.

34. A mere reading of Article 32.2 of the agreement explicitly states that a waiver cannot be exercised after 15.06.2015, i.e. post the lapse of the financial close. In the case of ***Maharashtra State Electricity Distribution Company Ltd. Vs. Datar Switchgear Limited***, reported at

(2018) 3 SCC 133 Para 19, the Hon'ble Supreme Court has observed as follows:-

> "...The High Court also held that the question of waiver or acquiescence is a question of fact and since there was finding of fact by the Arbitral Tribunal (which was upheld by the Single Judge as well) that there was no waiver or acquiescence on the part of the respondent, such an argument was not even available to the appellant in appeal under Section 37 of the Act."

35. Moreover, Article 9.4.1 and 9.4.2 of the agreement are pure questions of interpretation and this Court has a limited jurisdiction vested under Section 37 of the Arbitration Act is narrower to reinterpret the terms of the agreement. Furthermore, the appeal before this court is mere attempt to reargue and re-interpretation of the same clauses adjudicated before the Arbitral Tribunal and the learned Single Judge, which is prohibited under Section 37 of the Act.

36. In **Mahanagar Telephone Nigam Ltd. vs Finolex Cables Limited FAO(OS) 227/2017** reported at 2017(166) DRJ1, stated as follows:-

> *"It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitshu*

India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse."

37. We have perused all the submissions and findings of the court and find no infirmity in the decision of the learned Single Judge.

38. Accordingly, the appeal stands dismissed.

CM APPL 26179/2018 (stay)

39. In view of the order passed in the appeal, the application stands disposed of.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 14th, 2019//

Parsvnath Developers Ltd. Delhi